Document:-
A/CN.4/SR.2040

Summary record of the 2040th meeting

Topic:
Other topics

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

91. Prince AJIBOLA said that the problems which had arisen could be solved by incorporating the material that was in dispute in footnotes.

92. Mr. BEESLEY suggested that the Special Rapporteur should submit a revised version of the commentary, dealing solely with the obligation to consult, at the next meeting. In addition, the Commission should perhaps confine itself to precedents relating only to watercourses.

93. The CHAIRMAN, speaking as Special Rapporteur, thanked Mr. Beesley for his constructive proposal and pointed out that the precedents relating to the law of the sea which had been cited represented only a fraction of those contained in the 1980 commentary. A comparison of article 3 provisionally adopted in 1980 with the present article 4 would reveal that the Commission had merely replaced the obligation to negotiate by the obligation to consult. Hence the authorities which supported the obligation to negotiate should, *a fortiori*, support an obligation to consult. However, he was prepared to modify the commentary to take account of the concern expressed.

94. Speaking as Chairman, he said that the Commission would revert to paragraph (21) of the commentary to article 4 at the next meeting.

95. Mr. CALERO RODRIGUES, speaking on a general point, said that the General Assembly had requested the Commission to indicate in its annual report the subjects and issues on which views expressed by Governments, either in the Sixth Committee or in writing, would be of particular interest for the continuation of its work.[4] The Commission could respond to that request either by providing appropriate indications in the various chapters of its report or by setting aside a separate part of the report for that purpose. The chapters considered thus far did not contain any such indications and he feared that any failure by the Commission to respond to the request would attract criticism from the Sixth Committee.

96. The CHAIRMAN said that, having consulted the Rapporteur of the Commission, he considered that the best course would be to give the requisite indications at the end of the chapters on the various topics the Commission had discussed during the session.

97. Mr. THIAM, speaking as Special Rapporteur for the topic of the draft Code of Offences against the Peace and Security of Mankind, said that he would like to have further details regarding the questions to be put to the General Assembly. He did not think it was possible at the present stage to examine in plenary a series of questions prepared by each Special Rapporteur.

98. The CHAIRMAN said that, in his view, each special rapporteur should specify which questions should be put to the General Assembly. Since the sections in which the questions would appear formed part of the Commission's report, they would naturally have to be approved by the Commission, hence the need to be concise. In the case of the draft Code of Offences against the Peace and Security of Mankind and the law of the non-navigational uses of international watercourses, it would suffice to question the General Assembly more particularly about the draft articles adopted during the session.

It was so agreed.

The meeting rose at 6.10 p.m.

[4] General Assembly resolution 41/81 of 3 December 1986, para. 5 (*b*).

2040th MEETING

Friday, 17 July 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

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

Draft report of the Commission on the work of its thirty-ninth session (*continued*)

CHAPTER III. *The law of the non-navigational uses of international watercourses* (continued) (A/CN.4/L.415 and Add.1-3)

C. **Draft articles on the law of the non-navigational uses of international watercourses** (*concluded*) (A/CN.4/L.415/Add.2 and 3)

TEXTS OF DRAFT ARTICLES 2 TO 7, WITH COMMENTARIES THERETO, PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS THIRTY-NINTH SESSION (*concluded*)

Commentary to article 4 ([Watercourse] [System] agreements) (*concluded*)

Paragraphs (21) to (26)

1. The CHAIRMAN, speaking as Special Rapporteur, said that, further to consultations, he wished to propose certain changes to the commentary.

2. Paragraph (21), which dealt with the *Lake Lanoux* case, would remain unchanged, but it would be indicated in footnote 21 that the ICJ had also dealt with the obligation to negotiate in cases involving the apportionment of maritime resources. Reference would then be made to the cases cited in paragraphs (22) to (26), and those paragraphs would be deleted.

3. A new paragraph (22) would be added, paraphrasing paragraph 3 of article 4 and reading:

> "For these reasons, paragraph 3 of article 4 requires watercourse States to enter into consultations, at the instance of one or more of them, with a view to negotiating, in good faith, one or more agreements which would apply or adjust the provisions of the present articles to the characteristics and uses of the international watercourse in question."

