Document:-
A/CN.4/SR.2001

Summary record of the 2001st meeting

Topic:
<multiple topics>

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

62. He also agreed that draft article 4 was the essence of the entire draft code, but he did not agree with the use of the word "perpetrator", which seemed to imply a presumption of guilt. It would be better to refer to the "accused" or to the "individual charged with the offence".

63. There was an apparent omission in draft article 6 on jurisdictional guarantees, for it made no reference to legal capacity; but, in the modern-day world, children were in fact taking part in fighting. And what of insanity, which constituted a defence in many jurisdictions?

64. Mr. KOROMA said that, without in any way wishing to criticize the Secretariat, he regretted that only one summary record had been made available so far. The task of members would be facilitated if they could refer to the summary records as the Commission's discussions progressed.

65. He continued to believe that the title of the draft code should be retained as it stood. *Black's Law Dictionary* showed that "offence" was a generic term embracing both felonies and misdemeanours. It was possible that the title could be amended at a later stage to refer to "crimes", but, until it had been agreed which offences constituted offences against the peace and security of mankind, the title should stand.

66. He did not agree that draft article 5 was superfluous. It was true that certain jurisdictions imposed a statutory limitation for criminal offences. However, in the case of extremely serious offences, such as genocide, war crimes and crimes against humanity, it should not be possible to invoke statutory limitations in order to prevent prosecution, no matter how long the period of time involved.

67. He did not understand why an argument had arisen regarding the primacy of internal law or international law and the adoption of the code under internal law. Different States obviously had different ways of incorporating international law into their internal law. The main point was to agree on what was acceptable to all States and, then and only then, for States to decide how to translate the code into their legislation.

68. The thesis argued by Mr. Barsegov (1999th meeting) regarding *mens rea*, which he endorsed, had its justification in the outcome of the Nürnberg Trial, when the defences of superior orders and duress had been rejected because of the magnitude of the crimes involved. Genocide and crimes against humanity could also not be excused on the ground that there had been no intent to commit the offence. Nor, in his view, could lack of capacity or insanity constitute a defence in the case of offences against the peace and security of mankind. Children, to whom reference had been made, might be capable of murder, but they could not commit genocide without the support of the State. That was why such defences had been rejected whenever they had been invoked.

69. Mr. BEESLEY said that, in his earlier statement, he had not been arguing for or against any particular point, but had merely wished to draw attention to the fact that systems of jurisprudence differed on such issues as *mens rea* and an exhaustive list of offences. The Commission would ignore that fact at its peril.

70. Mr. Sreenivasa RAO said he did not think that there was any wide divergence of views in the Commission on the question of *mens rea,* given the nature of the crimes involved. Crimes such as *apartheid*, genocide and the use of nuclear weapons placed the whole of mankind in jeopardy and there was therefore no justification for extrapolating from ordinary internal law concepts. The Commission could be guided by the principles of ordinary criminal law, but it should be very careful about applying them to international situations.

71. It had rightly been said that there was no need for the Commission to become involved in the implementation of the code. As he had already pointed out (1994th meeting), the Commission's first aim should be the formulation of rules that would command the broadest possible agreement. It should then be left to individual States to decide how best to implement the code. Mr. Beesley's suggestion, which looked to the practical realities, was an innovation that merited consideration. The Commission had made good progress and neither *mens rea* nor the implementation of the code should detain it any longer.

72. Mr. CALERO RODRIGUES said he agreed with Mr. Koroma that the word "offence" in the title of the draft code was correct. It was, however, also imprecise, for it was a general term which covered not only crimes, but also minor offences, whereas the draft code dealt solely with the category of offences known as crimes.

73. Mr. BARSEGOV said that the comments he had made at the previous meeting on the question of intent and motive had nothing to do with the particular characteristics of his own country's legal system. The subjective element of intent, whether or not it could be invoked under internal law in the case of ordinary crimes, could not be invoked in the case of offences against the peace and security of mankind. Contrary to what some people might think, international law was not merely a transposition of internal law to external relations.

The meeting rose at 1.05 p.m.

2001st MEETING

Thursday, 21 May 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

later: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*) (A/CN.4/398,[2] A/CN.4/404,[3] A/CN.4/407 and Add.1 and 2,[4] A/CN.4/L.410, sect. E, ILC(XXXIX)/Conf.Room Doc.3 and Add.1)

[Agenda item 5]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

ARTICLES 1 TO 11[5] (*concluded*)

1. The CHAIRMAN invited the Special Rapporteur to sum up the discussion.

2. Mr. THIAM (Special Rapporteur) thanked the members of the Commission for their contribution to a debate notable for its richness and depth. Starting with general considerations, he noted that some English-speaking members had proposed that, in the title of the topic, the word "offences" should be replaced by "crimes", whereas others, who were less numerous, would prefer the title to remain unchanged. While he did not feel qualified to settle that question, it seemed to him that the word "offence" was indeed a generic term and that the word "crime" denoted a particular class of offences, namely the most serious. No doubt the Drafting Committee could settle that question.

