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Summary record of the 1555th meeting

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ber of river projects had given rise to user agreements, for example for the use of electric power, but dam projects on main rivers had led to serious legal, economic, social and other problems. Legal difficulties could of course be overcome if States displayed the necessary political will. The draft articles could well serve as a model for States wishing to enter into user agreements. The world was entering a new era in international law, in which a balanced approach had to be maintained in all cases.

The meeting rose at 6 p.m.

1555th MEETING

Tuesday, 19 June 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

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

Tribute to the memory of Professor D. P. O'Connell

1. The CHAIRMAN informed the Commission of the sad news of the recent death of Professor D. P. O'Connell, a scholar who had been well known to the Commission and had made a great contribution in particular to the study of the topic of State succession. He suggested that the Commission send a message of condolence to Professor O'Connell's family.

It was so decided.

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

[Item 5 of the agenda]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

2. Mr. FRANCIS said that the Special Rapporteur's preliminary but none the less masterly report would doubtless prove of great interest to jurists throughout the world. He had in mind, for instance, the interest shown in the topic at the nineteenth session (1978) of the Asian-African Legal Consultative Committee, which he had attended as an observer for the Commission. For the first time in its history, the Commission was embarking on a task of codification on the basis not of abstract legal theories but of scientific and technical data. Moreover, it was dealing with the international regulation of one of the most important aspects of national development, namely, resource management.

3. It was apparent from the replies of States to the Commission's questionnaire [1] that no decision could be taken immediately as to whether the geographical concept of an international drainage basin should be adopted as the basis for studying the legal aspects of the non-navigational uses of international watercourses. In addition, it was evident that any draft articles adopted by the Commission must be residual in character and widely acceptable to States, and also take account of the relationship between non-navigational and navigational uses of international watercourses and of such matters as flood control and soil erosion.

4. Certain fundamental issues would have to be tackled from the outset. To give an example, let it be assumed that a major watercourse, used *inter alia* for navigation, traversed several States and had an important tributary which lay entirely in another State, whose territory abutted the major watercourse solely at the confluence of the latter and the tributary. What should be the international obligations of the latter State in respect of navigation and other uses of the dominant watercourse towards the riparian States downstream from the confluence? Again, where a watercourse abutted more than one State and, because of rainfall in an upstream State, caused floods in a downstream State, what should be the international obligations of the former State towards the latter? Those were some of his reflections on the Special Rapporteur's report. He had little hesitation in endorsing the Special Rapporteur's general approach.

5. Mr. TABIBI said that the topic had important economic, social and political implications and should be examined with the utmost care. The Commission was fortunate to have a Special Rapporteur from a country that not only had great technical and scientific experience but that was also fully alive to the problems involved, being an upper riparian State in relation to Mexico and a lower riparian State in relation to Canada.

6. In view of the increase in world population and advances in science and technology, the Commission's consideration of the non-navigational uses of international watercourses was a matter of very great importance. In recent years, bodies in the United Nations system and private institutions such as the International Law Association and the Institut de droit international had been seeking ways to regulate and improve the use of water, but they seemed to have approached the matter in differing terms, on a regional and geographical basis, as a result of which there were no clear and universal principles of international law on the subject. One writer had stated that it was doubtful whether international law recognized any ser-

[1] See 1554th meeting, foot-note 6.

vitude conferring a right to the uninterrupted flow of streams, as did civil and common law; upstream States had not acknowledged any general obligation to refrain from diverting water and had thereby denied downstream States the benefits of the rivers they shared. Only by treaty had upstream States accepted restrictions in that respect. Other writers had similarly concluded that there were no generally recognized rules of international law concerning the economic uses of international rivers. No international tribunal had delivered a decision directly touching on the legal principles affecting diversion of international watercourses. The Permanent Court of International Justice, in its judgement on the *Diversion of Water from the Meuse* case,[2] had explicitly confined itself to the provisions of the treaty concerned and had refused to consider the customary rules of international law concerning international watercourses.

7. The set of rules proposed by the Institut de droit international as far back as 1911, and the various and sometimes contradictory drafts adopted since 1954 by the International Law Association, had been premature attempts at codification. Some decisions of the Supreme Court of the United States of America had contributed to the case law governing the rights and duties of riparian States, but the States concerned formed part of a federation, and no judgement of that Court had referred to a particular rule of international law that was applicable to the use of waters of a river. One commentator had observed that the United States Supreme Court had not been obliged to seek light from the law of nations in enunciating the rules to be applied, and that it had not hesitated to deny that an American Commonwealth might rightfully divert and use, as it chose, the waters flowing within its borders in an interstate stream, regardless of any prejudice that such action might cause to other countries having rights in the stream below its boundaries.