4. The law of the sea cases cited in the present paragraphs (22) to (26) could, of course, be mentioned again in connection with a future article providing for the obligation to negotiate. With regard to that particular point, the ICJ had laid down a very general principle which should be borne in mind even if it were dropped from the commentary to article 4.

5. Mr. EIRIKSSON said that he supported the Special Rapporteur's proposed amendments.

6. Mr. BARSEGOV said that he, too, supported the amendments. Apportionment of natural resources, however, to which the Special Rapporteur had referred, was a notion which, notwithstanding its practical content, had no existence in law. From the legal standpoint, the disputes to be resolved related, for instance, to the delimitation of boundaries or exclusive zones. Care should be taken to ensure that the Commission did not embark on the wrong path because of wording that was wrong in law.

7. The CHAIRMAN, speaking as Special Rapporteur, explained that the main purpose of the addition he had proposed to footnote 21 was to avoid having to determine whether or not the decisions of the ICJ established the existence of an obligation to negotiate. To dispel the ambiguity pointed out by Mr. Barsegov, he proposed that the words "apportionment of maritime resources" should be replaced by "fisheries and maritime delimitation".

8. Mr. BARSEGOV said that that wording was acceptable.

9. Mr. REUTER said that he agreed with the amendments proposed by the Special Rapporteur, and also with the way in which he had dealt with the *Lake Lanoux* case in paragraph (21).

10. Prince AJIBOLA said that the inclusion in a footnote of examples relating to the law of the sea and taken from the case-law of the ICJ seemed to be an appropriate solution. It was simply a question of analogies, which should be dealt with in the same way as those which the Commission had drawn, in another context, with the Nürnberg trial.

The Special Rapporteur's amendments were adopted.

Paragraph (21) and new paragraph (22) were approved.

The commentary to article 4, as amended, was approved.

Commentary to article 5 (Parties to [watercourse] [system] agreements)

Paragraph (1)

11. Mr. REUTER said that, as he understood the purpose of article 5, it laid down the principle whereby a watercourse State whose interests might be affected by the use of the watercourse was entitled to participate in negotiations with a view to the conclusion of an agreement. In practice, however, the principle was by no means easy to apply. It was a relatively easy matter where only two States were involved, but the problem acquired another dimension in the case of multilateral agreements. New procedures and mechanisms, in other words the whole machinery of implementation, had to be introduced. He therefore remained sceptical about a provision whose implementation he found difficult to envisage.

12. Mr. BARSEGOV and Mr. AL-KHASAWNEH said that they agreed with Mr. Reuter.

Paragraph (1) was approved.

Paragraph (2)

13. The CHAIRMAN, speaking as Special Rapporteur, said that, in the third sentence, the words "It is true that there are likely to be" should be replaced by "It is true that there may be".

Paragraph (2), as amended, was approved.

Paragraphs (3) to (9)

Paragraphs (3) to (9) were approved.

The commentary to article 5, as amended, was approved.

Commentary to article 6 (Equitable and reasonable utilization and participation)

Paragraph (1)

14. Mr. AL-KHASAWNEH proposed that the words "The most", at the beginning of the second sentence, should be replaced by "One of the most".

It was so agreed.

Paragraph (1), as amended, was approved.

Paragraphs (2) to (10)

Paragraphs (2) to (10) were approved.

Paragraph (11)

15. Mr. CALERO RODRIGUES said that he wondered whether contiguous watercourses and successive watercourses could be placed on the same footing, as was the case in the last two sentences of paragraph (11). It seemed to him that the Act of Asunción, which was referred to in paragraph (16), made a very definite distinction, unlike paragraph (11), and that the two kinds of watercourse could not be the subject of régimes that were completely interchangeable.

16. The CHAIRMAN, speaking as Special Rapporteur, said it had not been his intention to deny that there could be differences between contiguous and successive watercourses and he would therefore propose that the last sentence of the paragraph should be incorporated in a footnote. He was in favour of retaining the penultimate sentence, since it was the conclusion he had arrived at on the basis of his examination of a very large number of treaties.

17. Mr. MAHIOU said that footnote 6, which consisted almost entirely of quotations from the works of various legal writers, was very long. If those works had already been mentioned in the Special Rapporteur's reports, it was perhaps pointless to repeat them. The same applied to the works cited in footnote 10.