3. There had been much discussion on the question of intent, which of course arose in both internal law and international law. In internal law, offences were divided into two or three categories, according to the legal system concerned. French law, for example, distinguished between *contraventions*, *délits* and *crimes*, and, depending on the category of offence considered, intent might or might not have to be established; a *contravention* could, indeed, be committed unintentionally, whereas a *délit* and a *crime* presupposed a guilty intention. But there were exceptions: it might happen that a *contravention* constituted a *délit*, for example in the case of a traffic accident involving death. Similarly, assault and wounding which caused death unintentionally was treated as a crime. Offences against the peace and security of mankind were, in principle, the most serious crimes, and it must therefore be accepted *a priori* that they involved intent. But the question remained what was the content of the intent? Some took the view that motive and intent were the same and that to determine, for example, whether an act of genocide had been committed, it was necessary to examine the feeling of the author of that act to ascertain his motive for committing it. Others considered that it was not the motive for the act that was important, but its mass, systematic character. Those two theses had different consequences: in the first case, there could be an offence against the peace and security of mankind even if the rights of only one human being had been violated; in the second case, it was the mass and systematic character of the offence which caused it to be characterized as an offence against the peace and security of mankind. It was difficult to decide between the two theses, but a problem arose concerning the burden of proof: for in the first case, the accuser must establish intent, whereas in the second, the mass nature of the act presupposed a guilty intention. In fact, those questions were very often left to judges, who decided according to the circumstances of the case. Moreover, the position of the judge in criminal law and his "inner conviction" were well known.

4. The question had been raised whether complicity and attempt should be included among the general principles or treated as separate offences. The research he had carried out on the criminal codes of many countries showed that complicity and attempt were sometimes incorporated in general principles and sometimes treated as separate offences; there was no authoritative doctrine on that point and it was really more a matter of form than of substance. The Commission could therefore reserve the question, or leave it to the Drafting Committee to decide where to place those two notions in the code.

5. If there was one point on which there was total agreement, it was the quality of seriousness: offences against the peace and security of mankind were the most serious offences, and all questions linked to that fact were merely matters of form. Should the notion of seriousness be stated in the definition, in the general principles, or in the commentaries? There again, the Drafting Committee could decide.

6. On draft article 1 there had, from the outset, been two opposing views, one favouring a definition by enumeration and the other a definition based on a general criterion. Since the discussions which had taken place over the years in the Commission and in the Sixth Committee of the General Assembly had shown that the first view was dominant, he had thought it preferable to revert to his initial proposal of a definition by enumeration, which was, moreover, the method most commonly used in criminal law. In any case, if a reference to general principles was considered unnecessary, there would be no need for a general definition either, since such a reference would make it possible to draw up a declaratory list, but not an exhaustive one.

7. But there was one possibility which seemed to have the support of the majority. Since criminal law had to be strictly interpreted, neither general criteria nor methods such as analogy would be used to characterize an act; to be characterized as an offence against the peace and security of mankind it would have to appear on a list and the list would have to be exhaustive. That did not mean that the list could not be revised as international society evolved, in the same way as criminal and civil codes were revised in internal law. To overcome the reluctance to adopt such a definition by enumeration, he pointed out that it was an accepted principle of the Commission that, for any topic studied, definitions should always be provisional until the work was completed. He therefore believed that a definition by enumeration would be preferable, it being understood that it would be provisional, that it could always be improved and that, once the list of offences against

[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

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

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

[4] *Ibid.*

[5] For the texts, see 1992nd meeting, para. 3.

the peace and security of mankind had been drawn up, the Commission would decide on the definition to be finally adopted.

8. Referring to the expression "crimes under international law" in draft article 1, he pointed out that it had already been used in Principle I of the Nürnberg Principles[6] and in article 1 of the 1954 draft code. The reason why that expression was justified was that, in reality, international crimes did not all have the same source: there were international crimes by nature, that was to say crimes coming directly under international law because the international community as a whole regarded them as crimes, and international crimes which had been made crimes under a convention concluded for the purposes of prosecution and punishment. Personally, he was not unduly attached to the expression "crimes under international law"; he thought it would be better to let the Drafting Committee settle that issue.

9. Draft article 2 raised the problem of the autonomy of international criminal law, which had two aspects, one concerning affirmation of the principle of the autonomy of international criminal law and the other its implementation.

10. The autonomy of international criminal law, which was a corollary of the autonomy of general international law, was a principle to which there was no objection. The question arose, however, what was the real source of international criminal law: conventions, or general principles of law? That was not a new subject of debate. In practice, the most frequent case was that a rule existed, which was not yet formulated, but was applied as a customary rule; then at some particular time written law—in other words a convention—confirmed its existence. It was then that the question of the source of the rule arose; it was a difficult question, but purely theoretical, and the answer mattered little for the drafting of the code.

11. The other aspect of the problem—that of the implementation of international criminal law—was more interesting and more important. The organs of States were undoubtedly responsible for such implementation, but it was there that methods differed: there was the method of direct application of international conventions, as in the common-law countries, and the method of indirect application, by way of ratification or approval; and lastly, States could declare, when acceding to an international convention, that the accession entailed automatic application of the instrument in their territory. It was not an easy problem to solve and the Commission would have to decide either to leave each State free to choose the method, or to provide that accession to the code required automatic incorporation of its provisions in internal law. The best course, however, might be to complete the first part of the work, which consisted in defining the acts to be condemned, before passing on to the second part, which would deal with the modalities of application of the code.

