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Summary record of the 1611th meeting

Topic:
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Rapporteur had explained in paragraphs 119–123 of his report that, in that context, the meaning of the word "appreciable" lay somewhere between "substantial" and "minimal", but the point was, where? The phrase "affected to some appreciable extent", which appeared in paragraph 119 of the report, was no clearer. Hence it seemed that the criteria for determining whether another system State could participate in the conclusion of an agreement required further consideration.

36. Lastly, with regard to article 6, he considered that provision for the systematic exchange, as opposed to the collection, of hydrographic data pertaining to the planned uses of water should be made in a sub-system agreement, and not be incorporated in the draft as a general principle of law.

The meeting rose at 1 p.m.

1611th MEETING

Friday, 13 June 1980, at 10.10 a.m.

Chairman: Mr. Juan José CALLE Y CALLE

Members present: Mr. Barboza, Mr. Castañeda, Mr. Díaz González, Mr. Francis, Mr. Jogota, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Mr. Verosta, Mr. Yankov

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The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/332 and Add.1)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[1] (*continued*)

1. Mr. CASTAÑEDA said that the Special Rapporteur's second report (A/CN.4/332 and Add.1), which in the main he endorsed, had the merit of being based on perception of contemporary needs. Rivers and watercourses were used far more widely than in the past, when navigation had been the main use and the sections of a watercourse which passed through each State, as well as the tributaries of rivers, had been regarded, quite logically, as having a certain autonomy, particularly as the exigencies of international life had not yet imposed the concept of shared resources. Since the beginning of the twentieth century, however, there had been a marked change in the situation, which was why a new legal regime for watercourses was required.

2. The first question to consider was whether the Commission should start by drawing up a set of general principles common to all the uses of watercourses, or should deal first with specific uses and then move on to general principles. While either approach was possible, he thought the Special Rapporteur had been right to adopt the first, deductive, approach; for, as pointed out in paragraph 30 of the report, it would be difficult to draw up "a rule dealing with specific activities without knowledge of how the rule fits into a general scheme of things". If the Commission decided to adopt the first approach, it would presumably determine certain general principles applicable to each of the specific uses of an international watercourse and then, in the second stage of its work, lay down the rules applicable to those uses.

3. The second question which had to be considered was whether the Commission should think in terms of a framework agreement that was residual in character and would be supplemented by system agreements. In his view, the Special Rapporteur's approach to the question was well conceived, since system agreements would obviously be required to take account of the widely differing features of international watercourse systems. Some thought should, however, be given to the possibility that, within the residual framework, certain basic principles might be determined which were not themselves residual, but were perhaps even in the nature of a *jus cogens* rule. The concept of shared natural resources, for example, when it had reached its final form, could constitute such a principle.

4. A third question was whether the draft articles should regulate the use of an international watercourse system or the use of the water of such a system. Mr. Ushakov had raised a valid point at the 1607th meeting when he had suggested that, in the case of hydroelectric power stations and timber floating, it was not so much the water itself that was used as the current or flow of the water, which should therefore also be treated as a resource. The Commission's mandate was to prepare draft articles to regulate all the uses of an international watercourse—not only the uses of the water, but also the uses of the current or flow. Possibly that point could be covered by an appropriate reference in draft article 1.

5. The latter part of paragraph 1 of draft article 1 listed certain problems associated with international watercourse systems, and it had been suggested that pollution should be included. That seemed to him to be a most important point. Pollution was an indirect consequence of one of the oldest and most traditional uses of watercourses, namely, as a vehicle for the disposal of human and other waste. With the development of industry, particularly the chemical industry, that problem had inevitably become more acute, and strict regulation was required, bearing in mind, especially, the effects which pollution would have on downstream riparian States. At a symposium on pollution which he had attended, his colleague from the

[1] For the text of articles 1 to 7 submitted by the Special Rapporteur, see 1607th meeting, para. 1.

Netherlands, referring to the recycling of river waters, had said that every glass of water a Dutchman drank had been drunk at least four times before. That was a measure of the size of the problem.

