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Summary record of the 1556th meeting

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

Extract from the Yearbook of the International Law Commission:-
1979, vol. I

1556th MEETING

Wednesday, 20 June 1979, at 10.15 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/320 and Corr.1)

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Sir Francis VALLAT said that as members of the Commission sat not as representatives of Governments but as individual experts on international law, they might sometimes be in a better position than representatives to assess the equities of a situation. Accordingly, while recognizing that the United Kingdom's direct interest in the item under consideration was marginal, he thought it was only right, in view of the importance of the subject for international relations, for every member to contribute his views. He also thought it essential for lawyers to have a general understanding of the technical considerations involved, and was therefore grateful to the Special Rapporteur for the outline of those considerations included in his report.

2. That outline was only a beginning, however, and seeking further information he had turned to the report of the Secretary-General on legal problems relating to the utilization and use of international rivers.[1] Although that document was a valuable source of material, it did not provide any substantial technical information, being almost exclusively devoted to treaties and studies by non-governmental organizations such as the International Law Association. In the circumstances, it would be useful if the Commission could be provided, as its work progressed, with one or more selected bibliographies on water, related to the particular topics under consideration. The Secretariat and the Special Rapporteur might perhaps bear that in mind. He was thinking not of an exhaustive bibliography but of some guide that would enable members to have ready access to sources of technical information, and thus to inform themselves on the matters with which they were dealing. The kind of document that could provide members with useful background information was the publication *Unitar News*, volume IX (1977) of which dealt with over-all water problems. That issue also contained a map of the various river basins throughout the world, of which members should have some knowledge.

3. He agreed that in the future course of its work the Commission should concentrate on the various uses of water. He would be inclined to include pollution under that heading, although strictly speaking it was an abuse rather than a use of water. As far as the choice of topics was concerned, he would certainly agree that irrigation should be included among the uses of water to be considered by the Commission. He referred members to paragraph 1 of the Secretary-General's supplementary report on legal problems relating to the non-navigational uses of international watercourses,[2] which outlined the proposal made on that subject by the representative of Bolivia in the Sixth Committee at the fourteenth session of the General Assembly. That proposal provided some ideas on the initial approach that might be adopted, and he saw nothing to contradict it.

4. The articles on data exchange and collection were a necessary part of the draft, but it was clear from the statements made by Mr. Jagota and Mr. Tabibi (1555th meeting) that they would require more detailed examination.

5. Lastly, as there had been no appreciable decrease in the volume of water for 3 billion years, he would suggest that in dealing with the subject the Commission think in terms not of the volume but of the distribution and quality of water.

6. Mr. QUENTIN-BAXTER said there could be no question about the General Assembly's keen and continuing interest in the progress of the Commission's work on the law of the non-navigational uses of international watercourses, and the Commission, as a body of lawyers, was not indifferent to the political considerations involved. Indeed, it was its constant practice to take account of the major policy interests of the international community and of the reasons motivating those interests. In dealing with a subject such as succession in respect of treaties, the Commission had had no difficulty in basing its draft on the concept of decolonization and on the "clean-slate" principle, while seeking to strengthen the bonds of continuity in other directions. In the present case, however, it was faced not with broad divisions of interest that followed regional patterns, but with divisions of interest between neighbours.

7. It had been said that the positions taken in that regard in earlier times had been little more than a rationalization of national self-interest. Were that now to be said of the Commission, it would gravely reduce the respect in which the Commission was held. The difficulty could not be overcome merely by saying that the Commission should include members from a few lower and upper riparian States as well as from States with mixed interests. The problems were too local and

[1] *Yearbook... 1974*, vol. II (Part Two), p. 33, document A/5409.

[2] *Ibid.*, p. 270, document A/CN.4/274.

too acute for that kind of reassurance to give much comfort to a State that had major interests in the matter, yet no national serving on the Commission. It was therefore important for the Commission to be constantly aware of the need for an objectivity akin to that displayed by the members of an international tribunal hearing a contentious case. Only then would world opinion be satisfied that a small body of experts serving in their individual capacities could make a significant contribution to the study of the subject. He for one had no doubt that they could do so.

