Document:-
A/CN.4/SR.2014

Summary record of the 2014th meeting

Topic:
Law of the non-navigational uses of international watercourses

Extract from the Yearbook of the International Law Commission:-
1987, vol. I

the Drafting Committee so that it could find generally acceptable formulas.

65. Mr. TOMUSCHAT noted that some members of the Commission wished to refer draft articles 11 to 15 to the Drafting Committee, whereas others were against doing so because the texts had not yet reached "maturity". The difference between those two positions was, however, not very great. It was true that the principle of co-operation had been interpreted rather unilaterally in the sense of prevention of harm and, possibly, reparation for damage; but the scope of that principle could easily be enlarged. However, such a provision could be included in the draft only as an indication. He fully agreed with Mr. Graefrath (2011th meeting) that there were very fruitful forms of co-operation in the practice of States, such as river commissions, but he did not think that that form of co-operation could be imposed on a universal scale. The Commission could draw up some sort of list enumerating the different forms of co-operation, as an indication without binding force. The addition of a draft article of that kind need not hold up the work of the Drafting Committee.

66. There seemed to be agreement on the need to delete draft article 14, which stated very strict rules on responsibility—a matter that would continue to be governed by the general régime applicable. Members of the Commission also seemed to consider that the time had not yet come to propose rules on third-party settlement of disputes. He believed that, in order to fill a very definite gap in the draft, it was necessary to insert an additional draft article on structural pollution, which was a matter of particular concern to the industrialized countries.

67. Finally, he saw no need for the Special Rapporteur to draft new provisions, especially as the General Assembly expected the Commission to submit draft articles and the Commission was in a position to do so.

68. Mr. KOROMA said that, as he understood it, the duty to co-operate did not constitute a binding obligation that could give rise to penalties in the event of non-compliance. He saw co-operation as a means of preventing conflicts and of avoiding causing appreciable harm to riparian States.

69. It was regrettable that the discussion should have taken the form of a debate on whether the entire set of draft articles under discussion should be referred to the Drafting Committee. He did think that such an approach offered members a fair choice. It would be preferable, on the basis of the discussion, to decide whether any particular article or articles should be referred to the Drafting Committee.

70. He hoped that, in summing up the discussion, the Special Rapporteur would offer some suggestions to remedy a gap in the draft, which did not contain any provisions on multilateral co-operation. That point could not be left for the Drafting Committee to decide.

71. Mr. THIAM said that he thought it would be best to leave the decision on whether the draft articles should be referred to the Drafting Committee until after the Special Rapporteur had summed up the discussion. The referral of those texts to the Drafting Committee would not prevent the Special Rapporteur from proposing others, if necessary, at the Commission's next session, including provisions on forms of co-operation.

72. Mr. McCAFFREY (Special Rapporteur), replying to the questions raised by Mr. Tomuschat and Mr. Koroma concerning the inclusion in the draft of provisions on broader forms of co-operation, recalled that, in his second report (A/CN.4/399 and Add.1 and 2, para. 59), he had suggested that the Commission should concentrate initially on the formulation of general principles and rules providing guidelines to be followed by States in negotiating and implementing international watercourse agreements and that, at a later stage, it could attempt to draw up articles or simply some indicative procedures to be used as models by States in making their own arrangements for co-operation with regard to the administration and management of international watercourses. As he had put it:

> . . . Once that task has been accomplished, the Commission may wish to consider whether it would be advisable to go on to make recommendations concerning various forms of non-binding provisions, for example the establishment of institutional mechanisms for implementing the obligations provided for in the articles. (*Ibid.*)

The question of provisions on broader forms of co-operation, such as the joint management of watercourses, could thus be taken up at that later stage.

The meeting rose at 1 p.m.