6. The problem of defining an international watercourse involved two questions: first, how should a watercourse be defined for the purposes of the draft articles; and second, what should be the scope of the draft articles? As to the first question, he considered that the Special Rapporteur had been right not to attempt a precise definition at that stage. It would be necessary to do so before long, however, since in examining specific uses, the Commission would need to know exactly what it was talking about. His own preference would be for a definition which took as its central theme the flow of waters in a continuous movement towards a final point. The same idea had been conveyed in a proposal made by the representative of the Soviet Union in the Sixth Committee of the General Assembly, namely, that the term "international watercourse" should be taken to mean "waters flowing along a certain course" (see A/CN.4/332 and Add.1, para. 36). That wording, with some adjustment, could perhaps cover all international watercourse systems within the meaning of the draft articles.

7. The second question, that of the scope of the draft articles, was a matter of vital importance, on which every member of the Commission should express an opinion. For his own part, he considered that, bearing in mind the conditions of modern life, the only valid approach was to take the broad view and adopt the concept of the drainage basin; that, however, was an entirely different matter from deciding whether or not certain elements, such as ground water, should be regarded as part of the drainage basin. He agreed entirely that a river which flowed through the territory of one State but was fed by subterranean waters from another State should not be subject to the legal regime proposed in the draft articles. The essential principle was that of the ecological and hydrological unity of the basin. In varying degrees, the same conditions obtained for the majority of rivers, irrespective of whether they were long, with few tributaries and few riparian states, like the Nile, or short, with many tributaries and many riparian states, like the Rhine or the Danube—and those conditions required that the river be dealt with as one unit.

8. As the world's population increases over the coming decade, so would its water requirements. The classic concept of international rivers, as adopted at the Congress of Vienna (1815), had made sense in the days when supply exceeded demand and the use of rivers had not involved complex issues relating to the rights and obligations of riparian States. The present situation was akin to that which had arisen in regard to exploitation of the resources of the sea: it had been recognized that those resources would have to be used in a rational manner that was fair to all States, and that mankind could no longer enjoy the total freedom it had had when the resources of the sea had been more than sufficient for all the world's needs.

9. Mr. Yankov had advocated, at the 1609th meeting, a pragmatic approach, urging the Commission to rely more on precedent and to guard against a tendency to draw analogies with the law of the sea. While he (Mr. Castañeda) agreed on the need to be pragmatic, he considered that where precedent was concerned it was necessary to be selective. The Commission should not refer to precedents that had been relevant in the very different conditions of the nineteenth century, but only to those that were relevant in the contemporary world. Indeed, that was the decisive criterion for the codification of any subject and the progressive development of the international law governing it. For instance, when the Commission had first considered the question of the continental shelf, none of the classic conditions for codification had existed; there had been no uniform doctrine, no uniform State practice, and virtually no precedent. The Commission had nonetheless drafted a convention which had been adopted and which, twenty years later, was recognized as constituting international law on the subject. Thus precedent should not be over-emphasized. Lawyers dealing with matters subject to great change, particularly technological change, should adopt a flexible approach and look to the future rather than to the past. During the nineteenth century, the only technological change introduced in navigation had been the use of steam for locomotion; that had revolutionized transport, but not the navigational uses of rivers—and still less the non-navigational uses. Radical changes in that area had been relatively recent, and had occurred mainly since the Second World War.

10. The importance of analogy was also sometimes over-emphasized, in his view, but in certain circumstances it could be useful. The examples given in the report, particularly those drawn from the United Nations Conference on the Law of the Sea, were very pertinent, but, once again, it was essential to bear in mind the decisive criterion of the needs of modern man. In the case of the exclusive economic zone, for example, precedent had held that any move to appropriate, or even to mark a preference for, the resources of the sea beyond the narrow band of territorial waters was illegal—and that precedent had been invoked only ten years earlier. Yet, at the Conference on the Law of the Sea, the lawyers had brought about a radical change in a relatively short space of time, on the basis of the clearly expressed will of States. Since 1964, there had been 62 unilateral declarations on rights relating to the exclusive economic zone beyond the territorial sea; that was an extremely important development, and one that indicated the path to be followed in an area of rapid change. Similarly, in the case of marine pollution, it was the international community's sense of responsibility that had led to the adoption of new standards.

