Document:-

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Summary record of the 2073rd meeting

Topic:

Law of the non-navigational uses of international watercourses

Extract from the Yearbook of the International Law Commission:-

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alternative A, which in practice covered both diplomatic and consular bags. It could be criticized for that reason, but in his view a pragmatic approach should be adopted. As stated in the comments by the Italian Government, "the distinction between diplomatic and consular bags has become obsolete in international practice" (A/CN.4/409 and Add.1-5).

The meeting rose at 1.20 p.m.

2073rd MEETING

Tuesday, 5 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, 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.4/406 and Add.1 and 2,[1] A/CN.4/412 and Add.1 and 2,[2] A/CN.4/L.420, sect. C, A/CN.4/L.421)

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*concluded*)

ARTICLE 17 [13] (Consultations and negotiations concerning planned measures)[3] (*concluded*)

1. Mr. EIRIKSSON said that, although he did not intend at the present stage to propose amendments to article 17, he wished to make a few comments on the text. First, the expression "the watercourse States concerned", in paragraph 1, was much too vague and he would have preferred "the notifying State and the State making the communication". In paragraph 2, it would have been preferable to replace the words "The consultations and negotiations provided for in paragraph 1" by "These consultations and negotiations", and, in paragraph 3, to replace the words "if so requested by the notified State at the time of making the communication under paragraph 2 of article 15" by "if the other State so requests at the time it makes the communication". Lastly, he wondered whether the members who had pressed for the retention in article 16 of the words "within the period provided for in article 13" might not be concerned that the same words did not appear in article 17.

2. Mr. AL-QAYSI, supported by Mr. KOROMA and Mr. MAHIOU, proposed that the words "the watercourse States concerned", in paragraph 1, should be replaced by the form of words suggested by Mr. Eiriksson.

3. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the proposal was acceptable. On the other hand, he thought it necessary to retain the present wording of paragraph 2 and keep the words "provided for in paragraph 1".

4. Mr. KOROMA suggested the deletion, in paragraph 2, of the adjective "legitimate" before "interests". The adjective was pointless, since the State invoking an interest had in any case to establish that the interest was a valid one.

5. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the Drafting Committee had considered that the word "interests" on its own would be much too broad, because it could also apply to interests not in conformity with the principles of international law.

6. Mr. KOROMA said that, although he was not convinced, he would not press his proposal.

7. The CHAIRMAN suggested that the Commission should provisionally adopt article 17 [13] with the amendment proposed by Mr. Al-Qaysi, and accepted by the Chairman of the Drafting Committee, to replace the words "the watercourse States concerned", in paragraph 1, by "the notifying State and the State making the communication."

It was so agreed.

Article 17 [13] was adopted.

ARTICLE 19 [15] (Measures of utmost urgency)

8. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 19 [15], which read:

Article 19 [15]. Measures of utmost urgency

1. In the event that the implementation of planned measures is of the utmost urgency in order to protect public health, safety or other equally important interests, the State planning the measures may, subject to articles 6 and 8, immediately proceed to implementation, notwithstanding the provisions of article 14 and paragraph 3 of article 17.

2. In such cases, a formal declaration of the urgency of the measures shall be communicated to the other watercourse States referred to in article 12 together with the relevant data and information.

3. The State planning the measures shall, at the request of the other States, promptly enter into consultations and negotiations with them in the manner indicated in paragraphs 1 and 2 of article 17.

9. Article 15 submitted by the Special Rapporteur at the previous session[4] dealt with measures of extreme urgency which the State had to implement immediately, without waiting for the expiration of the period allowed to other States for reply and for study and evalua-

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

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[3] For the text, see 2072nd meeting, para. 71.

[4] See *Yearbook . . . 1987*, vol. II (Part Two), pp. 22-23, footnote 77.

tion of the effects of those measures. The measures were considered urgent if there were a threat to public health, safety or other similar considerations. The debate at the previous session had indicated some differences of opinion on the usefulness of the article. Some members had considered that it would be unfair to penalize a State in such exceptional situations and had therefore wanted those situations to be dealt with in the draft. Others had been concerned that the article was too broad and feared that States might invoke it in order to avoid their obligations. The Drafting Committee had thought that it would be useful to have an article on exceptional situations but that it should be drafted carefully to eliminate or minimize abuse. The three paragraphs of article 19 took account of those considerations.

10. Paragraph 1 contained a definition of the situation of utmost urgency: since the Drafting Committee had judged that it would be impossible to list all such situations, it had preferred to lay down criteria. The Committee had found the criteria originally proposed by the Special Rapporteur viable for that purpose. Nevertheless, to avoid too broad an interpretation of the provision, it had decided to alter it slightly and replace the words "similar considerations" by "equally important interests".

11. In addition, paragraph 1 waived the waiting period provided for in article 14 and in paragraph 3 of article 17, subject of course to articles 6 and 8, the application of which was not suspended even for measures of utmost urgency.