8. It was clear that the law on the non-navigational uses of rivers had not been fully developed. Each river had historical, social, geographical and hydrologic peculiarities of its own. Views on the uses of international rivers had been subject to much change; one Austrian author had stated that most writers, from Grotius to the end of the nineteenth century, had simply treated the subject in accordance with their own general ideological concept of international law. Harmon, the United States Attorney-General at the time of the dispute in 1895 between the United States and Mexico over the waters of the Rio Grande, had taken the view that international law imposed no obligation upon the United States to share its waters with Mexico, since the United States had sovereignty over the Rio Grande in its own territory. Although the United States was unlikely to defend the Harmon doctrine at the present time, in view of the importance it attached to its interests as a lower riparian State, many still invoked the argument of sovereignty. General Assembly resolution 3171 (XXVIII), concerning permanent sovereignty over natural resources, could in some respects be regarded as a revival of the Harmon doctrine.

9. The ineffectiveness of that doctrine could perhaps be ascribed to the emergence in international law of the involuntary obligation. One writer had rightly said that all good laws, whether national or international, must be the fruit of practical experience. Others believed that nations must negotiate in order to resolve particular problems relating to international rivers. If international river basins were considered as constituting a single *res* jointly owned by the riparian States concerned, the first duty of those States was to consult one another. Although a duty to negotiate without any legal rules to govern the subject-matter of the negotiations might seem somewhat problematic, satisfactory results had none the less been achieved in regard to international rivers through negotiation. In some cases, however, a negotiating State might attempt to extort a heavy price for giving a consent which, if broad and generally recognized principles existed, it could not reasonably withhold.

10. To some extent, the subject of the non-navigational uses of watercourses was not ripe for codification. Every river had unique features; furthermore, little was known about return flow, subterranean water and the cyclical nature of stream flows. Experience indicated that, although certain principles were applicable to all nations, it was difficult to move rapidly beyond that minimum body of rules. The Commission should therefore proceed carefully, taking account of the principle of national sovereignty and also of the right of peoples over their natural resources, a right that called for observance of the rule that every State must behave in such a way as not to damage the rights and interests of others.

11. The principle of equitable apportionment of water, mentioned by the Special Rapporteur, had been accepted by the International Law Association. The best way of determining equitable apportionment was for the parties concerned to engage in direct consultations. In that connexion, he wondered whether the Helsinki Rules adopted by the International Law Association in 1966[3] did not contradict the principles adopted by the Association at Dubrovnik in 1956[4] and in New York in 1958.[5]

12. The settlement of disputes relating to international watercourses by voluntary agreement could best be assisted by recommendations from impartial technical commissions. One writer had expressed the view that international lawyers should be cautious about enouncing principles of substantive international law,

[2] *P.C.I.J.*, Series A/B, No. 70, p. 4.

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

[4] ILA, *Report of the Forty-seventh Conference held at Dubrovnik, August 26th to September 1st, 1956* (London, 1957), p. x, resolution 3.

[5] ILA, *Report of the Forty-eighth Conference held at New York, September 1st to September 7th, 1958* (London, 1959), p. viii, resolution 1.

but should lead the way in suggesting procedures likely to produce voluntary agreement and voluntary procedures for the settlement of disputes.

13. With regard to the definition of an international watercourse, he considered that the General Assembly had been wrong to adopt the concept of a watercourse enunciated in the Helsinki Rules. The Final Act of the Congress of Vienna had simply stated that an international river was a river that separated or traversed the territory of two or more States.[6] It might of course be successive or contiguous where it served as a boundary between States; if successive, it was under national jurisdiction; if contiguous, sovereignty was shared and prior agreement was required for the water to be used. The term "drainage basin" was suitable for use in an engineering and technical context, but vague, and it was better, for the purposes of a study of the legal aspects of fresh water uses to employ the term "watercourses" or "international rivers" or "waters".

14. Before adopting a position with regard to the draft articles, he would be grateful for clarification from the Special Rapporteur on a number of points. First, had the General Assembly been correct in adopting the concept of non-navigational uses of international watercourses, instead of the clear historical concept of watercourses used for irrigation? Secondly, should the Commission pay greater attention to the Helsinki Rules than to other texts adopted by the International Law Association, bearing in mind that many of those rules had been formulated to protect the special interests of certain States? Thirdly, was the Commission dealing in the present topic with watercourses or with the entire national territory of States in possession of lakes or rivers? It should be remembered that a drainage basin might in some cases cover the whole of a State's territory. Should a riparian State lay its watercourses open to inspection by a neighbouring riparian State simply for the sake of co-operation, bearing in mind the concepts of territorial integrity and the right of nations to sovereignty over their natural resources? If the Commission went so far as to endorse the drainage basin approach, it should also recognize that all coastal States should be ready to share the wealth of their continental shelf and of their territorial waters with the other countries on the continent in question, especially the land-locked and geographically disadvantaged States. Also, an obligation concerning data collection and exchange might prove extremely burdensome for certain countries.

15. Unfortunately, the Commission had little time to consider the present report, but it should make its views on the topic known in order to assist the Special Rapporteur in his future work. A further questionnaire should be sent to Member States, as the number of States that had replied to the previous questionnaire accounted for only a small proportion of the total membership of the United Nations.