12. Draft article 3 on individual responsibility raised very difficult problems, for two separate subjects of law were involved: the individual as a natural person and the State as a legal person. It was clearly impossible to apply the same rules to those two subjects, so the questions should be taken up *seriatim*. For the time being, therefore, the content of the draft code *ratione personae* was confined to natural persons, that was to say individuals. But that was where article 19 of part 1 of the draft articles on State responsibility[7] came in and the ambiguity of the word "crime" appeared. The language of internal law was not rich, and that of international law even less so, since it had recourse to terms borrowed from internal law which changed their content when they passed into the sphere of international law. For example, in the French legal system, a *délit* had both a civil content and a criminal content, and the same word was used to denote those two entirely different notions. The same applied to the word "crime" in international law, which had two different meanings, depending on whether it was applied to individuals or to States. In article 19 of part 1 of the draft articles on State responsibility, the word "crime" did not have a criminal content: it had a totally different content, namely a civil one, as could be seen from the commentary to the article.[8] For instance, in paragraph (59) of the commentary, a clear distinction was made between the criminal responsibility of the individual and the international responsibility of the State; similarly, paragraph (21) distinguished between the criminal responsibility of the individual acting as an organ of the State and the international responsibility of the State itself. Of course, those two kinds of responsibility could be linked in internal law when they derived from an act which could generate both criminal and civil responsibility, and it might be thought that that also applied in international law to a crime committed by an individual acting as an organ of the State. But since paragraph (44) of the same commentary showed that the theory of criminal responsibility of the State was not yet dominant, the Commission would do well not to prejudge that question in the draft code, especially as States themselves, to judge from their comments,[9] did not favour it. Accordingly, he was willing to amend draft article 3 by adding a new paragraph to read:

> "The foregoing provision does not preclude the international responsibility of a State for crimes commited by an individual in his capacity as an agent of that State."

As to the criminal responsibility of the State itself, the Commission could indicate in the commentary that the criminal responsibility of the individual, as provided for in article 3, was without prejudice to the question of the criminal responsibility of the State for an international crime, explaining the reasons which had led it to take that position.

13. The discussion on draft article 4 had been concerned with choice—the choice between establishing an international criminal court and providing for universal jurisdiction. But in fact there was no choice: it was not a question of conferring exclusive jurisdiction on a future

[6] See 1992nd meeting, footnote 12.

[7] See 1993rd meeting, footnote 7.

[8] *Yearbook . . . 1976*, vol. II (Part Two), pp. 96 *et seq.*

[9] See the views of Member States and intergovernmental organizations received pursuant to paragraph 2 of General Assembly resolution 40/69 of 11 December 1985 and circulated to the General Assembly, at its forty-first session, in document A/41/537 and Add.1 and 2.

international criminal court, or of thereby excluding the jurisdiction of national courts. The two systems would have to be combined. Some members of the Commission had spoken in favour of establishing an international criminal court, but it remained to be seen whether it would ever come into being. Moreover, that solution also raised serious problems. For example, who would be responsible for conducting prosecutions? Would a department of public prosecutions be set up that was independent of States? And supposing that that were possible, how would that department prosecute wanted persons who were in the territory of sovereign States? If it had no authority there, and the task was entrusted to the magistrates of a State's internal legal order, would there not be duplication of functions? Lastly, if the international court was to be part of the United Nations system, it would be necessary to amend the Charter: were Member States prepared to do so?

14. He was not overlooking the difficulties caused by the rule of territoriality. It was true that that rule had been applied after the Second World War for the trial of a number of war crimes. But the draft code covered a whole group of offences, not only war crimes. For instance, the crime of genocide could be committed in time of war or of peace. It could also be committed by a State in its own territory: in that case, how was the rule of territoriality to be applied? Would a State which had committed the crime of genocide try itself? To all those questions was linked the question of localization: some crimes could be localized, others could not. That was why the 1945 London Agreement[10] had provided for a multiple system. In the preamble, it had laid down the principle of territoriality in the following terms:

> And whereas the Moscow Declaration of the 30th October 1943 on German atrocities in Occupied Europe stated that those German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in atrocities and crimes will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free Governments that will be created therein;

and in article 6 it had laid down the principle of international criminal jurisdiction and personal competence by providing:

> Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any Allied territory or in Germany for the trial of war criminals.

15. The discussion on choice was therefore pointless: the international reality must be taken into account. It was true that the establishment of an international criminal court represented an ideal to be attained; but other principles must not be excluded. That was why he had chosen a flexible system, in which the rule of extradition, while making it possible to give preference to territorial jurisdiction, did not exclude international jurisdiction or even personal competence. With regard to extradition, he was willing to specify in draft article 4 that the offences covered by the code were common crimes, not only with respect to extradition, but also with respect to the rules of detention. Such a provision need not be detailed, for extradition, as understood in the draft code, was an international obligation of States on the same level as the obligation to try the offender. That being so, draft article 4 would not give rise to any objection on principle and the drafting problems could be entrusted to the Drafting Committee.