12. Paragraph 2 corresponded to the last part of paragraph 1 and the opening of paragraph 2 of former article 15: a State having to implement measures of utmost urgency was required to make a formal declaration to the potentially affected watercourse States mentioned in article 12, and that declaration must be accompanied by relevant information and data. Under the new paragraph 2, as opposed to the original text, there was no obligation of notification under article 12. The whole point was that the State implementing measures of utmost urgency did not have the time to follow the normal procedures. Nevertheless, the other watercourse States should not be left completely helpless, and they should be given some data and information on urgent measures.

13. Paragraph 3 was concerned with situations in which the other watercourse States believed, after receiving the information and data, that the urgent measures would have appreciable adverse effects upon them. The Drafting Committee had considered that all that could reasonably be expected in such situations was to require the States concerned promptly to enter into consultations with each other "in the manner indicated in paragraphs 1 and 2 of article 17". That wording, which helped to avoid a long repetition, referred only to the purpose and conduct of consultations; it referred neither to the obligation triggered by the provisions of article 17, nor to the applicability of paragraph 2 of article 15 mentioned therein.

14. Paragraph 3 of the original article 15 had been deleted, since the Drafting Committee had taken the view that, in an article on procedures for evaluating the effects of planned measures, it was inappropriate to refer to the liability arising from those effects.

15. With regard to the title of article 19, the Drafting Committee had thought it more logical to drop the word "planned", since the article dealt with emergency situations in which States did not have time to plan measures. Consequently, the article was entitled "Measures of utmost urgency". In the text of the article, however, the expression "planned measures" continued to be used.

16. Mr. AL-QAYSI said that, although he understood the Drafting Committee's reasons for using the expression "equally important interests" in paragraph 1, he was bound to point out that an interest could be important without necessarily being urgent. It was therefore necessary to find some other qualifier that would bring out the idea of urgency.

17. Mr. EIRIKSSON said he did not like the formula "immediately proceed to implementation", in paragraph 1, for the reasons he had already indicated in connection with article 16 (2072nd meeting, para. 60). He would have preferred the phrase: "implement or permit the implementation".

18. Paragraph 2 mentioned the "watercourse States referred to in article 12". In fact, the States referred to in article 12 were the States on which the planned measures could have an adverse effect and which had to be notified. A more precise formula should therefore have been used, such as "on which the measures may have an appreciable adverse effect".

19. In paragraph 3, the words "shall, at the request of the other States, promptly enter into consultations and negotiations with them" should be replaced by "shall, at the request of a State referred to in paragraph 2, promptly enter into consultations and negotiations with it". Again, instead of saying "in the manner indicated in paragraphs 1 and 2 of article 17", the present wording of those paragraphs should be used, namely "with a view to arriving at an equitable resolution of the situation. These consultations and negotiations shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State". That remark applied also to paragraph 2 of article 18.

20. Lastly, since paragraph 3 of article 18 also provided for a six-month waiting period, might it not be appropriate to add a reference to that paragraph at the end of paragraph 1 of draft article 19?

21. Mr. BARSEGOV urged that, in future, amendments as complex as those which had just been submitted should either be submitted to the Drafting Committee or communicated in advance to the Commission so that the Commission might have time to reflect on them.

22. Mr. SOLARI TUDELA pointed out that, in the Spanish text, the word *seguridad* was ambiguous: it could be interpreted in the sense of security, whereas in the present instance it meant the safety of the population—in the event of the risk of flood, for example.

23. Mr. McCAFFREY (Special Rapporteur) explained that, in the English text, the adjective "public" qualified the two words that followed, namely "health" and "safety". He would ensure that the commentary brought out that idea clearly.

24. Mr. KOROMA said that the wording proposed by the Drafting Committee did not adequately express the basic idea of the article, namely the utmost urgency of the measures planned for the protection of public health and safety or other important interests, rather than the implementation of those measures. Without pressing the matter, he would suggest that paragraph 1 should be recast to read:

> "1. When, as a matter of utmost urgency, in order to protect public health, safety or other equally important interests, it becomes necessary to implement such planned measures, subject to articles 6 and 8, the State planning the measures may . . .".

25. Mr. Sreenivasa RAO said that he was prepared to accept article 19 as submitted by the Drafting Committee. As the title indicated, the article concerned measures of utmost urgency, whether or not those measures were planned. The only change that might perhaps be made for the sake of greater clarity would be to delete from paragraph 3 the reference to paragraphs 1 and 2 of article 17. Mr. Koroma's suggestion could be considered on second reading.

26. The CHAIRMAN, replying to Mr. Barsegov, said that Mr. Eiriksson had not formally proposed an amendment to the text under consideration and that Mr. Koroma and Mr. Sreenivasa Rao had merely made some suggestions.

27. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that Mr. Koroma and Mr. Sreenivasa Rao had drawn attention to what was visibly a problem. In constrast to the actual text of the article, which spoke of "planned measures", the title of article 19 referred to "measures of utmost urgency"; hence it would not be impossible to argue that the article dealt only with measures of utmost urgency that were not planned. The Special Rapporteur might perhaps explain his thinking on that point on second reading.

28. On the subject of the wording of paragraph 1, he replied to Mr. Al-Qaysi that the measures referred to were subject to two conditions: they must, in the first place, be of the utmost urgency and, secondly, they must aim at one of the goals set out in paragraph 1. To replace the expression "other equally important interests" by "other equally urgent interests" would therefore be redundant. The problem raised by Mr. Solari Tudela in connection with the Spanish text of the same paragraph did not affect the English text, which was the original version, and in which the words "public safety" would be understood to apply to flooding; the Spanish text could perhaps be rendered more clearly.

29. He did not think that there could be any misunderstanding with regard to paragraph 2: the States referred to were clearly those States on which the planned measures might have an adverse effect.

30. As to paragraph 3, the Drafting Committee, in referring to paragraphs 1 and 2 of article 17, had simply wanted to avoid making the text too cumbersome.

31. Mr. EIRIKSSON, taking up Mr. Barsegov's comments on the methods of work, said that the Commission had two possibilities before it, discounting a third, rather impracticable one, that would require all amendments to texts proposed by the Drafting Committee to be submitted in writing. Once the texts had been adopted by the Drafting Committee, either the Committee could hold a special meeting in which all members of the Commission would be invited to participate, or else the Chairman of the Drafting Committee could introduce them to the Commission for consideration and comments, as was done at present, after which the Drafting Committee would discuss the comments made and report back to the Commission on the outcome of its deliberations.

32. The CHAIRMAN suggested that the Planning Group should consider those suggestions within the framework of the consideration of the Commission's programme, procedures and methods of work.

33. Mr. AL-QAYSI said that he was satisfied by the clarification given by the Chairman of the Drafting Committee concerning the expression "other equally important interests".

34. As to the nature of the measures covered by the article, a problem the Chairman of the Drafting Committee had recognized, the measures were undoubtedly planned measures of the utmost urgency. After all, part III of the draft, of which the article formed part, was entitled "Planned measures". The adjective "planned", which already appeared in the titles of articles 11, 12 and 17, might therefore be added to the title of article 19 in the interests of greater clarity.

35. Mr. BARSEGOV said that, in his earlier remarks, he had raised no objection to the Commission's discussing facts pertaining to Mr. Eiriksson's proposals on the article under consideration. He simply thought it desirable that the Commission should in future find a simpler procedure for the consideration of proposals concerning the actual structure of the texts before it.

36. On the question of measures of utmost urgency, he shared Mr. Sreenivasa Rao's views: the term could be applied equally to planned and to unplanned measures. It would be useful to specify, either in the commentary or in the actual text of the article if the Commission decided to amend it, that the measures in question were in fact planned measures of utmost urgency.

37. Mr. GRAEFRATH said that the Commission's report to the General Assembly should reflect Mr. Eiriksson's suggestions on the subject of methods of work, with the explanation that the Commission had not had time to consider them at the current session and would do so at the next session.

38. He would like to know why paragraph 1 of article 19 did not refer also to paragraph 3 of article 18.

39. The CHAIRMAN said he did not think it would be appropriate at the present stage to open a discussion on Mr. Eiriksson's interesting suggestions, which would

in any event be mentioned in the Commission's report under the heading "Programme, procedures and working methods of the Commission, and its documentation".

40. Mr. McCAFFREY (Special Rapporteur) said he agreed that measures of utmost urgency would be planned in some cases and not planned in many others. As that part of the draft was entitled "Planned measures", he had originally included the adjective "planned" in the title as well as in the text of the article. It had to be acknowledged, however, that sometimes, because of the urgency of the situation, there would be no time to plan anything whatsoever. Normally, it was true, a measure that might have an appreciable adverse effect on another watercourse State required some planning, no matter how rapid or how minimal. In that sense, the adjective "planned" could be retained. But it could also be deleted from paragraph 1 without doing violence to the article as a whole. The dilemma was obvious: if the word "planned" was maintained, it would have to be admitted that in certain cases there was almost no time to plan measures of the type envisaged in that part of the draft; if the word was dropped, it would have to be admitted that in certain cases measures had to be planned very rapidly and that there was no time for the entire process envisaged in the other articles, not only because of the urgency of the situation but also because of the interests at stake. In conclusion, the Commission could either maintain the text submitted by the Drafting Committee or delete the word "planned" from paragraph 1.