18. The CHAIRMAN, speaking as Special Rapporteur, confirmed that the authors quoted in both footnotes were also referred to in his second report

(A/CN.4/399 and Add.1 and 2, *passim*): he therefore agreed that the footnotes could be shortened.

It was so agreed.

19. Mr. BARSEGOV said he, too, considered that anything already covered by the Special Rapporteur's reports should be omitted from the commentary.

20. The second sentence of paragraph (11) spoke of "the recognition of the equal . . . rights", which did not seem to be a felicitous expression. A State might have only 10 kilometres of a river on its territory, and its neighbour more than a thousand kilometres: could they be said to have equal rights?

21. As to the distinction between contiguous and successive watercourses, he would like matters to be clear. If the articles were to apply to all watercourses without distinction, it was necessary to say so. If, on the other hand, they covered only certain categories of watercourse, the distinction should be made explicit.

22. The CHAIRMAN, speaking as Special Rapporteur, said that the expression "recognition of the equal . . . rights" did not mean that all watercourse States were entitled to, for instance, an equal amount of water: that was the whole basis of the doctrine of "equitable utilization". Theoretically, however, States could be said to have correlative rights to the equitable utilization of a watercourse.

23. Mr. AL-KHASAWNEH said that the concept of "equal rights to the use and benefits" of an international watercourse did not take account of the balance of power between riparian States. Sooner or later account would have to be taken of the problem of disparities in power, which varied according to whether the States concerned were situated on successive watercourses or contiguous watercourses.

24. Mr. GRAEFRATH said that the concept of equal rights, which seemed to cause problems, could well be deleted, provided the concept of correlative rights, which he regarded as essential, was retained.

25. Mr. REUTER said he, too, considered that it was the idea of correlation that should be emphasized. In his view, the relevant part of the second sentence should be amended to read ". . . their unifying theme is the recognition of rights of the parties to the use and benefits of the international watercourse or watercourses in question that are equal in principle and correlative in their application".

26. The CHAIRMAN, speaking as Special Rapporteur, said that that wording was acceptable.

Mr. Reuter's amendment was adopted.

27. Mr. REUTER said that, if the words "the same", in the last sentence, were replaced by "comparable", that sentence could perhaps be retained.

28. Mr. CALERO RODRIGUES said that, while Mr. Reuter's suggested amendment had merit, he still thought that the last sentence should be deleted, as it could weaken the paragraph.

29. The CHAIRMAN said he would take it that the Commission agreed to delete the last sentence of paragraph (11), along with footnote 10.

It was so agreed.

Paragraph (11), as amended, was approved.

Paragraph (12)

Paragraph (12) was approved.

Paragraph (13)

30. Mr. BARSEGOV said that he wished to enter a reservation concerning the paragraph, which referred to sovereignty in somewhat simplistic terms.

Paragraph (13) was approved.

Paragraph (14)

31. Mr. EIRIKSSON, referring to the earlier suggestion that certain references cited in the commentary should be incorporated in footnotes, said that he would prefer paragraphs (15) to (22) to take the form of footnotes to paragraph (14), in which case the wording of paragraphs (23) and (24) would have to be re-examined. He also suggested that the words "additional and unwavering", in the second sentence of paragraph (14), should be deleted.

32. Mr. BARSEGOV said that he supported Mr. Eiriksson's proposal regarding paragraph (14).

33. Mr. CALERO RODRIGUES, supported by Mr. TOMUSCHAT, said that a report with too many footnotes made for difficult reading. He would therefore prefer not to change the format. However, he supported Mr. Eiriksson's proposal with regard to the second sentence of paragraph (14).

Mr. Eiriksson's amendment concerning the second sentence of paragraph (14) was adopted.

Paragraph (14), as amended, was approved.

Paragraph (15)

Paragraph (15) was approved.

Paragraph (16)

34. Mr. REUTER said that paragraph 1 of the Declaration of Asunción could in no sense be regarded as stating a general rule of international law. Indeed, the arbitral award in the *Lake Lanoux* case had specifically rejected any suggestion that there was a general rule whereby the conclusion of a bilateral agreement was a prerequisite for the utilization of waters. International law imposed a fairly strict obligation of negotiation in such cases, but no one could claim that it amounted to a general rule. Luckily, countries were sufficiently in unison to have adopted that rule in inter-State relations, but the Commission could not contend that such an absolute rule had to be strictly applied. However desirable such agreements might be, it would be going too far to hinder the use of waters by a State in the event of a breakdown of negotiations. He therefore wished to enter a reservation to paragraph (16).