2014th MEETING

Friday, 12 June 1987, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/399 and Add.1 and 2,[1] A/CN.4/406 and Add.1 and 2,[2] A/CN.4/L.410, sect. G)

[Agenda item 6]

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[1] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

CHAPTER III OF THE DRAFT:[3]

ARTICLE 11 (Notification concerning proposed uses)

ARTICLE 12 (Period for reply to notification)

ARTICLE 13 (Reply to notification: consultation and negotiation concerning proposed uses)

ARTICLE 14 (Effect of failure to comply with articles 11 to 13) *and*

ARTICLE 15 (Proposed uses of utmost urgency)[4] (*concluded*)

1. Mr. McCAFFREY (Special Rapporteur) said that, in summing up a comprehensive discussion, he would endeavour not to repeat comments he had made earlier in response to observations or questions by members.

2. It was generally agreed that draft articles 11 to 15 as submitted in his third report (A/CN.4/406 and Add.1 and 2) were designed to promote co-operation and prevent disputes. Obviously, no one intended that the provisions of the articles should serve to create disputes, but as Mr. Mahiou (2012th meeting) and a number of other members had emphasized, co-operation had to be given some kind of concrete form in the context of reconciling the needs and interests of watercourse States in regard to international watercourses. In other words, the general rule of co-operation required specific rules for it to be implemented. Some of those rules—and only some of them—were contained in articles 11 to 15, a point that should be emphasized because those articles did not cover the entire scope of co-operation as envisaged in the draft as a whole. Care should be taken not to be carried away by the notion of co-operation, to the extent of failing to provide for the legal means whereby co-operation was to be carried out.

3. A second general point was that a set of procedures was necessary not only for new uses, but also for the maintenance of an equitable allocation of the uses and benefits of international watercourses. The maintenance of an equitable allocation of uses was covered by draft article 8, paragraph 2, and the procedures concerning new uses were dealt with in draft articles 11 *et seq.* Structural or "creeping" pollution could be dealt with under article 8, paragraph 2, and more specifically in an article on pollution that would be submitted in a future report. The procedures should be formulated so as to ensure, as far as possible, that one riparian State, in its utilization of an international watercourse, did not act to the detriment of another and also that the latter State was not given an actual or effective veto over the activities or plans of the first State. As emphasized by a number of members, the right of one State to exercise jurisdiction within its territory was limited by the duty not to cause injury to other States. Only in that way could the sovereignty of all the States concerned be respected.

4. A third general point was the need to take into account the relationship between draft article 9 and draft articles 11 to 15. It had been pointed out that the duty to notify under article 11 was brought into play by "a new use . . . which may cause appreciable harm". It was not necessarily a legal wrong to cause appreciable harm. The idea of using "appreciable harm" to trigger the mechanism contained in articles 11 to 15 was to allow the notified State to determine whether the contemplated new use would result in it being deprived of its equitable share of the uses and benefits of the watercourse, an idea that was further explained in paragraph (5) of his comments on article 11. It should be stressed that the criterion of "appreciable harm" was meant to be a factual, not a legal, criterion, and it was intended to afford States an opportunity to determine whether the notifying State would, by its proposed new use, exceed its equitable share: such an excess would constitute a legal wrong. The criterion of appreciable harm was certainly not designed to force a State to admit in advance that it intended to commit an internationally wrongful act.

5. However, since the expression "appreciable harm" had led to some misunderstanding, it might be preferable to speak of a new use which "may have an appreciable adverse effect upon other watercourse States". The adjective "appreciable" would thus indicate that the duty to notify would be triggered not simply by any adverse effect, but by a factual standard that could be established by objective evidence. Actually, the meaning of the term "appreciable" had been discussed by the Commission in the commentary to article 4, provisionally adopted in 1980,[5] and also in Mr. Schwebel's third report.[6] The term "adverse effect" would not seem to have the same connotation as "harm" and would thus be more suitable for the articles under consideration. Several members, including Mr. Graefrath (2011th meeting) and Mr. Njenga (2012th meeting), favoured the criterion of an "effect" rather than "harm". Article 13, paragraph 1, should nevertheless retain the reference to "depriving the notified State of its equitable share", since that was precisely the wrong that was to be prevented. Accordingly, while the criterion for giving notice should be that the proposed new use might have an "appreciable adverse effect", the test of whether the new use could lawfully be implemented would be that it should not deprive the notified State of its equitable share of the uses and benefits of the watercourse.