41. As to the absence of a reference to paragraph 3 of article 18, without wishing to encroach upon the prerogatives of the Chairman of the Drafting Committee, he would point out that the reason was that article 18 dealt with procedures in the absence of notification—in other words, with procedures set in motion by watercourse States which believed that they might be affected by a planned measure. That situation presumably would not obtain in the cases of utmost urgency envisaged in article 19, where there would be no standstill period of any kind. Nevertheless, he saw no objection to including a reference to paragraph 3 of article 18.

42. His own view, as a member of the Commission, regarding Mr. Eiriksson's remarks on methods of work, was that the simplest solution would be to encourage members of the Commission to take part in the work of the Drafting Committee; it had been done in the past and it could be done in the future.

43. Mr. AL-QAYSI said that the problem referred to by the Special Rapporteur could be resolved on second reading, possibly by including an explanation in the commentary. However, the wording of the article would have to be adjusted in the light of the comments made.

44. Mr. NJENGA said that the text proposed by the Drafting Committee could be improved in two ways. First, in order to remove any contradiction, the word "planned" might be deleted from paragraph 1, as the Special Rapporteur had suggested, without waiting for the second reading. Secondly, the addition of a reference to paragraph 3 of article 18 would be more in keeping with the intentions of the members of the Commission.

45. Mr. BENNOUNA said that the mechanism envisaged in article 19 was logical: it was the implementation of the planned measures referred to in the preceding articles that was a matter of urgency, not the measures themselves. The basic idea was that the implementation of planned measures was normally subject to a fairly lengthy procedure of consultation; but when a situation of utmost urgency supervened, such measures were implemented immediately—in other words, without applying the provisions of articles 14 and 17, but taking into account those of articles 6 and 8. Thus the provisions of article 19 were no more than an exception to the normal procedure. The only requirement was for a formal declaration of the urgency of the measures concerned. In short, consultations which should have been held *a priori* were entered into *a posteriori* because of the urgency of the situation. The word "planned" in the text should therefore be maintained. If the Special Rapporteur wished to envisage other situations, such as *force majeure* or absolute urgency, where there were no planned measures, he should deal with them in another part of the draft.

46. Mr. AL-QAYSI remarked that if the word "planned" were deleted, the reference to article 14 and to paragraph 3 of article 17, which concerned planned measures rather than urgent situations, would have to be deleted too. The question was: could the watercourse State, because an urgent situation had arisen, proceed immediately to the implementation of the measures it was planning, notwithstanding the provisions of article 14 and of paragraph 3 of article 17? In order to answer that question, it would be best to leave the text as it was, with the possible addition of the adjective "planned" in the title for greater clarity.

47. Mr. BEESLEY said he wondered whether the article dealt with planned measures whose implementation became urgent, or with measures of urgency which were not planned. If planned measures were not the point at issue, the words "planned" and "planning" should be deleted from paragraphs 1 and 3.

48. Mr. KOROMA, noting that the text could be interpreted in two different ways and having already given his own interpretation, suggested that the Commission should adopt the article as it stood, on the understanding that the matter would be reconsidered on second reading.

49. Mr. MAHIOU said that article 19 appeared to be open to two interpetations: the Special Rapporteur's, which was rather broad, and Mr. Bennouna's, which was somewhat restrictive. Since explanations in the commentary or reconsideration of the issue on second reading would not remove that ambiguity, it must be ensured that a provision of such importance should not lend itself to diverging interpretations.

50. Mr. TOMUSCHAT (Chairman of the Drafting Committee) explained that the reason why article 19 did not refer to paragraph 3 of article 18 was that the two articles dealt with two different situations. Article 18 was concerned with the State which had "serious reason to believe that another watercourse State [was] planning

measures", and article 19 with the State which actually implemented measures.

51. The Drafting Committee had considered at length the possibility of a separate article on measures taken urgently by a State without prior planning, a question that led on to the rights which would then be open to the other watercourse States. The need for a separate article had been disputed by some of the Committee's members. In interpreting article 19, it was essential to view it within the framework of planned measures which, even at the planning stage, could become of the utmost urgency. He was therefore opposed to deleting the words "planned" and "the State planning the measures".

52. Mr. McCAFFREY (Special Rapporteur) said that the object of article 19 was to enable watercourse States, if circumstances so required, to proceed as a matter of urgency with the implementation of measures they had planned. The situation thus fell between a situation of normal planned measures and a situation of *force majeure*, those being the two ends of a continuum. The extent to which planning was necessary for the article to become applicable was impossible to define inasmuch as the planning might be very prolonged, or accelerated, or even non-existent.

53. He therefore thought that article 19 should be maintained in its present form in order to avoid disturbing the general economy of the text, particularly in regard to cross-references between articles. The commentary would reflect all the considerations put forward at the meeting.