35. Mr. BARSEGOV said that he shared Mr. Reuter's view. It was true that neighbouring States or States from

the same region often had special political relations, as a result of which they became bound by certain rules, but those rules did not on that account become general rules of international law. What other reason was there for the distinction made between contiguous international watercourses and successive international watercourses for the purposes of paragraph (16)?

36. The CHAIRMAN, speaking as Special Rapporteur, explained that the purpose of the paragraphs quoted from the Declaration of Asunción was to show that in both cases—that of contiguous watercourses and that of successive watercourses—States enjoyed certain rights. Paragraph (16) could, however, perhaps be deleted in view of the comments to which it had given rise and since the preceding paragraph had already referred to a Latin-American instrument.

37. Mr. TOMUSCHAT said that, if paragraph (16) were retained, an explanation should be given as to what kind of instrument the Act of Asunción was. Despite its regional character, the Act showed that, in some instances, States were prepared to engage in very close cooperation. If, in the case in point, the Commission had embarked on the course of progressive development of international law, it would not be very far from a path that was now acceptable to States in all regions of the world. That would be an indication that the Commission had not strayed too far from the general trends of international law, although it could not show that there was an obligatory principle of international consultation. As the Act of Asunción was one of the elements on which the Commission had based its work, he favoured the retention of paragraph (16), accompanied by sufficient information concerning the nature of that instrument.

38. The CHAIRMAN, speaking as Special Rapporteur, said that the Declaration of Montevideo and the Act of Asunción were not treaties but could be classified among declarations of international conferences or interministerial meetings.

39. Mr. CALERO RODRIGUES said that the example given in paragraph (16) should be read in the light of paragraph (14), which stated: "These instruments provide support for the rules contained in article 6." Since the instruments in question had been adopted by States, it could be inferred that States would accept the rules laid down by the Commission in article 6. He therefore had no objection to retaining those examples in the commentary and thought it preferable to quote paragraphs 1 and 2 of the Declaration of Asunción, which give an idea of the difference between the treatment of contiguous watercourses and that of successive watercourses.

40. Prince AJIBOLA said that paragraph (16) should be retained, but that it should be stated that another Latin-American instrument, containing the Declaration of Asunción, provided a further example in support of the rules stated in article 6. Since it could not invoke the example of a watercourse which flowed across the whole world, the Commission had to take its examples from instruments concluded in various parts of the world.

41. Mr. PAWLAK said that the Commission could delete the references to examples in paragraph (15) ("An early example") and paragraph (16) ("Another Latin-American instrument"). Irrespective of whether it was a declaration or a treaty, the Act of Asunción was an interesting part of the Special Rapporteur's reasoning. Like Mr. Reuter, however, he would have a reservation to enter concerning paragraph 1 of the Declaration of Asunción, but would not insist that the reference should be deleted.

42. Mr. REUTER proposed that the beginning of paragraph (16) should be replaced by the following wording: "Another instrument offers a particularly constructive development of the principles set out in article 6 . . ."

43. The CHAIRMAN, supported by Mr. BARSEGOV, said that, as Special Rapporteur, he would be inclined to avoid characterizing the various instruments referred to in the commentary; he would also be hesitant about claiming that one instrument was more constructive than another.

44. He suggested that the Commission should approve paragraph (16) in its present formulation, on the understanding that the comments thereon would be reflected in the summary record.

It was so agreed.

Paragraph (16) was approved.

Paragraph (17)

45. Mr. BARSEGOV said that he wondered what the nature was of the instrument referred to in paragraph (17). If Principle 21 of the Stockholm Declaration was recommendatory, then it would be better to say so.

46. The CHAIRMAN, speaking as Special Rapporteur, said that the Stockholm Declaration in itself had no binding normative value.

47. Mr. BEESLEY said that a whole series of recommendations had emanated from the United Nations Conference on the Human Environment, Recommendation 51 being one example. The principles, some of which were of a legal nature, merely formed part of the Declaration. It had never been made clear whether the principles were declaratory of customary international law, but in his view that was not an issue the Commission needed to address.