16. Draft article 5 did not appear to meet with any objections and he agreed to add a provision indicating that the rule of non-applicability of statutory limitations applied to all the offences; it would indeed be impossible to make a distinction between war crimes and crimes against humanity.

17. It was true that he had not taken up the problem of pardon and amnesty, although he knew that certain tribunals established after the Second World War had affirmed that the crimes they had to try could not be pardoned or amnestied. The Commission could consider later whether it should include a provision to that effect in the draft code.

18. Positions differed on draft article 6, and they had changed over a period of time. At the outset, he had submitted a single provision and it had been at the request of some members of the Commission that he had later submitted a non-exhaustive list of the most important guarantees, to which he was currently invited to add others, such as the right of appeal or preliminary inquiry. The problem that arose was one of drafting, except perhaps in regard to the right of appeal. He had thought of that guarantee, but had not included it in the draft article submitted in his fifth report (A/CN.4/404) because he had been dissuaded by the possibility of establishing an international criminal court, which would be a supreme court like the Nürnberg Tribunal, the Charter[11] of which, in article 26, provided:

> The judgment of the Tribunal as to the guilt or the innocence of any defendant shall give the reasons on which it is based, and shall be final and not subject to review.

He need hardly point out that, in matters of general international law, the judgments of the ICJ were also final and not subject to review. In internal law, some systems did not recognize the right of appeal in criminal cases, except that judgments rendered in assize courts could be quashed for breach of a rule of law. It would therefore be for the Commission to decide whether the right of appeal was a fundamental matter or not. Generally speaking, he thought that, since the Commission was dealing with international law, it would be better to avoid procedural rules.

19. He noted that there had been no objections of principle to draft article 7 and agreed to add a provision reading:

> "The foregoing rule cannot be pleaded in bar before an international criminal court, but may be taken into consideration in sentencing if the court finds that justice so requires."

20. Draft article 8 also seemed to meet with approval in principle, although some members had questioned whether paragraph 2 should be retained. After mature consideration he thought that that paragraph should indeed be deleted: if the list of offences was exhaustive, that provision, which derived from the history of the

[10] See 1992nd meeting, footnote 6.

[11] *Ibid.*

establishment of the Nürnberg Tribunal, might conflict with the course the Commission had decided to follow.

21. As to draft article 9, if the Commission decided to recognize exceptions to the principle of responsibility, it must at the same time recognize that those exceptions could not apply to crimes against humanity in general, but only to war crimes.

22. With regard to the distinction that one member of the Commission had made between justifying circumstances and causes of non-responsibility, he agreed that it existed in some legal systems and was based on the fact that justifying circumstances, if established, wiped out the offence—such as in the case of self-defence—whereas causes of non-responsibility, such as *force majeure*, only eliminated responsibility, letting the offence subsist. As that distinction existed only in some legal systems, however, he had preferred to group together under a single heading all the exceptions, which in any case eliminated responsibility, whether as justifying facts or for some other reason.

23. To meet the concern of some members of the Commission regarding self-defence, he pointed out that that excuse could be invoked only in cases of aggression, as he had explained in his fourth report (A/CN.4/398, paras. 251-252). If a State carried out an action in the exercise of its right of self-defence, since that right was recognized, it could not be prosecuted: the offence was obliterated.

24. With regard to the other exceptions, he thought that, since some of them must be recognized in the case of States—and part 1 of the draft articles on State responsibility did provide for circumstances precluding the wrongfulness of an act, in particular *force majeure*, state of necessity and self-defence—they must also be recognized in the case of individuals. It would be intolerable if an individual who had committed a wrongful act was subject to criminal prosecution whereas the State on behalf of which he had acted was absolved of responsibility. On that point he referred the Commission to the cases mentioned in his fourth report. It would be for the Drafting Committee to solve the drafting problems and he would willingly assist in that task.

25. The question of error was a difficult one, because error resulted from lack of caution or attention by the author of the act. Some members of the Commission wished to distinguish between error of law, which would not be accepted as a justifying circumstance, and error of fact, which would be so accepted. On the problem of error of law, he referred to the decision of the United States military tribunal in the *I. G. Farben* case, cited in his fourth report (*ibid.*, para. 208), in which the tribunal had accepted that a military commander might in some cases be mistaken about the interpretation of the laws of war. It remained for the Commission to decide whether error of law should be systematically excluded in the case of crimes against humanity. As to error of fact, there were cases in which it seemed that it should be accepted. He reminded the Commission of a recent incident in which aircraft of one State had attacked a ship of another State and the question had arisen whether it was an intentional act or an error of fact: if error of fact was ruled out in that case, it would be necessary to recognize that there had been an act of aggression, with all the consequences that entailed. Thus there were cases in which error of fact must be accepted, and error had its place in the draft code as an exception to the principle of responsibility, although it was necessary to consider the question whether it should be regarded as a cause of non-responsibility in all cases, or as an absolving excuse.

26. In conclusion, noting that the Commission was in agreement on the essentials of the draft articles submitted in his fifth report (A/CN.4/404) and that only problems of form remained to be settled, he suggested that the draft articles be referred to the Drafting Committee on the understanding that the Committee would take into consideration all the written and oral proposals made concerning them.