54. Mr. REUTER wondered what would happen if the word "planned" was replaced by "envisaged".

55. Mr. CALERO RODRIGUES said that the discussion showed that article 19 dealt exclusively with the urgent implementation of measures that were already planned and not with the planning of urgent measures or the implementation of unplanned measures. Furthermore, there seemed to be agreement on the need for an article dealing specifically with the measures that the watercourse State could take in the event, quite simply, of an urgent situation. That being apparently the general interpretation of the article, the title should refer to "planned" measures.

56. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the Commission's debate clearly showed that the scope of article 19 was limited.

57. The English version of paragraph 1 used the expression "public health, safety or other . . .". The Drafting Committee had seen the adjective "public" as applying not only to health but also to safety. The phrase should therefore be modified slightly to read: "to protect public health, public safety or other equally important interests".

58. The CHAIRMAN pointed out that, in the Spanish text of paragraph 1, the use of the plural—*la salud y la seguridad públicas*—made it unnecessary to repeat the adjective *pública*.

59. Mr. SEPÚLVEDA GUTIÉRREZ and Mr. HAYES, referring to the title of article 19 in Spanish and English respectively, said that the exact wording should be "Urgent implementation of planned measures".

60. Mr. NJENGA said he was prepared to accept article 19 as it stood, so long as the commentary brought out the distinction between cases of real emergency and cases of *force majeure*.

61. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 19 [15] as proposed by the Drafting Committee and with the corrections to the title, it being understood that the considerations raised during the discussion would be taken into account on second reading and that a new article would be drafted to deal with situations not covered by article 19.

It was so agreed.

Article 19 [15] was adopted.

ARTICLE 20 [15] [16] (Data and information vital to national defence or security)

62. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 20 [15] [16], which read:

Article 20 [15] [16]. Data and information vital to national defence or security

Nothing contained in articles 10 to 19 shall oblige a watercourse State to provide data or information vital to its national defence or security. Nevertheless, that State shall co-operate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances.

63. Article 20 corresponded to paragraph 5 of article 15 [16] proposed by the Special Rapporteur at the current session (see 2050th meeting, para. 1). Its present place in the text was logical, since the exception it contained applied both to the regular exchange of data and information under article 10 and to the machinery provided for under part III (Planned measures).

64. The Drafting Committee believed that the idea underlying the original text should be retained, for two reasons: first, expressly excluding sensitive material from the data and information States were under an obligation to provide was preferable to tacitly tolerating non-compliance with that obligation; secondly, in the particular situation dealt with in the article, exemption from the normal obligation to provide information should not result in complete suppression of information. The two ideas were reflected in the two sentences composing the article. In order to overcome the apparent contradiction in the original text, the Drafting Committee had cast the first sentence in the form of a saving clause.

65. Concerning the phrase "information vital to its national defence or security", some members of the Drafting Committee had favoured deletion of the words "defence or". Others had said that information vital to national defence did not necessarily qualify as information vital to national security, and that, since article 20 provided for an exception, it should be as limited in scope as possible. It had also been pointed out that the concept of defence was included in that of security, as

evidenced by the fact that the system of collective security established under the Charter of the United Nations was dealt with in both Article 51, on the right of self-defence, and Article 2, paragraph 4, on the prohibition of the use of force. The majority of members of the Committee had favoured retention of the term "defence".

66. It had been further suggested that the word "concerning" should be substituted for "vital to", but the Drafting Committee had thought that such a change would unduly broaden the scope of the article.

67. The second sentence closely followed the original text, except that the phrase "concerning the general subjects to which the withheld material relates", which would have had an unduly restrictive effect on the discretion of States, had been deleted.

68. Mr. KOROMA, expressing a desire to "demilitarize" the text of an article that had nothing to do with national defence, proposed that the word "defence" should be deleted, since the concept of "national security" encompassed that of "defence".

69. As to the second sentence, the word "Nevertheless", with which it began, seemed to refer to the possibility of an entirely different situation arising, and that shed doubt on the meaning of the expression "under the circumstances", at the end of the sentence. Was it not inconsistent to affirm in the same article that a State was not obliged to provide information, only to add straightaway that it must "co-operate . . . with a view to providing as much information as possible"?

70. Mr. McCAFFREY (Special Rapporteur) said that he shared Mr. Koroma's concern. Article 20 in fact attempted to say too much in too few words and to cover two very distinct situations. The intention was to deal first with circumstances in which it was permissible not to provide substantive information, and then to express the idea that a State which availed itself of that permission must nevertheless furnish, in good faith, general information on the potential consequences of the measures it adopted.

71. The "circumstances" qualifying the obligation set out in the second sentence were obviously the very ones that necessitated the withholding of information for reasons of national defence or security. The object was to leave no loophole in the proposed régime that would enable a watercourse State to use the pretext of defence secrets indiscriminately; under the second sentence, the State was still required to inform its neighbours of the possible consequences of its action.