48. Mr. MAHIOU said that paragraph (14), by referring to "declarations, statements of principles, and recommendations concerning the non-navigational uses of international watercourses", clarified the subsequent paragraphs, which merely listed examples.

49. Mr. GRAEFRATH said that, while he understood members' concern regarding reference to instruments of different legal value, he would point out that paragraph (24) of the commentary stated that "all authorities referred to are not of the same legal value".

Paragraph (17) was approved.

Paragraphs (18) to (22)

Paragraphs (18) to (22) were approved.

Paragraph (23)

50. Mr. BARSEGOV said that he saw no point in speaking, as did the last sentence, of decisions handed down in "cases involving competing claims of quasi-sovereign political subdivisions of federal States", for such decisions were not relevant to the concerns of the Commission and could not be regarded as sources of international law.

51. The CHAIRMAN, speaking as Special Rapporteur, said some international lawyers maintained that judicial decisions of municipal courts were a subsidiary means for the determination of rules of law, in accordance with Article 38, paragraph 1 (*d*), of the Statute of the ICJ.

52. Mr. BEESLEY suggested that the reference to decisions of municipal courts should be retained, but that it should be made clear that such decisions did not stand on an equal footing with other sources of international law.

53. The CHAIRMAN, speaking as Special Rapporteur, suggested that the sentence in question should be incorporated in a footnote, followed by footnote 30, to make it clear that the decisions in question were not on a par with the decisions of international courts.

54. Mr. BARSEGOV said that he did not agree with such a broad interpretation of the decisions of municipal courts. In his view, their decisions were certainly not to be treated as sources of international law.

55. Mr. GRAEFRATH said that the question was not whether to recognize the importance of decisions of municipal courts, something nobody denied, but to decide whether a decision concerning the political subdivisions of a federal State could be compared with decisions handed down in the context of inter-State relations. The problem was that two entirely different legal systems were involved. He therefore suggested that a footnote should be added to make it clear that the reference was to an example which concerned a legal situation that differed from international law.

56. Mr. MAHIOU proposed that the last sentence should be amended to read: "This principle has also been enshrined in the decisions of municipal courts, particularly in cases involving competing claims in federal States."

57. Mr. AL-KHASAWNEH said that Mr. Mahiou's formulation was an improvement on the sentence in question, which should not be relegated to a footnote. It was well known that the value of decisions handed down in cases involving competing claims of subdivisions of a federal State was based on analogy. Those cases provided such a wealth of material that it would be a mistake to mention them only in a footnote.

58. Mr. CALERO RODRIGUES said he wondered whether the difficulties did not stem from the fact that the principle in question prohibited States from allowing their territory to be used in a manner that was harmful to other States, a principle that bore no relationship to internal law or the decisions of national courts. Perhaps the solution would be to delete the reference to "principle".

59. The CHAIRMAN, speaking as Special Rapporteur, said it could not be concluded from footnote 30 that decisions relating to the principle of equitable utilization were involved. Many courts used both the principles embodied in article 6, sometimes without specifying the one on which they relied. The two principles could not, therefore, always be separated.

60. Mr. BEESLEY suggested that a reference to article 6 should be made in the last sentence of the paragraph. He supported Mr. Mahiou's proposed amendment, whether the text was incorporated in a footnote or included in the paragraph itself.

61. Mr. TOMUSCHAT said that there had been cases in his country in which the courts had relied on rules of international law in order to resolve internal disputes. He therefore suggested that the last sentence should be deleted and the following new paragraph be added:

> "An instructive parallel can also be found in decisions of municipal courts under domestic law, particularly in cases involving competing claims of political subdivisions of federal States."

62. The CHAIRMAN, speaking as Special Rapporteur, suggested that a reference to article 6 should be inserted in the text proposed by Mr. Tomuschat, which would then read:

> "An instructive parallel may be found in decisions of municipal courts under domestic law which have enshrined the principles contained in article 6 in cases involving competing claims of political subdivisions of federal States."

He would, however, like the sentence to remain in paragraph (23).

63. Mr. GRAEFRATH said he, too, considered that the sentence should remain in paragraph (23), but would propose that it should be simplified to read: "An instructive parallel can be found in the decisions of municipal courts in cases involving competing claims in federal States."