8. He agreed that the Commission's target at its current session should be the adoption of draft article 1 (A/CN.4/320, para. 2), and he believed that common ground for it could be discerned. He was broadly in favour of the proposals made in regard to that article, but recognized that there was room for a separate debate at a later stage on its concepts and wording. He also agreed on the need to consider use in all its facets, bearing in mind that there would never be circumstances in which use and contribution could be wholly separated. Moreover, the number of uses could not readily be limited. Most cities that were not seaports were sited on a river, often for economic, commercial or agricultural reasons, but almost as often for purposes of recreation or to enhance the environment.

9. Referring to the relationship between the draft articles and general international law, he said that the judgements of the International Court of Justice in the *North Sea Continental Shelf* cases [3] had emphasized the difference between delimitation and apportionment. The Court had held that anything not outside the national jurisdiction belonged to the State with which it had the closest natural connexion. There was no question of awarding anything to anybody; it was simply a matter of determining to whom something belonged. The Court had held that there was no single solution, no rule that obviously had to be applied to the exclusion of all others, and that there was still need for negotiation and accommodation between adjacent States.

10. There was a certain subtlety in that notion, although it was common to the judicial process everywhere. When construing a contract or a will, courts were not giving to one party and taking away from another, they were ascertaining to whom something belonged. Delimiting an underwater boundary could be a complicated matter, but it was comparatively simple if regard were had to the factors that might have to be taken into account when dealing with the draft articles. The principle was the same. In that connexion, he referred members to paragraph 80 of the Special Rapporteur's report, which stated:

> A principle that injury to others be avoided in using one's own requires tests to determine what is one's own, what constitutes injury and where the dividing line between a permissible measure of injury and an impermissible measure of injury lies.

The criterion of injury might well be the hardest to establish, but it was that concept, determined after all conflicting considerations had been weighed, that would introduce in the draft the concept of delimitation, of determining what belonged to whom and what was the limit of the particular national interest. Those principles should perhaps be considered in relation to the doctrines governing the present study.

11. It had rightly been said that the abandonment by the United States of America of the Harmon doctrine might not have been unrelated to a new perception of national interest. The law between States as developed by the Commission was of course always based on perception of national interest, but it imported a greater degree of enlightenment and performed the normal legal function of allowing to others what one claimed for oneself. The principle of national sovereignty over natural resources could perhaps be regarded as the modern equivalent of the Harmon doctrine; but that principle, so dear to the hearts of all United Nations Members, flourished within a world organization that emphasized interdependence, a certain concern for other people's interests as well as for one's own, and a duty to the world community, which was the price to be paid for the benefits derived from national sovereignty over natural resources.

12. Again, some encouragement could be drawn from the principles laid down in the *North Sea Continental Shelf* cases, one of which was that equality was to be reckoned within the same plane. [4] Thus it was clearly not the purpose of the draft articles to iron out the natural inequalities in resources between States, or to tone down the central importance of the principle of national sovereignty over natural resources. But it was equally clear, both under the old law and under the new, particularly in regard to uses of water, that there had always been perceptions of a duty owed to neighbours regarding the way in which the natural resources of a sovereign territory were used. It was unthinkable that a nation that lived on the banks of a river should lose that river entirely as a result of the application of modern technology in the interests of a higher riparian State. It was equally unthinkable that a lower riparian State should refuse to receive a natural flow of water by erecting a dam for the benefit of its own hydroelectric resources, thereby causing that water to flood valuable land in a neighbouring State. In that area more than any other the basic duties could be seen.

13. He agreed entirely that there was a continuing need for user agreements between adjacent States or States with a community of interests in a particular source of water, and that reliance on a general principle was not enough. The general rules the Commission would formulate in regard to user agreements were far more than residual rules, however, since they arose out of the bedrock of customary law, having been recognized ever since States started to regulate the joint use of their resources, and having been rein-

[3] *I.C.J. Reports 1969*, p. 3.

[4] *Ibid.*, p. 50.

forced countless times by United Nations doctrines. It was on that basis that the Commission would be able to reassure those government representatives who might wonder if it was bargaining with their natural resources.