6. As to the individual articles, the first issue to be examined in connection with article 11 was the use of the word "contemplates", which raised the question of the precise point in time at which a State had the duty to notify the other State or States of a contemplated new use. The notification should be early enough in the planning stage to allow meaningful consultations on the design of the project, but late enough for sufficient technical data to be available for the notified State to determine whether the new use was likely to result in ap-

[3] The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook . . . 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

[4] For the texts, see 2001st meeting, para. 33.

[5] *Yearbook . . . 1980*, vol. II (Part Two), p. 119, paras. (9) *et seq.* of the commentary.

[6] *Yearbook . . . 1982*, vol. II (Part One), pp. 98 *et seq.*, document A/CN.4/348, paras. 130 *et seq.*

preciable harm. The data should, according to article VII, paragraph 2, of the 1960 Indus Waters Treaty, be such "as may be available and as would enable the other Party to inform itself of the nature, magnitude and effect of the work", in other words of the new use (see A/CN.4/406 and Add.1 and 2, para. 71). Mr. Reuter, among other members, had made a useful suggestion (2008th meeting) to the effect that the State contemplating the new use should provide notice when it had sufficient technical data for it and the notified State to determine the potential effects of the new use, and before the legal procedure to implement the project was initiated. Notification should thus be given as soon as practicable, but in any event before the watercourse State undertook, authorized or permitted the project in question. It would also appear—as rightly pointed out by Mr. Graefrath—that there would have to be an initial decision in principle by the State to begin the process of planning, feasibility studies and similar steps that usually preceded the actual authorization or initiation of a new use.

7. The use of the term "State", at the beginning of article 11, was meant, as he had already explained, to include private activities within a State. That point could perhaps be clarified in the context of fixing the time at which notification would be required, namely "before a watercourse State undertakes, authorizes or permits" the new use in question. Accordingly, there should be no problem in making it plain that the article also applied to activities by private persons that were authorized or permitted by the State.

8. The main issue regarding article 12 was the "standstill" or "suspensive" effect, and he had been asked during the discussion to indicate the authority for such an effect. It was to be found in a large number of treaties, declarations, etc. mentioned in his third report (A/CN.4/406 and Add.1 and 2, paras. 43 *et seq.*). Numerous European treaties had been analysed by F. L. Kirgis in his well-known book, *Prior Consultation in International Law: A Study of State Practice*,[7] and Kirgis had concluded that European practice recognized a norm of prior consent, not just a norm of prior consultation. The requirement of consent would obviously imply a suspensive effect until consent was forthcoming.

9. He agreed that, in order to avoid giving the notified State a veto, provision should perhaps be made for some fixed maximum period for reply to the notification, a period that could be extended at the request of the notified State, as suggested by Mr. Solari Tudela (2013th meeting). It has to be remembered that most projects that were likely to entail appreciable adverse effects would take a number of years to plan and implement, so that in many cases even a nine-month period would not seem unreasonably long. Indeed, a fixed period would encourage early notification by the State contemplating the new use, so that it could proceed with its plans as soon as possible. Paragraph 1 should be formulated on the basis of alternative B, modified in the way he had just indicated. Paragraph 3 would then be unnecessary, and could be deleted.

[7] Charlottesville (Va.), University Press of Virginia, 1983.

10. With reference to article 13, and particularly paragraph 1, Mr. Mahiou (2012th meeting) had rightly pointed to the need not to lose sight of the obligations of the notified State. A better balance would be achieved if the notified State were required to provide a reasoned and documented explanation of its grounds for considering that a proposed new use would result in the notifying State exceeding its equitable share of the watercourse. The question whether it should also establish that the new use would cause it appreciable harm would depend largely on the Commission's final decision on the wording of article 9.