It was so agreed.

Paragraph (23), as amended, was approved.

Paragraph (24)

64. Mr. REUTER said that the first sentence was not satisfactory, particularly the French text. The expression "representative authorities" seemed particularly defective.

65. After a brief discussion in which Mr. BARSEGOV, Mr. AL-BAHARNA and Mr. BEESLEY took part, the CHAIRMAN, speaking as Special Rapporteur, suggested that the first sentence should be replaced by the following text: "The foregoing survey of legal materials, although of necessity brief, reflects the tendency of practice and doctrine on this subject. It is recognized that all the sources referred to are not of the same legal value."

It was so agreed.

66. Mr. GRAEFRATH said that the use of the adjective "unshakeable", in the third sentence, was excessive.

67. Mr. AL-BAHARNA proposed that the adjective "consistent" before "support", in the second sentence, should be deleted; the survey referred to included such items as resolutions of learned bodies, which did not provide a firm guide to the doctrine and practice in the matter.

68. Mr. BARSEGOV said that he agreed with Mr. Al-Baharna's remark. The survey in question covered a great variety of sources and there was an obvious discrepancy between the character of those sources and the strong conclusion embodied in the commentary.

69. The CHAIRMAN, speaking as Special Rapporteur, pointed out that the sources in question included hundreds of international treaties of indisputable legal value. It was therefore quite appropriate to say that there was a solid basis for the rules contained in article 6. It would give a wrong impression if the word "consistent" were deleted. He knew of no other practice and certainly of no contrary practice.

70. Mr. YANKOV proposed that, in the third sentence, the words "unshakeable foundations" should be replaced by "sound foundations" and that the adjective "solid" before "basis" should be deleted.

It was so agreed.

Paragraph (24), as amended, was approved.

The commentary to article 6, as amended, was approved.

Commentary to article 7 (Factors relevant to equitable and reasonable utilization)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were approved.

Paragraph (4)

71. Mr. BEESLEY asked whether the part of the commentary dealing with paragraph 1 (*a*) of article 7 was regarded as adequately covering the maintenance and optimum utilization of biological resources.

72. Mr. BARSEGOV said that, as he understood it, the term "conservation" as used in connection with paragraph 1 (*e*) of article 7 related to the protection of nature in the ecological sense; it did not refer to such questions as fishing quotas in a country's own waters.

73. The CHAIRMAN, speaking as Special Rapporteur, pointed out that the term "conservation" was defined in the commentary to article 2 and the term "protection" in the commentary to article 6. Nowhere was anything said about a State's right to fish in its own waters.

74. Mr. BARSEGOV pointed out that both fish and water were resources, although of a different character. The issue of the quantity that a State was entitled to catch lay outside the present topic and was regulated by agreements between States. He could accept the term "conservation" only in the ecological sense.

75. Mr. AL-KHASAWNEH proposed that the words "such as quantity of water", in the second sentence, should be expanded to read "such as quantity and quality of water". Quality of water was an extremely important question in the arid parts of the world.

It was so agreed.

Paragraph (4), as amended, was approved.

Paragraph (5)

76. Mr. OGISO proposed that the word "discussions", in the fifth sentence, should be replaced by "consultations", which was used everywhere else in the paragraph.

It was so agreed.

Paragraph (5), as amended, was approved.

Paragraphs (6) to (9)

77. Mr. GRAEFRATH proposed that the lists of factors in paragraphs (6) to (9) should be transferred to a footnote with the appropriate cross-references.

78. The CHAIRMAN, speaking as Special Rapporteur, said that the purpose of the passages in question was to give the sources of the relevant factors mentioned in paragraph 1 (*a*) to (*f*) of article 7.

79. Mr. RAZAFINDRALAMBO proposed that only the list in paragraph (6) should be retained and that the material in paragraphs (7), (8) and (9) should be presented in a footnote in the form of references.

80. Mr. AL-KHASAWNEH pointed out that it would be useful for members of the Sixth Committee of the General Assembly to see the lists in full in the commentary itself. Cross-references were not convenient.