27. The CHAIRMAN thanked the Special Rapporteur for his comprehensive summary of the discussion and suggested that draft articles 1 to 11 be referred to the Drafting Committee.

28. Mr. NJENGA said that certain issues raised by the Special Rapporteur should be clarified before the draft articles were referred to the Drafting Committee. For example, he did not agree with the Special Rapporteur on the question of the right of appeal, which was provided for not only in the International Covenant on Civil and Political Rights (art. 14, para. 5), but also, implicitly, in Additional Protocol I[12] (art. 75, para. 4 (*j*)) to the 1949 Geneva Conventions. He could understand the objection to the right of appeal in the case of an international court, or even in the case of an *ad hoc* tribunal of the type advocated by Mr. Beesley (1994th meeting); but the position was very different when it came to national courts, where the right of appeal, when allowed, was a fundamental right which could not be denied. The point was especially important because of the different approaches to it adopted by different countries.

29. Mr. THIAM (Special Rapporteur) said that he had not rejected the right of appeal; if a national court was called upon to try the alleged perpetrator of a crime, it would do so under internal law and rules of procedure, including the right of appeal. The only case in which it would be difficult to recognize that right was when an international tribunal was called upon to try the accused.

30. Mr. BARSEGOV, referring to the distinction he had made in his earlier statement (1999th meeting) between intent and motive—a distinction that was recognized in all legal theory—observed that the Special Rapporteur had dealt only with intent and that the question seemed to call for more thorough examination, since the Commission was not in agreement. He would like to know the Special Rapporteur's position on motive, and emphasized that motive had not been recognized as an exception by the Nürnberg Tribunal or in the International Convention on the Suppression and Punishment of the Crime of *Apartheid* or the Defintion of Aggression. He therefore questioned whether there

[12] *Ibid.*, footnote 10.

was agreement on that point and whether the Drafting Committee could deal with it.

31. After a brief exchange of views in which Mr. ARANGIO-RUIZ and Mr. Sreenivasa RAO took part, the CHAIRMAN suggested that the Commission should refer draft articles 1 to 11 as submitted by the Special Rapporteur in his fifth report to the Drafting Committee for consideration in the light of the debate and of the subsequent exchange of views.

It was so agreed.[13]

32. Mr. EIRIKSSON observed that the discussion had shown the need to review the Commission's working methods. He trusted that the matter would soon be taken up by the Planning Group.

Mr. Díaz González, First Vice-Chairman, took the Chair.

The law of the non-navigational uses of international watercourses (A/CN.4/399 and Add.1 and 2,[14] A/CN.4/406 and Add.1 and 2,[15] A/CN.4/L.410, sect. G)

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

CHAPTER III OF THE DRAFT:[16]

ARTICLES 10 TO 15

33. The CHAIRMAN invited the Special Rapporteur to introduce his third report on the topic (A/CN.4/406 and Add.1 and 2), as well as the six articles of chapter III of the draft submitted therein, which read:

CHAPTER III

GENERAL PRINCIPLES OF CO-OPERATION, NOTIFICATION AND PROVISION OF DATA AND INFORMATION

Article 10. General obligation to co-operate

States shall co-operate in good faith with other concerned States in their relations concerning international watercourses and in the fulfilment of their respective obligations under the present articles.

Article 11. Notification concerning proposed uses

If a State contemplates a new use of an international watercourse which may cause appreciable harm to other States, it shall provide those States with timely notice thereof. Such notice shall be accompanied by available technical data and information that are sufficient to enable the other States to determine and evaluate the potential for harm posed by the proposed new use.

Article 12. Period for reply to notification

1. [ALTERNATIVE A] A State providing notice of a contemplated new use under article 11 shall allow the notified States a reasonable period of time within which to study and evaluate the potential for harm entailed by the contemplated use and to communicate their determinations to the notifying State.

1. [ALTERNATIVE B] Unless otherwise agreed, a State providing notice of a contemplated new use under article 11 shall allow the notified States a reasonable period of time, which shall not be less than six months, within which to study and evaluate the potential for harm entailed by the contemplated use and to communicate their determinations to the notifying State.

2. During the period referred to in paragraph 1 of this article, the notifying State shall co-operate with the notified States by providing them, on request, with any additional data and information that are available and necessary for an accurate evaluation, and shall not initiate, or permit the initiation of, the proposed new use without the consent of the notified States.

3. If the notifying State and the notified States do not agree on what constitutes, under the circumstances, a reasonable period of time for study and evaluation, they shall negotiate in good faith with a view to agreeing upon such a period, taking into consideration all relevant factors, including the urgency of the need for the new use and the difficulty of evaluating its potential effects. The process of study and evaluation by the notified State shall proceed concurrently with the negotiations provided for in this paragraph, and such negotiations shall not unduly delay the initiation of the contemplated use or the attainment of an agreed resolution under paragraph 3 of article 13.

Article 13. Reply to notification: consultation and negotiation concerning proposed uses

1. If a State notified under article 11 of a contemplated use determines that such use would, or is likely to, cause it appreciable harm, and that it would, or is likely to, result in the notifying State's depriving the notified State of its equitable share of the uses and benefits of the international watercourse, the notified State shall so inform the notifying State within the period provided for in article 12.