11. The Special Rapporteur had wisely decided not to use certain concepts such as the catchment area of draingage basin and, instead, had simply adopted the word "system". It was a felicitous choice, for that word indicated a plurality of interests in an integrated whole, and would make for the requisite broadly based approach.

12. While he agreed with the provisions of draft article 4, he considered that emphasis should be placed on the obligation of States to enter into negotiations in good faith, within the framework agreement, with a view to settling all matters relating to the uses of the waters of an international watercourse system. As suggested by the Special Rapporteur, it might therefore be advisable to state that obligation in more specific terms.

13. He endorsed the basic approach and general principle adopted in draft article 5. At the same time, however, he recognized that the more general problem, referred to by Mr. Reuter (1607th meeting), of the right of States to participate in treaties, was not easy to solve and that some modification of the draft article might therefore be required.

14. With regard to draft article 7, although the legal effects of treating an international watercourse system as a shared natural resource had not been determined, he agreed with Mr. Riphagen (1609th meeting) that there was no need for the Commission to be wary of the idea. There were a number of documents, to which Mr. Barboza (*ibid.*) had already referred, that gave some idea of those effects, and the Commission should therefore be able to accept the "shared resource" approach, on the understanding that at a later stage a special regime would be established. In his view, however, it would be quite wrong for the Commission to say that it could not decide whether water was a shared natural resource until the legal effects of that concept had been determined. It should accept the principle of a shared natural resource and proceed, on that basis, to draw up a balanced and equitable body of rules to govern the rights and obligations of States.

15. Nevertheless, the precise legal character of the concept required further study and analysis before it could be more clearly delineated, particularly as it related to the sovereignty of States. One possibility would be to treat the concept of a shared natural resource as an exception to the exercise of sovereignty, though he had doubts about the viability of that approach. Another possibility would be to accept a form of shared sovereignty, but there again he was not convinced. It seemed to him that, in the case of a river which flowed through several territories, a State could perhaps exercise sovereignty over a part of the shared natural resource commensurate with its uses of that resource. In the case of boundary rivers and lakes, some other solution would, of course, have to be found. In his view, however, the Commission did not need to have a precise idea of the legal character of a shared natural resource before it proceeded to formulate the draft articles.

16. He would recommend that the draft articles proposed by the Special Rapporteur be referred to the Drafting Committee, in the hope that they could then be submitted to the thirty-fifty session of the General Assembly.

17. Mr. ŠAHOVIĆ, referring to the statement he had made at the 1607th meeting, said he had understood that the general debate on the Special Rapporteur's second report would be followed by a discussion on each separate draft article, but now it seemed that all the draft articles might be referred to the Drafting Committee. In his opinion, that step would be premature, because the Commission had not yet agreed on matters that were essential for the drafting of articles to be submitted to the General Assembly. In particular, the Commission should first decide on a method of work.

18. It should also be noted that some of the ideas put forward in the report, although they were accepted by the Commission and reflected in draft articles, would not meet the needs of the great majority of States and did not take due account of concrete situations. It was in order to meet the needs of States that the Commission had been entrusted with the codification and progressive development of the rules relating to the topic under consideration. In these rules, emphasis could be placed either on the uses of water as the common heritage of mankind, or on the interests of user States. However, there was an economic, political and legal fact which could not be overlooked: States were sovereign entities whose authority extended over all their territory. In particular, it extended to the water of watercourses which traversed their territory, even if that water was used by other States in other territories. Hence water should not be considered in the abstract, but having regard to the sovereignty of States.

19. In the past, States had gradually come to co-operate in the settlement of problems raised by international watercourses, and they had worked out legal rules which were now embodied in positive international law. Instead of trying to draw analogies with the law of the sea, the Commission should study the topic under consideration in the light of the solutions that could be provided by positive international law; many of the situations described by the Special Rapporteur could be regulated in that way. The Commission should not place too much emphasis on the innovative aspect of the work, but start out from positive law and adapt it, where necessary, to particular situations. If it dwelt too much on problems that were not really essential, it would be in danger of complicating its task.