11. Paragraph 5 of article 13 referred to the "dispute-settlement provisions of the present articles". He agreed that such provisions could usefully be set out in an annex to the draft and that the Commission could, in keeping with its usual practice, postpone a decision on whether the draft should contain such an annex. He would therefore recommend that the reference to "dispute-settlement provisions" be replaced by a reference to the means of peaceful settlement, other than negotiation, provided for in Article 33 of the Charter of the United Nations. The same change would have to be made in article 14, paragraph 1. It was worth noting that, for the present topic, where technical expertise played such a prominent role, compulsory conciliation or even fact-finding by an independent expert or experts would be the most appropriate solution. That point could, of course, be examined later.

12. Mr. Shi (2011th meeting) and other members had made suggestions for provisions specifying a time-limit to ensure that consultations, negotiations or other procedures did not unduly delay the initiation of a contemplated new use. In that regard, he would point out that the purpose of the draft articles was precisely to prevent abuse of the consultation and negotiation process by a State in order to prolong the proceedings. Paragraph 4 of article 13 was intended to deal with that point, but it might well be advisable to spell out the idea. That could be done either by providing that the process of confirming or adjusting the determination in question must not unduly delay the initiation of the proposed new use or by establishing a specific period of time within which those consultations and negotiations had to take place.

13. Of course, abuse was always possible, regardless of whether the present approach of article 13 was adopted, one that might favour the notified State, or whether provision was made for cutting off the negotiations, an approach that might favour the notifying State. Either type of procedure could be exploited by the party that stood to benefit most, but it had to be presumed that, at some point, the parties would act in good faith, as that concept was construed in the *Lake Lanoux* arbitral award (see A/CN.4/406 and Add.1 and 2, para. 73 (*c*)).

14. Article 14 had also been criticized for being unbalanced and tipped in favour of the notified State. He therefore proposed that a number of steps be taken to redress the balance. First, in paragraph 1, it should be made clear that failure to notify did not necessarily signify that the State contemplating a new use had failed to comply with article 11; it might simply mean that the

State in question had arrived at the conclusion that the proposed new use would not have an appreciable adverse effect on other States or cause them appreciable harm.

15. Article 14 could also include a provision requiring a State which believed it might be adversely affected by a new use to provide a reasoned and documented explanation of its grounds for considering that the proposed new use would result in the notifying State exceeding its equitable share of the watercourse. That provision would correspond to the one he had suggested including in article 13, paragraph 1. Of course, such an explanation would be possible only to the extent that the notified State possessed adequate information concerning the proposed use.

16. The subsequent procedures would then parallel those in article 13: consultation and, if necessary, negotiation and further procedures aimed at adjusting the notified State's determination or the notifying State's plans, so as to preserve an equitable balance in the uses and benefits of the watercourse.

17. The reference in paragraph 2 of article 14 to article 9, which stipulated the obligation to avoid causing appreciable harm, should perhaps be replaced by a reference to article 6, which laid down the obligation of equitable utilization. It had rightly been pointed out that the proviso at the end of paragraph 2 should be amended so as to refer to article 11 and to only paragraphs 1 and 2 of article 12. The Commission seemed to be generally agreed that paragraph 3 was not necessary, since the notifying State would, in any event, be responsible for a breach of its international obligations. The paragraph could therefore be deleted without loss to the system of procedural rules as a whole.

18. Some members regarded article 15 as indispensable, whereas others thought that a more precise definition of the term "utmost urgency" was necessary. Yet others considered that the article provided a loophole that would allow States to avoid their obligations under articles 11 to 14. His own view as Special Rapporteur was that some provision should be made for that kind of situation. What was needed was greater clarification of the criterion of "utmost urgency", or possibly of what kinds of situation would permit a State to proceed with a new use without wating for a reply. That task could conveniently be left to the Drafting Committee. Paragraph 3 could be deleted for the same reasons as the corresponding paragraph of article 14.