72. Mr. AL-QAYSI said he feared that deletion of the term "defence" would unduly enlarge the scope of the provision. When taken alone, the expression "national security" could be interpreted as also referring to economic security, which would open up a multitude of possibilities, whereas the purpose of article 20 was to restrict the circumstances in which a State could maintain that it should be exonerated from the obligation of informing its neighbours.

73. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said he thought it was clear to all members of the Commission that article 20 was intended to deal with "national defence". Mr. Koroma would prefer the Commission not to use a term that had strong military connotations. However, if that was precisely the concept the Commission had in mind, it should expressly say so.

74. Mr. REUTER said he believed article 20 should be adopted as it stood. As to matters of form, the French text of article 19 referred to *sécurité publique*, while article 20 spoke of *sécurité nationale*: it should be made clear in the commentary that the former referred to the safety of the population, while the latter related to the security of the State.

75. The CHAIRMAN remarked that the same comment applied to the Spanish text.

76. If there were no objections, he would take it that the Commission agreed provisionally to adopt article 20 [15] [16] as proposed by the Drafting Committee, it being understood that the necessary explanations would be incorporated in the commentary.

Article 20 [15] [16] was adopted.

ARTICLE 21 (Indirect procedures)

77. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 21, which read:

Article 21. Indirect procedures

In cases where there are serious obstacles to direct contacts between watercourse States, the States concerned shall proceed to any exchange of data and information, notification, communication, consultations and negotiations provided for in articles 10 to 20 through any indirect procedure accepted by them.

78. As he had indicated in connection with article 10 (2071st meeting, para. 10), the Drafting Committee had thought it appropriate to provide for cases in which direct contacts could not be established between the parties, and in which indirect procedures must therefore be used to channel modifications and communications to the parties concerned and to conduct consultations and negotiations. The phrase "serious obstacles to direct contacts" applied to circumstances such as a state of war or the absence of diplomatic relations, and the various procedural moves referred to were listed in the order in which they appeared in articles 10 to 20.

79. The additional data and information provided for under article 14 was to take the form of a notification, in accordance with article 12, and the reasoned and documented explanation of findings provided for under article 15, paragraph 2, as well as the formal declaration provided for in article 19, were to take the form of a communication. The list given in article 21 was thus complete.

80. The CHAIRMAN, speaking as a member of the Commission, said he would have preferred the phrase "direct communication between" to "direct contacts between".

81. Speaking as Chairman, he said that, if there were no objections, he would take it that the Commission

agreed provisionally to adopt article 21 as proposed by the Drafting Committee.

Article 21 was adopted.

82. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that the Drafting Committee had briefly discussed the question of including a new article to deal with cases in which a watercourse State became aware of measures that might have an appreciable adverse effect on it after those measures had been initiated. The Committee had had before it an article on the subject proposed by the Special Rapporteur, but the discussion had been inconclusive due to lack of time. He suggested that the question be considered in greater detail at a later stage.

It was so agreed.

ARTICLE 15 [13] (Reply to notification)[5] (*concluded*)

83. The CHAIRMAN invited the Commission to resume its consideration of article 15 [13].

84. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that, as the solution envisaged by the working group appointed to examine article 15 had created some difficulties with regard to article 18, the Special Rapporteur had suggested a compromise solution whereby the words "a reasoned and documented explanation of such finding" would be replaced by "a documented explanation setting forth the reasons for such finding to the extent possible". Many members were prepared to accept that solution, but others preferred the original wording because the objection raised by a State must be based on serious grounds and because article 15 should reflect that requirement.

85. Mr. KOROMA proposed that the phrase "it shall provide . . . in article 13", in paragraph 2, should be replaced by "it shall provide the notifying State within the period referred to in article 13 with a documented explanation setting forth the reasons for such finding to the extent possible".

86. Mr. BARSEGOV said that Mr. Koroma's amendment was acceptable, but that he did not see the point of the words "to the extent possible".

87. Mr. KOROMA said he agreed that the final words of the proposal were perhaps superfluous and could be deleted.

88. Mr. AL-QAYSI said that the proposed wording of paragraph 2 did not seem to meet the objection raised during the original discussion on article 15, which had centred on the "documented" nature of the explanation. Yet the compromise text was based on that very term, although the second element in the phrase—the "reasoned" aspect of the explanation—had not been dropped.

89. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 15 [13] as amended by Mr. Koroma.

It was so agreed.

Article 15 [13] was adopted.

[5] For the text, see 2072nd meeting, para. 14.

ARTICLE 18 [14] (Procedures in the absence of notification)

90. Mr. TOMUSCHAT (Chairman of the Drafting Committee) introduced the text proposed by the Drafting Committee for article 18 [14], which read:

Article 18 [14]. Procedures in the absence of notification

1. If a watercourse State has serious reason to believe that another watercourse State is planning measures that may have an appreciable adverse effect upon it, the former State may request the latter to apply the provisions of article 12. The request shall be accompanied by a reasoned and documented explanation of the grounds for such belief.