20. For instance, it would be useless to discuss the concept of shared sovereignty as an exception to the principle of permanent sovereignty. He could not accept such a concept, and doubted whether it would

be acceptable to the great majority of States. The introduction of that concept might lead the Commission's work in an entirely different direction. It should not be forgotten, for example, that when rules had been formulated on freedom of navigation on international watercourses, a serious dispute had arisen between riparian States and other States which had claimed that they, too, enjoyed such freedom, independently of the sovereign rights of riparian States. It was to be feared that such a situation might arise again, and that industralized States, invoking the concept of shared sovereignty, might claim the right to use the waters of certain international watercourses in defiance of the basic principle of permanent sovereignty.

21. With regard to terminology, he agreed with the Special Rapporteur that it was too early to define the term "international watercourse", though he noted that draft article 3 contained four alternatives. The Special Rapporteur should state his preference, in the light of the Commission's discussion and of all the political, economic, legal and other consequences those alternatives might have. Draft article 1, on the scope of the draft articles, would depend directly on the definitions appearing in draft article 3.

22. The Special Rapporteur had generally given good reasons for his decision to use one term rather than another, but, in paragraph 56 of his report, he had justified the use of the term "system" on the basis of principles adopted at Buenos Aires in 1957 by the Inter-American Bar Association. His reasoning was not very convincing, because that Association seemed to have made a distinction between a "watercourse" and "system of rivers or lakes". Now that he had adopted the term "system States", it might be doubted whether it really applied to all States belonging to a system, whether they were riparian States or not. The concept of a river basin should also be more clearly defined and should, perhaps, not include tributaries.

23. In view of those uncertainties, he thought the discussion should be continued until the Commission reached a consensus on articles which could then be referred to the Drafting Committee.

Co-operation with other bodies* (*continued*)

[Item 10 of the agenda]

Statement by the Observer for the Inter-American Juridical Committee

24. The CHAIRMAN said that it was his privilege, on behalf of all the members of the Commission, to extend a very warm welcome to Mr. Rubin, the Observer for the Inter-American juridical Committee, and to invite him to address the Commission.

25. Mr. RUBIN (Observer for the Inter-American Juridical Committee) said that the Inter-American Juridical Committee had been established in 1939 as the Inter-American Neutrality Committee and had been given its present title and status in 1942, at the Third Meeting of Consultation of Ministers of Foreign Affairs of the American Republics. Its mandate, given to it by the Organization of American States (OAS), was similar to that of the Commission, and it was clear that the two bodies had profited from the co-operation they had been carrying on over the years. The Committee had certainly benefited from Mr. Šahović's visit in 1979, and he hoped that the Commission would benefit from his own visit at the current session.

26. He then drew attention to the loss to the Committee and to the world of international law as a whole, caused by the recent deaths of two former presidents of the Committee: Mr. José Joaquín Caicedo Castilla, who had died from natural causes; and Mr. Adolfo Molina Orantes, who had been tragically killed during the occupation of a diplomatic mission in Guatemala.

27. One of the main items on the Committee's agenda was work in the field of private international law. Two specialized inter-American conferences on that subject had been held, in Panama in 1975 and Montevideo in 1979, under the auspices of OAS, for which the Committee had prepared preliminary documentation and draft conventions on topics such as letters rogatory, the taking of evidence abroad and proof of judgements. At the conference held at Montevideo, the United States of America delegation had suggested the adoption of an additional protocol to the Inter-American Convention on the Taking of Evidence Abroad. With the assistance of the secretariat of OAS and its Legal Counsel, a first meeting of experts on private international law had been held in April 1980 at Washington, D.C., and had discussed in detail the proposed additional protocol. That protocol would be very useful in reconciling differences between the two great systems of law which existed on the American continents, namely, common law and civil law.

28. He drew attention to the work of that conference because it had highlighted the great value of the technique of convening committees of experts to deal with specific issues within the broad areas in which a body like the Committee generally worked. That technique should, in his opinion, be used more widely, because members of the Committee had the problem of dealing with difficult technical issues with which they were not always entirely familiar. Indeed, increased use of that technique should make the Committee's meetings even more productive than they had been in the past.