19. It should not be forgotten that articles very similar to the ones under consideration had been discussed both in 1983 and in 1984. The texts proposed by Mr. Evensen in 1983 had been criticized by some members as too favourable to the notified State. They had been reworded and, in 1984, had been criticized as being too favourable to the State proposing the new use. Clearly, if the present articles were redrafted and submitted again in 1988, the same situation was likely to arise. There would never be unanimity within the Commission on so delicate a subject; compromise solutions would have to be found and the best place to begin that process was in the Drafting Committee. Articles 11 to 15 formed a coherent whole and the Drafting Committee would have difficulty in dealing with one or two of them in isolation. He therefore proposed that they all be referred to the Drafting Committee for consideration in the light of the discussion, including the proposals he had just made.

20. The CHAIRMAN thanked the Special Rapporteur for his summing-up and invited the Commission to consider the Special Rapporteur's proposal.

21. Mr. CALERO RODRIGUES said that he supported the Special Rapporteur's proposal, but would point out that one question had not been answered. A time-limit was specified for the reply by the notified State and the Special Rapporteur was proposing a maximum rather than a minimum period. He would like to know how long the standstill clause would operate. It was not clear whether it came to an end with the consultations or with the negotiations. The expiry of a fixed period of time was one conceivable solution.

22. Mr. McCAFFREY (Special Rapporteur) said that the question raised two different problems: first, the actual period for reply, and secondly, the period during which negotiations would be held for the purpose of arriving at mutual adjustments. Provision would have to be made for some kind of limit on the suspensive effect with respect to both periods. Clearly, the standstill clause would have to operate during the adjustment of plans by the two States concerned. Two approaches were possible. One was to specify that the consultations and negotiations must not unduly delay the initiation of the project. The other was to lay down a specific time-limit. In that regard, a period of nine months would seem adequate. He had refrained, however, from suggesting a definite period, in the hope that an acceptable compromise would be reached to allow for all the positions taken by members.

23. Mr. Sreenivasa RAO said that, in his helpful summing-up, the Special Rapporteur had not covered all the points raised during the discussion. He therefore suggested that, when the articles were referred to the Drafting Committee, the Committee's terms of reference should be more flexible than usual and broad enough to take into account all the matters that had been raised.

24. Mr. REUTER said that any member of the Commission who did not sit on the Drafting Committee was entitled to submit suggestions in writing. Personally, he considered that the discussion on articles 11 to 15 could not be usefully continued in plenary. He wished to congratulate the Special Rapporteur on his moderation and conciliatory spirit.

25. Mr. McCAFFREY (Special Rapporteur) explained that he had done his best, on the basis of his own notes, to reply as fully as possible to the points raised during the discussion. He wished to apologize for not being able to deal with every single question: that would have been possible only with the help of the summary records, which took some time to produce but would be available to the Drafting Committee when it came to consider articles 11 to 15.

26. As to the Drafting Committee's terms of reference, it was the usual practice for the Commission to

refer draft articles to the Committee for consideration in the light of the discussion. The Committee would thus take into account all the points made during the debate, and not merely those to which he had been able to refer in his necessarily summary exposition.

27. Mr. BENNOUNA said that he, too, wished to congratulate the Special Rapporteur on his open-mindedness and his grasp of the discussion, as revealed in the suggested changes, which took full account of the comments made by members. Thanks to the Special Rapporteur's summing-up, the debate had proved constructive and had enabled the Commission to make progress in its understanding of the draft articles. It would be preferable to refer all the articles to the Drafting Committee, but he wondered whether the Committee should not first complete the substantive provisions, particularly draft article 9, before examining the procedural provisions.

28. The CHAIRMAN pointed out that a decision to refer the procedural articles to the Drafting Committee would not imply any kind of priority upon them.

29. Mr. BEESLEY said that he strongly supported the Special Rapporteur's proposal. He had been impressed by the Special Rapporteur's willingness to accommodate the different views expressed. For his own part, he preferred the concept of accommodation to that of compromise. As a result of the Special Rapporteur's efforts, the articles would be much more acceptable to States.