2. In the event that the State planning the measures nevertheless finds that it is not under an obligation to provide a notification under article 12, it shall so inform the other State, providing a reasoned and documented explanation of the grounds for such finding. If this finding does not satisfy the other State, the States concerned shall, at the request of that other State, promptly enter into consultations and negotiations in the manner indicated in paragraphs 1 and 2 of article 17.

3. During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it requests the initiation of consultations and negotiations, refrain from implementing or permitting the implementation of those measures for a period not exceeding six months.

91. The present article corresponded to paragraph 1 of article 14 submitted by the Special Rapporteur at the previous session.[6] It provided for cases in which a watercourse State feared that the planned measures, of which it had not been notified under article 12, would have appreciable adverse effects for it. The purpose of the article was to enable a State which found itself in such a situation to seek the benefit of the protective régime provided for under article 12. The Drafting Committee had noted that the first two sentences of paragraph 1 of article 14, as originally proposed by the Special Rapporteur, referred to two successive stages, the first being that at which the potentially affected State sought the application of the provisions of article 12, and the second that at which the State which planned the measures responded. The Drafting Committee had deemed it appropriate to deal with those two stages in two separate paragraphs.

92. In formulating the article, the Committee had taken account of the view of several members of the Commission that the text proposed by the Special Rapporteur was too favourable to the potentially affected State.

93. The Committee had noted that the opening words of the original text of paragraph 1, "If a State contemplating a new use fails to provide notice thereof to other States as required by article 12 [11]", had been based on the assumption that the obligation of notification under article 12 had been disregarded. Such an assumption was not necessarily correct, however, inasmuch as the absence of notification could be the consequence of a determination on the part of the State concerned, made in good faith, that the planned measures would have no appreciable adverse effects on the other watercourse States. The Drafting Committee had therefore deleted the words in question.

[6] *See Yearbook . . . 1987*, vol. II (Part Two), p. 22, footnote 77.

94. The Committee had also noted that the original text had been criticized for giving watercourse States the right to seek the application of article 12 on the vague basis of a "belief". Accordingly, the State wishing to assert the right provided for under paragraph 1 had to comply with two conditions: first, it had to have "serious reason to believe", and no longer simply "believe"; secondly, it was required to provide a reasoned and documented explanation of the grounds for its position.

95. Further, in the text proposed by the Special Rapporteur, the potentially affected State had been entitled to "invoke the obligations of the former State under article 12 [11]". The Drafting Committee had considered that the word "invoke" did not indicate clearly what the rights and obligations of the States concerned would be in the situation contemplated. It had therefore replaced the phrase by "request the latter to apply the provisions of article 12", which did not prejudge the question whether the planning State had complied with its obligations under article 12.

96. The other changes made to the original text were designed to bring paragraph 1 into line with the other articles prepared by the Drafting Committee. Thus the concept of "contemplated use" had been replaced by "measures being planned", and the concept of "appreciable harm" by that of "appreciable adverse effect".

97. Paragraph 2, which corresponded to the second sentence of paragraph 1 of the original text, dealt in the first sentence with cases in which the State planning the measures reacted negatively to the request addressed to it and, in the second sentence, with the consequences to which that reaction might give rise.

98. The Drafting Committee had considered it necessary to link the first sentence of the paragraph more closely to the preceding provision by including a reference to the object of the request of the potentially affected State, namely the notification provided for under article 12. There again, the Committee had used a neutral formula which did not prejudge the question whether the planning State had applied article 12 correctly. The second part of the same sentence sought to maintain a fair balance between the States concerned by requiring the planning State to justify its reaction, as the potentially affected State was required to do under paragraph 1.

99. The second sentence of paragraph 2 related to cases in which the finding of the planning State did not satisfy the other State. Apart from the opening clause, which, as in the first sentence, was intended to describe clearly the chronology of events, the second sentence of paragraph 2 closely followed the original text. For the sake of consistency, however, the words "consultations and" had been added before the word "negotiations", and the words "at the request of that other State" had been added after "the State concerned shall", in order to make it clear that the process of negotiations and consultations was triggered by the initiative of the potentially affected State. The Drafting Committee had also introduced more flexibility in the last part of the original text by replacing the words "in the manner required by paragraphs 3 and 4 of article..." by "in the manner indicated in paragraphs 1 and 2 of article . . .". The text had also been simplified by eliminating the phrase "with a view to resolving their differences", which had been considered unnecessary since the purpose of the consultations and negotiations was already described in paragraph 1 of article 17.

100. Paragraph 3 of article 18 was modelled on paragraph 3 of article 17. In that connection, the Drafting Committee had considered whether the six-month standstill period could be specified simply by a cross-reference to paragraph 3 of article 17. Since, however, the starting point for that period was not the same in the cases envisaged under articles 17 and 18, the Committee had deemed it preferable to include a separate provision on the matter and make it clear that, in the context of article 18, the six months started to run from the time of the request for consultations and negotiations.