14. Mr. USHAKOV said that, since the physical and legal situation of international watercourses was extremely varied, the Commission must draw up very general rules that could be applied to any conceivable situation. Those rules must be legal, not technical. The rules proposed in draft articles 8, 9 and 10, however, were more technical than legal, and the provisions of article 8 were not sufficiently general to be applicable to all situations.

15. In his view, it was not necessary to collect and exchange technical data on every international watercourse. Such activities were justified only with respect to international watercourses that were exploited. Furthermore, the data mentioned in article 8 were not relevant to all regions of the world. For example, data on water evaporation would concern mainly tropical countries, whereas countries like the Soviet Union would be more interested in information relating to the ice that covered certain rivers in winter. Since the technical data concerning international watercourses varied from one geographical region to another, it would be impossible to enumerate all the data necessary for the study of those watercourses. Hence it would be preferable not to specify the data in the draft, and to replace articles 8, 9 and 10 by a more general article providing that the States concerned should co-operate in studying the situation with respect to certain international watercourses and in exchanging data.

16. The draft articles before the Commission had been drawn up as though they formed part of a draft convention, but he thought that approach was contrary to the Commission's mandate and practice. The Commission was not required to prepare draft conventions, but only draft articles, and it was for the General Assembly alone to decide how those articles should be used when completed. It was therefore impossible to know in advance whether a set of draft articles would become a multilateral convention.

17. Draft article 2 was based on the concept of the "international drainage basin". It should be noted that, according to the definition of that term given by the International Law Association at its Helsinki Conference in 1966, which the Special Rapporteur had included in his report (A/CN.4/320, para. 34), a national watercourse that flowed through the territory of a single State could become an international watercourse if it was fed by underground water originating in the territory of another State.

18. In draft article 1, the concept of use could include or exclude that of consumption. It might be preferable to adopt the latter alternative. The definition of the scope of the draft articles given in paragraph 1 of the article did not correspond to the title of the subject. In his view, there was a difference between the "law of the uses" and the "uses" of watercourses. He also wondered why the term "non-navigational" had been omitted from the article. Did that mean that navigation was included in the scope of the draft articles, or that it was implicitly excluded by the title of the subject? He believed that it would be better to reproduce the title of the subject and to say, in article 1, paragraph 1: "The present articles apply to the law of the non-navigational uses of international watercourses ...".

19. With regard to paragraph 2 of the article, he pointed out that the great majority of international watercourses were not navigable and that it was mainly to such watercourses that the articles were intended to apply, since the major international rivers were already covered by agreements concluded between the riparian States. He had already proposed making a distinction between international rivers, which were navigable watercourses and could be used by all States, and multinational rivers, which were not navigable watercourses and which were used only by the riparian States.

20. Mr. VEROSTA thought some difficulties might have arisen because of a lack of awareness of the existing rights and duties of States under the general rules of international customary law. During the discussion, reference had been made to the national character of rivers, but in his view the sovereignty of a State over the mass of water flowing through its territory was matched by certain duties. Mr. Quentin-Baxter had said it was unthinkable that one State should dam the waters of a river on its territory before the river reached a lower riparian State, or that a lower riparian State should force water back on to the territory of an upper riparian State. With the advances in technology, however, those were now very real possibilities. In such an event, a rule of customary law would come into play: on the one hand, the upper riparian State would have the duty to allow an appropriate volume of water to flow down and out of its territory and, on the other, the lower riparian State would have the right to expect that the water would flow into its territory at seasonal intervals. The same could be said to apply to lakes on which a number of States bordered, such as lakes Léman and Constance.

21. Modern technology also played a significant part in the use of water as a major tourist attraction. The Horseshoe waterfall at Niagara, for example, had been largely constructed by engineers.