2. The notifying State, upon being informed by the notified State as provided in paragraph 1 of this article, is under a duty to consult with the notified State with a view to confirming or adjusting the determinations referred to in that paragraph.

3. If, under paragraph 2 of this article, the States are unable to adjust the determinations satisfactorily through consultations, they shall promptly enter into negotiations with a view to arriving at an agreement on an equitable resolution of the situation. Such a resolution may include modification of the contemplated use to eliminate the causes of harm, adjustment of other uses being made by either of the States and the provision by the proposing State of compensation, monetary or otherwise, acceptable to the notified State.

4. The negotiations provided for in paragraph 3 shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and interests of the other State.

5. If the notifying and notified States are unable to resolve any differences arising out of the application of this article through consultations or negotiations, they shall resolve such differences through the most expeditious procedures of pacific settlement available to and binding upon them or, in the absence thereof, in accordance with the dispute-settlement provisions of the present articles.

Article 14. Effect of failure to comply with articles 11 to 13

1. If a State contemplating a new use fails to provide notice thereof to other States as required by article 11, any of those other States believing that the contemplated use may cause it appreciable harm may invoke the obligations of the former State under article 11. In the event that the States concerned do not agree upon whether the contemplated new use may cause appreciable harm to other States within the meaning of article 11, they shall promptly enter into negotiations, in the manner required by paragraphs 3 and 4 of article 13, with a view to resolving their differences. If the States concerned are unable to resolve their differences through negotiations, they shall resolve such differences through the most expeditious procedures of pacific settlement available to and binding upon them or, in the

[13] For consideration of draft articles 1, 2, 3, 5 and 6 proposed by the Drafting Committee, see 2031st and 2032nd meetings, and 2033rd meeting, paras. 1-26.

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

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

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

absence thereof, in accordance with the dispute-settlement provisions of the present articles.

2. If a notified State fails to reply to the notification within a reasonable period, as required by article 13, the notifying State may, subject to its obligations under article [9], proceed with the initiation of the contemplated use, in accordance with the notification and any other data and information communicated to the notified State, provided that the notifying State is in full compliance with articles 11 and 12.

3. If a State fails to provide notification of a contemplated use as required by article 11, or otherwise fails to comply with articles 11 to 13, it shall incur liability for any harm caused to other States by the new use, whether or not such harm is in violation of article [9].

Article 15. Proposed uses of utmost urgency

1. Subject to paragraphs 2 and 3 of this article, a State providing notice of a contemplated use under article 11 may, notwithstanding affirmative determinations by the notified State under paragraph 1 of article 13, proceed with the initiation of the contemplated use if the notifying State determines in good faith that the contemplated use is of the utmost urgency, due to public health, safety, or similar considerations, and provided that the notifying State makes a formal declaration to the notified State of the urgency of the contemplated use and of its intention to proceed with the initiation of that use.

2. The right of the notifying State to proceed with a contemplated new use of utmost urgency pursuant to paragraph 1 of this article is subject to the obligation of that State to comply fully with the requirements of article 11, and to engage in consultations and negotiations with the notified State, in accordance with article 13, concurrently with the implementation of its plans.

3. The notifying State shall be liable for any appreciable harm caused to the notified State by the initiation of the contemplated use under paragraph 1 of this article, except such as may be allowable under article [9].

34. Mr. McCAFFREY (Special Rapporteur) said that his third report (A/CN.4/406 and Add.1 and 2) consisted of four chapters and two annexes. Chapters I and II and annexes I and II had been included largely as background information. Chapter III formed the core of the report, since it contained the draft articles he was submitting to the Commission for discussion and action at the present session. Chapter IV was an introduction to the subtopic of exchange of data and information, on which he intended to submit draft articles at the next session. A general discussion on that chapter at the present session, time permitting, would assist him in preparing those draft articles.

35. Chapter I of the report contained a brief summary of the status of the Commission's work on the topic, while a more extensive account could be found in his preliminary report[17] and in his second report (A/CN.4/399 and Add.1 and 2). At its thirty-second session, in 1980, the Commission had provisionally adopted six articles (arts. 1 to 5 and X), together with a provisional working hypothesis as to what was meant by the term "international watercourse system" (see A/CN.4/406 and Add.1 and 2, paras. 2-3).

36. In his first report,[18] submitted to the Commission at its thirty-fifth session, in 1983, the previous Special Rapporteur, Mr. Evensen, had submitted a complete set of draft articles in the form of an outline for a draft convention, the revised text of which, submitted in his second report at the thirty-sixth session, in 1984, comprised 41 draft articles. The Commission had decided at its thirty-sixth session to refer articles 1 to 9 of the revisted outline to the Drafting Committee, which was considering them now because, owing to lack of time, it had been unable to do so earlier (see A/CN.4/399 and Add.1 and 2, paras. 15-30).

37. Chapter II of the report under discussion contained information on procedural rules relating to the utilization of international watercourses. Section A briefly reviewed the relevant features of a modern system of water resource management and discussed three examples. Two were taken from federal practice in the United States of America, namely the legislation of the State of Wyoming and the Delaware River Basin Compact, simply because the details on them had been readily available to him. However, they did provide an indication of how modern planning processes could work with regard to the management of water resources. The third example was particularly apt for the purposes of the present discussion, since it was that of an international treaty on an international watercourse, namely the Convention between Mali, Mauritania and Senegal relating to the status of the Senegal River (Nouakchott, 1972).