30. Surely it would be enough to refer the articles to the Drafting Committee for consideration in the light of the discussion, for there was no material difference between the suggestions made by Mr. Sreenivasa Rao and those made by Mr. Reuter. During the discussion, some members had said that articles 11 to 15 were not yet ripe for referral to the Drafting Committee. Following the Special Rapporteur's summing-up, the situation had changed and the Committee could fulfil its traditional role of bridging the existing differences, a task which went well beyond mere drafting.

31. He wished to point out that the Commission would be judged on an important issue. Everyone knew that water was a diminishing resource, but pollution was not a diminishing problem. Moreover, disputes between States were bound to occur and the questions involved could not be left for settlement on a purely bilateral or regional basis. That was why the Commission was working on a "framework convention", although he would prefer the term "umbrella convention", which had already been used in other contexts.

32. The Chernobyl incident had raised a number of issues and, to its credit, the country concerned had adopted a co-operative regional approach to some of the problems involved. Another case was the recent catastrophic pollution of the Rhine and the action taken by Switzerland in that connection. He therefore reluctantly supported the Special Rapporteur's suggestion that paragraph 3, relating to liability, should be deleted from articles 14 and 15.

33. Mr. GRAEFRATH said he had initially thought that the Drafting Committee might have difficulty reconciling the various positions adopted during the discussion. In the light of the Special Rapporteur's summing-up, however, he would not object to referral of articles 11 to 15 to the Drafting Committee.

34. Mr. NJENGA said that he, too, endorsed the proposal to refer articles 11 to 15 to the Drafting Committee.

35. Mr. AL-BAHARNA said that certain views and proposals regarding articles 11 to 15 had yet to be considered and might lead to a discussion of substantive issues in the Drafting Committee, which should be concerned with matters of drafting. The Special Rapporteur could therefore perhaps be asked to redraft the articles to reflect the views that had been expressed in the Commission, before they were referred to the Drafting Committee. That would assist the Committee in its task and also save time.

36. Mr. THIAM said that he welcomed the changes suggested by the Special Rapporteur to accommodate the views expressed by members. As usual, the Drafting Committee would not fail to take them into account. In his opinion, the Special Rapporteur should not be asked to recast the draft articles and submit them again to the Commission.

37. Mr. BARSEGOV thanked the Special Rapporteur for taking account of the views expressed by members of the Commission, but thought that it would be preferable to revise the draft articles before submitting them to the Drafting Committee, a course that would simplify the Committee's task. Unquestionably, the more thorough the preparation of the texts submitted to the Drafting Committee, the faster it could deal with them. Apart from those pragmatic considerations, matters of principle were involved. There was a wide divergence of views in the Commission concerning the articles which had been discussed, and many suggestions had been made. Taking them into account was not a matter of drafting; it called for analysis, reflection and the preparation of new texts. He was convinced that the Special Rapporteur could perform that task, as was clear from his summing-up.

38. Generally speaking, differences of opinion on matters of principle would not be eliminated by referring draft articles to the Drafting Committee. On the contrary, such an approach would protract the work of the Drafting Committee and, at a later stage, severely slow down the work of the Commission itself, especially on such topics as the draft Code of Offences against the Peace and Security of Mankind. The fact that the first 10 draft articles on the present topic had been discussed in the Drafting Committee could not serve as an example, because they related to more general aspects, whereas the Commission was now engaged in examining articles of a specific nature, to which there were different approaches. There was no reason to fear that the debate would be reopened; that would happen only if the Special Rapporteur failed to take into account the opinions expressed by members of the Commission, and that was not the case in the present instance.