22. Mr. NJENGA said he was grateful for the scientific and technical information in the introductory part of the Special Rapporteur's comprehensive report, which was extremely instructive. It was to be hoped that the capacity of water for self-purification, referred to in paragraphs 22 and 23 of the report, would not lead to complacency about the task of preventing pollution, for it should be remembered that a very high proportion of the peoples in developing countries, particularly in Africa, drew their water directly from rivers. Mankind must obviously take account of the ability of water to cleanse itself, but must also ensure that

toxic substances were not discharged into watercourses.

23. He wondered whether the Commission's decision to defer consideration of the definition of an international watercourse [5] had in fact been wise, since it would be difficult to establish rules without an appropriate definition of what was involved. For example, it was quite conceivable that Governments would accept rules relating to international watercourses defined as successive or contiguous rivers, but would be completely opposed to the same rules if they were applied in the wider context of international drainage basins. For the moment, he had not come to any firm conclusions regarding the best approach. The Special Rapporteur appeared to be in favour of the concept of an international drainage basin. In any event, since there seemed to be some difference of opinion among members, and since the very content of the rules would depend upon the way in which an international watercourse was defined, it was essential for the Commission to consider that matter at the earliest opportunity.

24. Another problem was whether, in view of the diversity of the uses and characteristics of rivers, and even of drainage basins, it would be possible or useful to formulate general rules applicable in all cases. On that point, he agreed with Brierly's view, cited by the Special Rapporteur in paragraph 65 of his report, that rivers could not be subjected to legal regulation by rules applying generally to all rivers, since the political factors that had to be taken into account differed, as did the uses to which rivers might be put. General rules might prove to be so general that they would be of little value for codifying the law, and it was questionable whether the Commission would be able to elaborate a comprehensive code that would be broadly acceptable to States. Clearly, a further exchange of views was required to determine whether it was really necessary to draw up a general code for international watercourses. By and large, the absence of general principles applicable to all international watercourses had not created major obstacles to negotiations between States aimed at co-operation in the utilization of international watercourses.

25. Water was the most important of all natural resources, for all life depended on it. Few States, if any, would agree that they should not be allowed to make the fullest possible use of water within their national boundaries. Of course, he did not in any way endorse the Harmon doctrine, but full and responsible use by a State of an international watercourse was not necessarily inconsistent with protection of the interests of lower riparian States. Hence the emphasis should be placed on co-operation between States in the use of watercourses rather than on limitation of the rights of States to use them. He did not see how any State, if it was not damaging the interests of other States, could be prevented from making the widest possible use of its water resources. It would be dangerous to place too much reliance on the Helsinki Rules,[6] which did not take account of a State's permanent sovereignty over its resources.

26. Many of the draft articles raised serious problems if the Commission was not yet agreed on its basic approach. Some of them were not clearly drafted: in article 2, for example, it was difficult to determine whether the two elements of the phrase "contributes to and makes use of" were separate or cumulative. Because of its climatic conditions, Egypt, for example, did not contribute to the waters of the Nile, but it none the less made use of those waters.

27. Lastly, some of the articles might impose a burden that States would regard as unreasonable. The categorical terms of article 8 placed an obligation on contracting States to collect a considerable amount of data, which would constitute an onerous responsibility for them, particularly if the Commission later decided to adopt the concept of the international drainage basin. The article should therefore be couched in terms of co-operation between States rather than of an obligation to other States, which would be more in keeping with article 3 of the Charter of Economic Rights and Duties of States [7] and recommendation 51 of the United Nations Conference on the Human Environment.[8]

28. Mr. REUTER said he would confine himself to pointing out that the subject under study entailed limitations both on the territorial sovereignty of States and on the ancients' concept of rivers, which had been regarded as divinities. The Commission must therefore find the golden mean between absolute respect for the principle of territorial sovereignty and prohibition of the use of, or construction of works on, international watercourses. Perhaps it should be guided by the position taken by ECE with regard to hydroelectric works, namely, that priority should be given to the concept of usefulness to man within the national context, as though the river concerned were not international. The judgements of the supreme courts of the United States of America and Switzerland might show the way in that matter.

29. As to the method of work, he thought the extreme complexity of the subject would make it difficult to see the way clear from the outset. Initially, the approach should be very broad; it could always be restricted later.