38. Section B of chapter II dealt with the relationship between procedural rules and the doctrine of equitable utilization. The principle was so flexible and general in character that it was difficult for individual States to apply. A set of procedural rules was therefore necessary. Every State needed information on other States' uses of a watercourse, so as to be able to determine whether its own intended utilization was in keeping with the principle in question. The purpose of the procedural rules set out in the draft articles submitted in chapter III was to ensure that information and data on the uses of a watercourse by other States were available to the State planning its own uses, thereby enabling it to take such data and information into account and avoid any breach of the equitable utilization principle.

39. The draft articles in chapter III fell into two categories. The first, consisting only of draft article 10, covered the general obligation to co-operate. The second category, comprising draft articles 11 to 15, set out rules on notification and consultation concerning proposed uses, which could best be considered together.

40. Draft article 10 set out the general duty of States to co-operate in their relations concerning international watercourses and in the fulfilment of their respective obligations under the draft. Such a duty to co-operate was supported by a broad range of authority. In that regard, he cited in his report international agreements (A/CN.4/406 and Add.1 and 2, paras. 43-47), decisions of international courts and tribunals (*ibid.*, paras. 48-50), declarations and resolutions adopted by intergovernmental organizations, conferences and meetings (*ibid.*, paras. 51-55) and studies by intergovernmental and non-governmental organizations (*ibid.*, paras. 56-58). More particularly, reference was made to the resolution entitled "The pollution of rivers and lakes and international law", adopted by the Institute of International Law at its Athens session, in 1979, which set out the obligation of States to co-

[17] *Yearbook . . . 1985*, vol. II (Part One), p. 87, document A/CN.4/393.

[18] *Yearbook . . . 1983*, vol. II (Part One), p. 155, document A/CN.4/367.

operate "in good faith with the other States concerned" (*ibid.*, para. 58). That resolution went on to specify the duty of States to provide data concerning pollution, to give advance notification of potentially polluting activities and to consult on actual or potential transboundary pollution problems. Clearly, that duty was the outcome of the general obligation of States to co-operate in their relations concerning international watercourses.

41. Draft article 10 stipulated that it was the duty of States to co-operate in good faith with other "concerned States", a term he had used so as to avoid both the expression "watercourse States", and the expression "system States". It would be for the Commission to decide on the final wording.

42. With regard to draft articles 11 to 15, he had also cited international agreements (*ibid.*, paras. 63-72), decisions of international courts and tribunals (*ibid.*, paras. 73-75), declarations and resolutions adopted by intergovernmental organizations, conferences and meetings (*ibid.*, paras. 76-80) and studies by intergovernmental and non-governmental organizations (*ibid.*, paras. 81-87).

43. Draft article 11 dealt with notification concerning proposed uses. The first sentence required a State contemplating a new use of an international watercourse which could cause appreciable harm to other States to provide those States with "timely notice" thereof. As explained in paragraph (7) of the comments on the article, the term "timely" was intended to require notification sufficiently early in the planning stages to permit meaningful consultation and negotiation, if necessary. The criterion of "appreciable harm", which was explained in paragraph (5) of the comments, had its origin in draft article 9 as submitted by the previous Special Rapporteur, which was still before the Drafting Committee.

44. It should be noted that the "comments" on each draft article were simply an explanation of his own reasons for including certain terms and provisions in the text. When the time came for the final adoption of each article, the Commission would as usual attach its own commentary, which would contain not only an explanation of the content, but also references to international instruments, judicial precedent and other supporting material.

45. Draft article 12, stating the rule on the period for replying to notification, contained two alternatives for paragraph 1. Alternative A stated that the notifying State must allow the notified States "a reasonable period of time" within which to study and evaluate the potential for harm entailed by the contemplated use and to communicate their determinations to the notifying State. Alternative B spoke instead of "a reasonable period of time, which shall not be less than six months". Paragraph 2 of the article stipulated that co-operation was required between the parties concerned during the period referred to in paragraph 1, and paragraph 3 set out the duty to negotiate in good faith.

46. Draft article 13 dealt with the reply to notification, and consultation and negotiation concerning proposed uses. The duty to consult, set out in paragraph 2, was intended to enable the States concerned to confirm or adjust the determinations made by the notified State under paragraph 1. Paragraph 3 laid down the duty to negotiate, and paragraph 4 specified that the negotiations must be conducted in good faith. Paragraph 5 stated that, if the consultations and negotiations failed, the parties must have recourse to "the most expeditious procedures of pacific settlement available" or, in the absence thereof, to "the dispute-settlement provisions of the present articles". He had included that proviso because he proposed to include provisions on dispute settlement in the draft at a later stage. It should be emphasized that paragraph 1 called for the notified State to make two separate determinations in order to trigger the notifying State's obligations under paragraph 2: (*a*) that the contemplated use would, or was likely to, cause the notified State appreciable harm; (*b*) that such use would, or was likely to, result in the notifying State's depriving the notified State of its equitable share.