39. Furthermore, the Commission should not lose sight of the fact that the General Assembly would judge its performance by reference to its methods of work. It

had been said during the debate that, if the articles were not referred to the Drafting Committee, the General Assembly might come to the conclusion that the new composition of the Commission was hindering progress in its work on the topic. Anyone would think that work on the 13-year-old topic had proceeded apace in the Commission as formerly composed. However, in its new composition, the Commission had already succeeded in working out some 10 draft articles. The General Assembly would more likely be surprised at a method of work which involved referring articles to the Drafting Committee even though there were divergent views on questions of principle. If the majority insisted on such a referral he would not disrupt the consensus, but he asked the Commission to bear in mind that further work on the articles could not be regarded merely as an editing exercise. It would therefore be necessary to recognize the right to use square brackets if it proved impossible to reach agreement on a text. In conclusion, he requested the secretariat to compile an exhaustive list of the proposals and observations made during the discussion in plenary, so as to allow the Drafting Committee to take into account the views of all members of the Commission.

40. Mr. MAHIOU said that he endorsed the Special Rapporteur's conclusions and the proposal to refer draft articles 11 to 15 to the Drafting Committee. As he recalled, the Drafting Committee had not always been asked to deal solely with articles on which the Commission was unanimous. Actually, draft articles 1 to 9 had given rise to even more divergent views than draft articles 11 to 15, but had none the less been referred to the Drafting Committee. It was difficult to know which solution was best. Sometimes the Drafting Committee was able to bridge certain differences, but in other cases that was done by the Commission itself. Yet the Commission had sometimes reopened the debate on questions which had been settled in the Drafting Committee. In his view, the practice followed so far had none the less proved positive and constructive.

41. Mr. FRANCIS said that problems did not disappear simply by being discussed in plenary. The Drafting Committee was a more flexible body and nearly always found it possible to solve a particular problem. Articles 11 to 15 should therefore be referred to the Drafting Committee, since that was the place where agreement was most likely to be secured.

42. Mr. KOROMA said that the time had come to review the Commission's methods of work. It was not necessary for each and every article before the Commission to be referred to the Drafting Committee. Indeed, he understood that that had not been the case in the past. Mr. Al-Baharna had made a constructive proposal: the Special Rapporteur should be requested to redraft articles 11 to 15 before their referral to the Drafting Committee.

43. Mr. McCAFFREY (Special Rapporteur) said that the articles submitted in his third report (A/CN.4/406 and Add.1 and 2) were revised versions of those submitted in his second report (A/CN.4/399 and Add.1 and 2), and had been redrafted in the light of the comments made in the Commission and the Sixth Committee of the General Assembly. It was, however, standard practice for special rapporteurs to submit a number of redrafts in the Drafting Committee and he would no doubt do so in the case of articles 11 to 15.

44. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed to refer draft articles 11 to 15 to the Drafting Committee, on the understanding that the Committee would take into account all the proposals made in plenary, including those made by the Special Rapporteur, as well as any written comments by members who did not sit on the Drafting Committee.

It was so agreed.

45. The CHAIRMAN said that the meeting would rise to enable the Drafting Committee to meet.

The meeting rose at 11.45 a.m.

2015th MEETING

Tuesday, 16 June 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

International liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/384,[1] A/CN.4/402,[2] A/CN.4/405,[3] A/CN.4/L.410, sect. F, ILC(XXXIX)/Conf.Room Doc.2[4])

[Agenda item 7]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

ARTICLES 1 TO 6

1. The CHAIRMAN invited the Special Rapporteur to introduce his third report on the topic (A/CN.4/405), as well as draft articles 1 to 6 contained therein, which read:

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[1] Reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

[2] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[4] The schematic outline, submitted by the previous Special Rapporteur, R. Q. Quentin-Baxter, at the Commission's thirty-fourth session, is reproduced in *Yearbook . . . 1982*, vol. II (Part Two), pp. 83-85, para. 109. The changes made to the outline in R. Q. Quentin-Baxter's fourth report, submitted at the Commission's thirty-fifth session, are indicated in *Yearbook . . . 1983*, vol. II (Part Two), pp. 84-85, para. 294.