29. Both the Committee and the Commission also faced the problem of trying to complete work on the many important and difficult topics typically on their agendas during the terms of office of the Special Rapporteurs assigned to those topics, on which progress often seemed to be made with the rapidity, if

* Resumed from the 1606th meeting.

not the certainty, of a glacier moving down a long slope. The Committee's agenda now included 11 very complex items, and it was unlikely that it would be able to deal thoroughly with any of them in the short time available at the two sessions it held each year.

30. At its most recent session, in January-February 1980, the Committee had however completed work on a draft convention defining torture as an international crime. Although the Committee had dealt reasonably successfully with the definition of problems raised by the question of torture, the draft convention was certainly not the last word on the subject, and would also have to be discussed by the Inter-American Commission on Human Rights. The agenda for the Committee's next session would include a proposed revision of the inter-American conventions on industrial property and the settlement of disputes relating to the law of the sea. The agenda item on the law regarding international peace and security might, however, be too broad for useful discussion by a regional juridical committee such as the one he represented.

31. Since many of the problems of the Commission and the Committee were very similar, he suggested that it might be useful for them, particularly since both of their agendas included an item on the jurisdictional immunities of States, to establish a more regular system of liaison by which they could exchange documentation and information on their programmes of work, if possible well in advance of their annual sessions, in order to enable their respective observers to make substantive suggestions while taking part in those annual meetings.

32. The CHAIRMAN thanked the observer for the Inter-American Juridical Committee, on behalf of the Commission, for his interesting account of the work being carried out by the Committee. Although there was a long tradition of co-operation between the Commission and the Committee, the suggestion by the observer for the Committee that such co-operation should be expanded was certainly a good one, which might be explored by the secretariats of the two bodies with a view to more regular exchanges of information and documentation.

33. The Committee's technique of convening committees of experts was a very interesting one, and he had been pleased to hear that it had been effectively used during the Committee's work on the additional protocol to the Inter-American Convention on the Taking of Evidence Abroad. In that connexion, he noted that, under article 16, paragraph (*e*), of its Statute, the Commission also could consult with experts.

34. Mr. ŠAHOVIĆ said that he had had the honour and pleasure of attending the most recent session of the Inter-American Juridical Committee, which he thanked for its kind hospitality. He welcomed Mr. Rubin, whose contribution to the Committee's work he had greatly appreciated.

35. The session of the Committee which he had attended had been particularly fruitful, because the Committee had adopted a draft convention defining torture as an international crime. He had found that its work was characterized by efficiency and informality.

36. The Committee's deliberation showed a long tradition of careful consideration, following a general approach characterized by concern to derive rules from the sources of law available, for application to regional conditions, taking account of the requirements of the subject-matter and the universal development of international law. All the work being done by American jurists should be regarded as contributing to the development of international law, as was shown by the placing on the Committee's agenda of an item on the law regarding international peace and security, the study of which would take special account of the results of the work of United Nations bodies such as the Sixth Committee and the Third Committee of the General Assembly.

37. Since the Committee had been the first body with which the Commission had established co-operation, relations between them were of very long standing. In that connexion, he observed that the Committee had been set up even before the Commission, and that jurists from the American continent had always been wholeheartedly devoted to the development of international law. The Commission should maintain close relations with the Committee and he welcomed the suggestions to that effect made by Mr. Rubin.

38. Mr. FRANCIS, speaking on behalf of the Latin American members of the Commission, said that he wished to express condolences to the observer for the Inter-American Juridical Committee on the deaths of two of its former presidents and to thank him for his interesting account of the Committee's current and future work.

39. It was of the greatest significance that an observer from the Committee regularly attended the Commission's sessions. Indeed, the Inter-American system to which the Committee belonged was truly the senior regional political organization and legal co-operative institution and had been an inspiring force in the establishment of organizations of a universal character, such as the League of Nations and the United Nations. The Committee was thus a vital institution, and its commitment to the codification of international law and a stable world legal order was most commendable. He hoped that the Committee's contacts with the Commission would continue to promote its progress and development.