81. Mr. TOMUSCHAT proposed that the list in paragraph (6) should be deleted, since it was the list adopted by the International Law Association in 1956, and had presumably been superseded by the Helsinki Rules of 1966, referred to in paragraph (8) of the commentary. The other lists should be retained, since they were not all of the same character. There could be no question of choosing between them. Indeed, he found it interesting that instruments so different as the Helsinki Rules of the International Law Association, the 1958 United States Department of State Memorandum and the 1973 draft of the Asian-African Legal Consultative Committee should run on parallel lines.

82. Mr. CALERO RODRIGUES said that it would be better to retain the lists in the commentary itself. Relegating them to a footnote would make for more difficult reading.

83. Mr. BEESLEY said that it was desirable to retain the lists as a kind of bibliography useful to the reader.

84. The CHAIRMAN, speaking as Special Rapporteur, proposed that the list in paragraph (6) should be deleted. The content of paragraph (8), dealing with the Helsinki Rules, would be transferred to paragraph (6). Paragraphs (7) and (9) would follow, the latter being renumbered.

It was so agreed.

Paragraphs (6) to (9), as amended, were approved.

Paragraph (10)

Paragraph (10) (now paragraph (9)) was approved.

The commentary to article 7, as amended, was approved.

Section C, as amended, was adopted.

B. Consideration of the topic at the present session (A/CN.4/L.415/Add.1)

Paragraphs 1 to 5

Paragraphs 1 to 5 were adopted.

Paragraph 6

85. Mr. BEESLEY proposed that the reference in the second sentence to newly elected members should be deleted.

It was so agreed.

Paragraph 6, as amended, was adopted.

Paragraphs 7 to 10

Paragraphs 7 to 10 were adopted.

Paragraph 11

86. Mr. GRAEFRATH proposed that the words "certain members", in the first sentence, should be replaced by "some members".

It was so agreed.

87. Mr. SEPÚLVEDA GUTIÉRREZ noted that both the first and the third sentences of the Spanish text began with the words *Por otra parte* and suggested that some other expression should be used in the third sentence.

88. Mr. BARSEGOV proposed that the words "According to this view", at the beginning of the second sentence, should be replaced by "According to some members of the Commission".

It was so agreed.

Paragraph 11, as amended, was adopted.

Paragraph 12

89. Mr. YANKOV proposed the addition of the word "members" after "Some", at the beginning of the fourth sentence.

It was so agreed.

Paragraph 12, as amended, was adopted.

Paragraph 13

90. Prince AJIBOLA, supported by Mr. GRAEFRATH, proposed that the words "certain members", in the first sentence, should be replaced by "some members".

It was so agreed.

91. Mr. PAWLAK proposed that, in the last sentence, the word "established" should be added before "legal foundation".

It was so agreed.

Paragraph 13, as amended, was adopted.

Paragraphs 14 to 16

Paragraphs 14 to 16 were adopted.

Paragraph 17

92. Mr. OGISO proposed the addition, after the first sentence, of the following text: "Some members wondered whether it would not be better for the provisions concerning procedural rules to be of a recommendatory nature", which would reflect the idea he had expressed during the discussion (2010th meeting).

93. The CHAIRMAN, speaking as Special Rapporteur, said that that opinion had been expressed by only one member and it would be inaccurate to speak of "Some members".

94. Mr. OGISO said he believed that one other member had raised the same point. He would not, however, insist on the words "Some members".

95. Mr. BENNOUNA said that he did not agree that the provisions concerning procedural rules should be of a recommendatory nature, for it was difficult to incorporate recommendations in a treaty. He would, however, propose that a sentence be added to the effect that such provisions should provide for a maximum of flexibility, should be less constraining, and should leave States the widest possible freedom of action in their relations.

96. The CHAIRMAN suggested that Mr. Bennouna and Mr. Ogiso should consult with the secretariat and the Special Rapporteur on the exact wording of their proposals.

Paragraph 17 was adopted on that understanding.

Paragraphs 18 and 19

Paragraphs 18 and 19 were adopted.

Paragraph 20

97. Mr. BENNOUNA said it had been recognized during the discussion that there was a need to establish a relationship between the provision on appreciable harm and the one on equitable utilization, and the Special Rapporteur had agreed that the matter should be considered later. He would like to know whether that point was reflected in the report.