47. Article 14 concerned the effect of failure to comply with articles 11 to 13. Paragraph 1 dealt with the failure of the proposing State, in other words the State contemplating a new use, to notify the other States concerned. Paragraph 2 related to the case of failure by a notified State to reply to a notification within a reasonable period. Paragraph 3 was intended to encourage compliance with the notification, consultation and negotiation requirements of articles 11 to 13 by making the proposing State liable for any harm to other States resulting from the new use, even if such harm would otherwise be allowable under the equitable utilization principle.

48. Draft article 15 covered cases in which the proposed use of an international watercourse was a matter of the utmost urgency, owing to public health, safety, or similar considerations, and in which failure to act by the notifying State would have potentially disastrous consequences. In such an event, paragraph 1 allowed the notifying State to proceed with the contemplated use. Under paragraph 2, that right of the notifying State was subject to the obligation to comply fully with the requirements of article 11 and to engage in consultations and negotiations with the notified State. Paragraph 3 specified that the notifying State would "be liable for any appreciable harm caused to the notified State by the initiation of the contemplated use".

49. In conclusion, he proposed that the Commission should first discuss draft article 10 by itself, and then proceed to take up draft articles 11 to 15 together. If enough time was available, the Commission could then engage in a general discussion of the subject-matter of chapter IV, on the exchange of data and information. As to future work on the topic, he envisaged submitting one further report, or possibly two if necessary, and hoped that the Commission could complete the first reading of the draft at its 1989 session.

50. After a brief procedural discussion in which Mr. BARSEGOV, Mr. CALERO RODRIGUES and Mr. Sreenivasa RAO took part, the CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed to adopt the Special Rapporteur's proposal as to procedure, on the understanding that members, particularly newly elected

members, would be free to raise any general questions, especially during the discussion of draft article 10.

It was so agreed.

The meeting rose at 1 p.m.

2002nd MEETING

Friday, 22 May 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Mr. A-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Visit by a member of the International Court of Justice

1. The CHAIRMAN, speaking on behalf of the members of the Commission, extended a warm welcome to Mr. Ago, a Judge of the International Court of Justice, who in the past had made an invaluable contribution to the Commission's work, particularly when he had been Special Rapporteur for the topic of State responsibility.

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

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

2. Mr. BEESLEY said that, before discussing the Special Rapporteur's third report (A/CN.4/406 and Add.1 and 2), he wished to make a few general observations and refer to the earlier work on the topic, including the Special Rapporteur's first two reports. The topic had been on the Commission's agenda since 1971 and progress on it had been slow, not only because the subject was complex, but also because three changes of special rapporteur had had to be made. The work of all four of them was to be commended. The present Special Rapporteur had shown an excellent grasp of the problems to be overcome and his recommendations were sound. Accordingly, the Commission was in a position to make headway on the topic.

3. In 1984, the Commission had had before it a draft framework agreement consisting of 41 articles prepared by the previous Special Rapporteur, Mr. Evensen, and had referred articles 1 to 9 to the Drafting Committee, where they were still to be discussed. The present Special Rapporteur had, from the start, proposed that those articles should be dealt with by the Drafting Committee without further debate in plenary, and that the general organizational structure of the draft prepared by his predecessor should be followed for the purposes of the subsequent articles.

4. Notwithstanding his view that draft articles 1 to 9 should be left with the Drafting Committee, the Special Rapporteur had, in his second report (A/CN.4/399 and Add.1 and 2), discussed difficult questions raised by those articles and had also submitted five draft articles on the procedures to be followed by States when new uses were proposed for the waters of an international watercourse.

5. At its previous session, the Commission had not been able to consider in full the second report, which dealt with four important points. The first concerned the definition of an "international watercourse". At the outset of its work on the topic, the Commission had been divided as to the meaning of the term "international watercourse". It had been decided not to use the term "drainage basin", and the alternative term "international watercourse system" had also given rise to controversy. In 1980, the Commission had appeared to move closer to a broad definition of an international watercourse when it had adopted a note "describing its tentative understanding of what was meant by the term 'international watercourse system' ". Accordingly, Mr. Evensen had been able to incorporate the substance of that understanding in article 1 of his original draft, in 1983, an article entitled "Explanation (definition) of the term 'international watercourse system' . . .".

6. There had, however, been some criticism in the Commission regarding the use of the word "system", and Mr. Evensen had abandoned it in his revised draft, in 1984, using instead the shorter expression "international watercourse". However, due to the persisting differences of opinion regarding the meaning of the latter expression, the present Special Rapporteur had recommended in his second report (*ibid.*, para. 63) that article 1 be withdrawn from the Drafting Committee and that the Commission proceed on the basis of the provisional working hypothesis which it had accepted in 1980. Obviously, the problem would have to be faced sooner or later, and all attempts to limit the scope of application of the principles embodied in the draft articles should be resisted. The drainage basin concept, or the system concept, was supported by the best expert opinion, and the interdependence of waters made it highly desirable that a system-wide approach should be taken.

7. The change made by Mr. Evensen from the drainage basin concept to the concept of an "international watercourse system" could provide a suitable basis for developing a coherent and rational body of general principles on international watercourses, without impinging upon those watercourses that were regulated by their own particular régimes.

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

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