40. Mr. JAGOTA, speaking on behalf of the members of the Commission from the Asian region, also expressed sympathy to the observer for the Inter-American Juridical Committee on the deaths of two of its past presidents and thanked him for

reporting on the Committee's work with a view to continued co-operation between the two bodies.

41. The Committee's work on various topics of international law was of great value to the Commission and its Special Rapporteurs as source material for their own work on draft articles that would be proposed for acceptance by the international community as a whole. The Committee was to be commended for the work on which it had made definite progress in recent years, and particularly on the draft convention defining torture as an international crime.

42. He was also grateful to the observer for the Committee for referring to the technique of convening committees of experts to deal with complex and difficult topics. That technique might be used by the Commission in the future. The suggestion made by the observer concerning closer contacts between the Commission and the Committee was also an excellent one, to which effect should be given as soon as possible.

43. Mr. USHAKOV said that there were not only very close links between the Commission and the Committee; there was also competition between them, which could only benefit mankind, as would certainly be demonstrated by the parallel work being carried out by the two bodies on jurisdictional immunities. He wished the Committee every success in its future work.

44. Mr. RIPHAGEN, speaking on behalf of the western European members of the Commission, express appreciation to the observer for the Inter-American Juridical Committee for the overview he had provided of the Committee's work, from which the Commission could certainly benefit. Indeed, close co-operation between the two bodies would assist the development of international law as a whole, for the work of a regional legal institution like the Inter-American Juridical Committee complemented that carried out by the Commission.

45. Mr. SCHWEBEL also expressed appreciation to the observer for the Inter-American Juridical Committee for the informative report he had given on the Committee's substantive work and methods of operation.

The meeting rose at 1 p.m.

1612th MEETING

Monday, 16 June 1980, at 3.10 p.m.

Chairman: Mr. C. W. PINTO

Members present: Mr. Barboza, Mr. Calle y Calle, Mr. Castañeda, Mr. Díaz González, Mr. Francis, Mr. Jagota, Mr. Quentin-Baxter, Mr. Reuter, Mr. Riphagen, Mr. Šahović, Mr. Schwebel, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta, Mr. Yankov.

Also present: Mr. Ago.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/332 and Add.1)

[Item 4 of the agenda]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[1] (*concluded*)

1. Mr. SCHWEBEL (Special Rapporteur), summing up the discussion, said that at the 1607th meeting Mr. Reuter had raised the question of the scope of the draft articles and the meaning to be attached to the term "international watercourse system", and had suggested two possible approaches. Other possibilities had been suggested by other members of the Commission. His own preference was for the first alternative suggested by Mr. Reuter, namely, that the term "international watercourse system" should be used without commitment as to its full contours, which could better be decided upon as the Commission's work progressed. That solution would be wholly consistent with the other alternative suggested by Mr. Reuter, and by a number of States, of applying a particular definition to particular provisions, but at a later stage.

2. He also agreed with Mr. Reuter that the right to negotiate was an important and sensitive one. But, when that right was confined to a shared natural resource, it was not unduly daring to insist on it. In fact, the *Lac Lanoux* arbitration had recognized its existence in respect of international water resources.

3. He fully agreed with Mr. Šahović (*ibid.*) that the Commission should strain out customary international law from the treaties and jurisprudence on the topic. As to the difficulties involved in treating the technical aspects of the topic, they must be dealt with if the Commission was to go beyond the level of general principles. There was no need to tackle them at the current session, however, or in all probability, at the next session. Like Mr. Šahović, he believed that, at the present stage, the Commission should seek to achieve concrete results in devising general principles applicable to the uses of international watercourses as a whole.

4. He saw every merit in Mr. Evensen's suggestion (*ibid.*) that non-navigational uses and pollution should be referred to in appropriate terms. Although the Commission had always thought of giving pollution a special place, that did not exclude specifying it earlier in the draft articles as well. Unlike Mr. Evensen, he found the term "system State" quite apt, but he would give it further consideration.

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[1] For the text of articles 1 to 7 submitted by the Special Rapporteur, see 1607th meeting, para. 1.