98. The CHAIRMAN, speaking as Special Rapporteur, said that that point had not been taken into account in paragraph 20, but it could be mentioned at the beginning of section B, in the part on the general discussion. He suggested that Mr. Bennouna should consult with him with a view to drafting a sentence on the relationship between articles 6 and 9.

Paragraph 20 was adopted on that understanding.

Paragraphs 21 and 22

Paragraphs 21 and 22 were adopted.

Paragraph 23

99. Prince AJIBOLA proposed that the words "would be likely to result", in the second sentence, should be replaced by "would likely result".

Paragraph 23 was adopted.

Paragraphs 24 to 29

Paragraphs 24 to 29 were adopted.

Paragraph 30

100. Mr. SEPÚLVEDA GUTIÉRREZ, referring to the first sentence of the Spanish text, said that some other word should be found for *desequilibrado*.

101. The CHAIRMAN asked Mr. Sepúlveda Gutiérrez to consult with the secretariat on a suitable word.

Paragraph 30 was adopted on that understanding.

Paragraphs 31 to 33

Paragraphs 31 to 33 were adopted.

Section B, as amended, was adopted.

102. Mr. BARSEGOV said that the text of chapter III of the draft report had often been available in Russian too late for him to be able to use it. In addition, the Commission had had to work so quickly that it had not always had time to enter into detail. If, therefore, it subsequently transpired that he had participated in the adoption of any provisions which were in contradiction with his statements in plenary, he reserved the right to defend his position at a later stage.

103. The CHAIRMAN said that Mr. Barsegov was, of course, fully entitled to reserve his position.

104. The Commission still had to adopt a final section for chapter III of the report to indicate the points on which comments by Governments were invited. He suggested the following wording:

"The Commission would welcome comment in the General Assembly, in particular on the draft articles on the law of the non-navigational uses of international watercourses provisionally adopted during the present session."

105. Mr. TOMUSCHAT said that that proposal was acceptable. Chapter III contained a detailed account of the discussion on the topic in plenary. He only regretted that all parts of the debate had not been fully reported, something which created an obvious imbalance.

106. The CHAIRMAN said that that point would be taken up by the Commission at its next session.

107. Mr. GRAEFRATH, associating himself with Mr. Tomuschat's remarks, said that, while he appreciated that the Commission was extremely short of time, he did not think it sufficed merely to draw the General Assembly's attention to certain draft articles. It would be more useful to direct its attention to specific points.

108. The CHAIRMAN said that he would consult members informally to see whether a suitable form of wording could be found. A final decision in the matter could then be taken at the next meeting.

The meeting rose at 1.10 p.m.

2041st MEETING

Friday, 17 July 1987, at 3 p.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Tomuschat, Mr. Yankov.

Draft report of the Commission on the work of its thirty-ninth session (*concluded*)

CHAPTER IV. *International liability for injurious consequences arising out of acts not prohibited by international law* (concluded)* (A/CN.4/L.416 and Add.1 and Add.1/Corr.1)

B. Consideration of the topic at the present session (A/CN.4/L.416/Add.1 and Corr.1)

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Paragraph 4

1. Mr. BARBOZA (Special Rapporteur) said that the last three sentences should be replaced by the following text:

"Thirdly, those physical events had to have social repercussions, in keeping with the arbitral award in the *Lake Lanoux* case. It then had to be shown that the physical consequences 'adversely' affected persons, objects or the use or enjoyment of areas within the territory or control of another State. The inclusion of the word 'adversely' was necessary, for without it a State might argue that, although the effect was beneficial, it was not to its liking and it would rather have an unchanged *status quo ante*."

Paragraph 4, as amended, was adopted.

Paragraph 5

Paragraph 5 was adopted.

Paragraph 6

2. Mr. AL-KHASAWNEH said he did not think that the expression *travaux préparatoires*, in the fifth sentence, was apposite in the context, for it normally referred to work done at a plenipotentiary conference of States.

3. The CHAIRMAN said that, as paragraph 6 reflected the Special Rapporteur's views, it should perhaps not be changed. Mr. Al-Khasawneh's point would, however, be reflected in the summary record.

Paragraph 6 was adopted.

Paragraphs 7 to 11

Paragraphs 7 to 11 were adopted.

* Resumed from the 2035th meeting.