30. It was both helpful and incautious to submit draft articles at that stage of the work. Without such articles, the Commission could not make progress, but they were bound to give rise to criticism. There was no reason to suppose that the Special Rapporteur saw the articles as necessarily forming part of a convention. The Commission's work might culminate in a

[5] See *Yearbook... 1976*, vol. II (Part Two), p. 162, document A/31/10, para. 164.

[6] See A/CN.4/320, para. 34.

[7] General Assembly resolution 328 (XXIX).

[8] See 1554th meeting, foot-note 25.

declaration or a model agreement; in any event, the Commission had always considered the preparation of draft articles to be a useful method.

31. Mr. SCHWEBEL (Special Rapporteur) said there was little time left to sum up the Commission's discussion, but he would try to draw some conclusions from it and answer some of the questions raised.

32. With a few notable exceptions, there appeared to be broad support among members for the basic approach adopted in the report and in the draft articles. The scope of the subject, as defined in article 1, appeared in the main to be acceptable. In effect, that article deferred the question of the definition of an international watercourse, but again there was general, if not unanimous, support for the idea of postponing that contentious question. At the same time, it was recognized by some members that the problem would have to be tackled at some stage. The Commission was markedly more sympathetic than it had been in 1976 to the adoption of the concept of the international drainage basin for defining an international watercourse, but at least three members had been opposed to that approach. A possible way to overcome the difficulty would be to include in the draft articles an optional clause that would enable States to specify that, as far as they were concerned, the articles applied to successive or contiguous rivers, to river basins or to international drainage basins.

33. Most members had expressed support for the preparation of articles structured to form a framework convention that would set out general principles of the law of the non-navigational uses of international watercourses binding the parties thereto, and that would be coupled with user or system agreements that would enable the States of a particular watercourse to establish detailed arrangements and obligations governing the uses of the watercourse in question.

34. The Commission had also questioned the nexus between general principles and the projected user agreements. While some members were ready to accept the approach adopted in articles 3 to 7, others doubted whether it was practicable. The nexus should be carefully reconsidered. Mr. Ushakov had not discussed the deficiencies of the nexus but had simply said that, as articles 3 to 7 were cast in treaty form, they should be set aside, because the Commission could not at present assume that the draft would eventually constitute the text of a convention. For the time being, however, the best method would be to draft the articles in the form of a convention, on the understanding that the Commission could decide at any time on the form in which it would submit the articles to the General Assembly. Member States were of course entitled to deal with the Commission's drafts as they saw fit.

35. Reconsideration of what had been termed the nexus problem was not regarded as a matter of first priority. The Commission thought it preferable that he should indicate particular uses of watercourses and the order in which they were to be discussed; he would then prepare reports and draft articles setting out the principles of law that applied or should apply to such uses, and would direct attention to the complementary role of user or system agreements. Once the articles had been drafted, it would be possible to judge whether the principles formulated in them were mainly a codification or essentially a progressive development of international law; the articles themselves would establish the link between those principles and user agreements.

36. In addition, support had been expressed for the idea that the draft articles should take full account of the physical properties of water and that the necessary scientific and technical advice should be obtained. That support was somewhat general, however, and its implications were not clear.

37. The members of the Commission, with two or three notable exceptions, had considered that the articles should deal with the problem of data collection and exchange and the costs thereof. There appeared to be willingness to formulate binding obligations in that regard, although some members had indicated in strong terms their belief that only recommendatory guidelines should be proposed. Mr. Ushakov had pointed out that certain watercourses were not exploited and that it would consequently be otiose to place a responsibility on States to engage in the collection of data for all watercourses. That point could perhaps be met by a provision to the effect that States should fulfil their obligation or comply with the guidelines, as appropriate, only in respect of international watercourses that were exploited. At the same time, even minor watercourses tended to be exploited in some measure.

38. Perhaps the most important conclusion to be drawn from the discussion was that nearly every member of the Commission who had spoken had regarded the topic as ripe for codification and progressive development. Only two members had expressed doubt.

39. Mr. Riphagen (1554th meeting) and Mr. Verosta had remarked on the need to clarify the relationship between the articles and customary international law. Most members also appeared to support the view that, under customary international law, States were not entirely free to treat international watercourses as they pleased.