101. Finally, the title of article 18 had been formulated in neutral terms to avoid any implication that the planning State might have failed to comply with the obligations set forth in article 12.

102. Mr. EIRIKSSON proposed that the words "apply the provisions of article 12", in paragraph 1, should be replaced by "provide a notification under article 12". In addition, for the sake of clarity, the words "the States concerned", in paragraph 2, should be replaced by "the two States".

103. Mr. KOROMA said that articles 15 and 18 should be harmonized in the light of the agreement reached on article 15.

104. Mr. Sreenivasa RAO said that he had no objection to the wording proposed for article 18, although it was not particularly felicitous from the standpoint of the chronology of events, which occurred in two stages. In the first stage, a State planned measures which, in its view, would not have appreciable adverse effects for the other watercourse States, and therefore implemented them; in a second stage, the other watercourse States, fearing adverse effects, sought the application of article 12. However, that was not the sequence of events contemplated in article 18.

105. Mr. TOMUSCHAT (Chairman of the Drafting Committee) said that articles 15 and 18 would of course have to be harmonized. The formula accepted for article 15 would read as follows in paragraph 1 of article 18: "The request shall be accompanied by a documented explanation setting forth the reasons for such belief." Similarly, in paragraph 2, the end of the first sentence would read: "providing a documented explanation setting forth the reasons for such finding". The difference between paragraphs 1 and 2, which referred respectively to "belief" and "finding", reflected the fact that the State referred to in paragraph 1 had certain vague fears, whereas the State which was planning measures had concrete data and information at its disposal and so could make a finding.

106. In reply to Mr. Eiriksson, he said that the Drafting Committee had been careful, in the first sentence of paragraph 1, to avoid requiring the State planning the measures to make a notification under ar-

ticle 12. That State first had to evaluate the situation, as was also provided for under article 12: only then could notification take place. Accordingly, paragraph 1 set forth the general obligation to apply article 12 in different stages. If the State planning the measures considered that they would have no appreciable adverse effects, it would not make a notification. The language used had been chosen after due reflection, and any change could lead to errors. Mr. Eiriksson's second proposal, on the other hand, appeared acceptable. Although there might well be more than two States concerned, article 18 contemplated only a bilateral relationship. Bearing in mind the changes to the same effect made in article 17, the words "the States concerned" would be replaced by "the two States".

107. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 18 [14], as amended.

It was so agreed.

Article 18 [14] was adopted.

TITLES OF PARTS II and III OF THE DRAFT ARTICLES

108. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt the titles proposed by the Drafting Committee for parts II and III of the draft articles, reading respectively: "General principles" and "Planned measures".

The titles of parts II and III of the draft articles were adopted.

The meeting rose at 1.10 p.m.

2074th MEETING

Wednesday, 6 July 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, 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 (*continued*)* (A/CN.4/384,[1] A/CN.4/405,[2] A/CN.4/413,[3] A/CN.4/L.420, sect. D)[4]

[Agenda item 7]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 1 (Scope of the present articles)

ARTICLE 2 (Use of terms)

ARTICLE 3 (Attribution)

ARTICLE 4 (Relationship between the present articles and other international agreements)

ARTICLE 5 (Absence of effect upon other rules of international law)

ARTICLE 6 (Freedom of action and the limits thereto)

ARTICLE 7 (Co-operation)

ARTICLE 8 (Participation)

ARTICLE 9 (Prevention) *and*

ARTICLE 10 (Reparation)[5] (*continued*)

1. Mr. HAYES thanked the Special Rapporteur for his very thorough and thoughtful fourth report (A/CN.4/413) and for the draft articles contained therein, the first five of which were revisions of those considered at the previous session.

2. As he saw it, the principle *sic utere tuo ut alienum non laedas* constituted the conceptual basis of the topic. That principle meant recognition that an act, although lawful in itself, could nevertheless be a source of potential or actual harm calling for measures of prevention and reparation. The draft articles provided a means of effective implementation of that principle.

3. He agreed with the Special Rapporteur's conclusion (*ibid.*, paras. 1-7) that it would be not only undesirable, but also impossible to draw up a list of the activities covered by the draft articles. He was concerned, however, at the excessive emphasis in the draft on the "risk" element. "Risk", "appreciable risk" and "activities involving risk" were all defined in draft article 2 and were carried into the substantive articles. The definitions were such that the application of the articles would be significantly limited. Certain passages in the report increased his concern, such as the statements that "the risk referred to is one which involves a greater than normal likelihood of causing transboundary injury" (*ibid.*, para. 30) and that "it is precisely because of the risk created—which is greater than is normal in other human activities—. . ." (*ibid.*, para. 44).

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* Resumed from the 2049th meeting.

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

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

[3] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

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

[5] For the texts, see 2044th meeting, para. 13.