40. It had been observed that the articles would presumably not govern existing user agreements, and the question arose whether they could be presumed to govern future user agreements. If a State not party to the articles concluded a user agreement with a State party to the articles, it would, by the terms of the user agreement, accept article 6 of the draft. There would be no question of imposing the articles on a user State, since that State would express its consent by adhering to a user agreement that specified that the parties thereto agreed that the articles applied to the user agreement in a residual manner, except where the agreement varied the terms of the articles. In his opinion, that was wholly consistent with the underlying

principles of the Vienna Convention.[9] Mr. Jagota (1555th meeting) did not believe that, in the light of such a requirement, a user State not party to the articles would conclude a user agreement and accept the provisions of article 6. Obviously, the matter called for further reflection. The report made the reasonable assumption that there might be situations in which a State not willing to accept all the provisions of the articles would in fact agree to a user agreement that incorporated the provisions of the articles exclusively in a residual manner, and at the same time permitted the parties to vary those provisions to suit their needs.

41. As to the extent to which the articles should deal with the navigational uses of international watercourses, he believed that those uses could not be excluded entirely, because of their impact on non-navigational uses.

42. A number of questions had been raised about the definition of a user State contained in article 2. For example, did the definition include States that only used, but did not contribute to, the watercourse? And in view of the facts of the hydrologic cycle, which States could be regarded as contributing to a watercourse? Plainly, further reflection would be required before those questions could be answered.

43. With regard to some of the questions put by Mr. Tabibi (*ibid.*), it was his impression that the General Assembly had not consciously decided to confine the topic to watercourses, any more than it had decided to adopt the concept of the drainage basin. He thought the Helsinki Rules reflected the most considered statement on the matter by the International Law Association. The articles would deal with land only in so far as it was necessary for them to deal with the uses and abuses of water. Moreover, it was not proposed that neighbouring riparian States should consult on all their economic planning, but simply that they should collect and exchange minimal data on shared watercourses.

44. As to the question how detailed and technical the articles were to be, in his capacity as Special Rapporteur he had been thinking in terms of articles that would go beyond the general principles of the Helsinki Rules. His view, as illustrated by articles 8, 9 and 10, was that the Commission could consider in detail certain uses of international watercourses, endeavouring to establish a core of obligations that States parties to the articles would undertake, and to suggest further matters that States parties to user agreements might wish to take into account. Such an approach might not prove feasible, but it would be extremely helpful to know whether the Commission wished to proceed further in that direction. Obviously, it would be much easier to prepare a draft on the lines of the Helsinki Rules than a draft that took account of highly technical matters and sought to formulate rules on them.

45. With regard to Mr. Njenga's comments, it was obvious that the exercise of permanent sovereignty over natural resources, like the exercise of sovereignty in general, was subject to international law. States did not enjoy complete discretion to deal with shared watercourses as they pleased. As Mr. Reuter had pointed out, if the Commission did not agree on that point it would be futile to prepare draft articles on the topic.

46. Lastly, Mr. Quentin-Baxter had observed that the problem was not an ideological one; it was a problem involving the interests of States that shared international watercourses. That was a cause for optimism, since it meant that, unlike some other issues, the subject under study was not encumbered by factors that made it extremely difficult for States to reach agreement.

The meeting rose at 1 p.m.

1557th MEETING

Thursday, 21 June 1979, at 10.5 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Francis, Mr. Njenga, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Schwebel, Mr. Tabibi, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Question of treaties concluded between States and international organizations or between two or more international organizations (*continued*)* (A/CN.4/319)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR (*continued*)

ARTICLE 48 (Error)

1. The CHAIRMAN invited the Special Rapporteur to introduce draft article 48 (A/CN.4/319), which read:

Article 48. Error

1. A State or an international organization may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State or that organization to exist at the time when the treaty was concluded and formed an essential basis of the consent of that State or that organization to be bound by the treaty.

[9] See 1554th meeting, foot-note 23.

* Resumed from the 1553rd meeting.