16. Mr. DÍAZ GONZÁLEZ agreed with the Special Rapporteur that a relationship existed between the law of the sea currently in process of elaboration and the question of the non-navigational uses of international watercourses, which involved a new international right to development. For developing countries, particularly the countries of Latin America, water was of fundamental importance; it was regarded as a natural resource, and both upstream and downstream riparian States therefore had a duty to preserve and protect it.

17. Hitherto, international watercourses had been dealt with in law as a part of *jus communicationis*, but the use of a watercourse as a means of transport involved a number of factors prejudicial to the use of the watercourse for mankind's other purposes. Hence the Commission's aim must be to regulate the use of international watercourses for the benefit of all, in an equitable manner. A body of legal rules governing the use of international watercourses had in fact emerged, but those rules lay in bilateral and multilateral agreements between the States directly concerned. Some of those agreements were of major importance. For example, the agreement concluded in 1978 between riparian States of the Amazon River[7] covered an area of 4,787,000 square kilometres. However, the existing agreements did not point the way to general rules that would be valid in all cases.

18. The Special Rapporteur's report was therefore of great importance. Its introductory part was acceptable, but with regard to the draft itself he saw little point in speaking of "associated problems" in article 1, paragraph 1, when the purpose of the articles was precisely to deal with those problems, together with other matters such as pollution. Article 5 was incompatible with article 6 of the Vienna Convention.[8] The freely expressed will of the parties to a treaty constituted the law; article 5 of the draft should reflect that fundamental principle and specify that the draft articles would govern the relations between user States in the absence of an agreement between the parties. Failing that, the Commission would be restricting the capacity of States to conclude agreements freely.

19. Yet the report, which contained important scientific and technical data, constituted a suitable point of departure for the Commission's consideration of the topic, although it was essential to adopt a cautious approach to the formulation of articles on a matter of such magnitude as the preservation and use of international watercourses. Upstream riparian States obviously had a right to use the waters in their territory, but they must not use them in such a way as to prejudice the rights of downstream riparian States, for the waters concerned represented a shared natural resource that must be protected by all the States concerned. Such an approach was now adopted in the increasing number of agreements being concluded on regional integration.

[6] See A/CN.4/320, para. 43.

[7] *Ibid.*, para. 98.

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

20. Mr. JAGOTA said that in dealing with international watercourses the Commission could make a significant contribution to an important and challenging subject. Given the special characteristics of the subject, however, it must fully understand the scientific and technical data involved.

21. The central issue that the Commission was required to consider, under General Assembly resolution 2669 (XXV), was the non-navigational uses of international watercourses, for that was the area where the law had yet to be developed and codified. Navigational uses, by contrast, were already largely regulated. Non-navigational uses included uses for domestic purposes, irrigation, agriculture, industry, generation of hydroelectric power, and fisheries, all of which were particularly important for developing countries. The question, therefore, was how to promote the co-operative and equitable use of water for the social and economic development of those countries without disregarding the needs of developed countries. He was not opposed to the Commission considering navigational uses, but that might take place later. Mr. Francis had rightly drawn attention to the question of the obligations of a State whose territory was traversed by an important tributary of a main river which was used to a great extent for navigation.

22. He agreed that the Commission should consider first the categories of uses of international watercourses, then the specialized problems involved and thereafter the relationship between those two matters. He also agreed that, since there was no general law on the subject and since all rivers and river systems had their own special characteristics, the States using a given river system should be free to regulate that system in the manner they deemed appropriate, but within the framework of basic general rules. The Commission's task was to formulate those rules. In doing so, it should draw upon the wealth of literature and information available, so as to determine which rules were general and therefore fundamental in character and which were in the nature of particular regulations and might be covered by user agreements. Some user agreements included a clause providing that the agreement did not affect the obligations and rights of the parties under international law. In such cases it was difficult to distinguish fundamental from particular law, but it should nevertheless be possible to do so if reference were made to the terms of the agreements themselves and to the work of other bodies involved in the matter. The Commission would have to consider the relationship between fundamental rules and user agreements.

23. He endorsed the views expressed in paragraph 55 of the Special Rapporteur's report on the definition of the term "international watercourse", and agreed that the Commission should deal with that later. Since the main issues would probably be tributaries and groundwater, the Special Rapporteur might wish to draft further articles catering for those two matters, and also an optional clause of the kind referred to in his opening statement (1554th meeting, para. 11). That should provide an effective solution to the problem represented by the difference of views on the question of definition.

24. Turning to the existing draft articles (A/CN.4/320, para. 2), he said that articles 1, 2 and 3 were generally acceptable. In connexion with draft article 2, would a third country that used a river solely for transport be regarded as a user State? That question would lose much of its significance if the draft articles were confined to non-navigational uses, but there were other matters to be considered, such as that of a power plant in a third country that used the water of an international watercourse to which it did not contribute and which it did not otherwise use directly.

25. He suggested that the Commission should revert to draft article 4 when it had completed its consideration of the substantive issues which the article involved.

26. Draft articles 5, 6 and 7 were crucial, in that they established the nexus between fundamental rules and user agreements. Assuming that an international watercourse was used by four States, A, B, C and D, and that State A alone was a party to the articles, States B, C and D would have the option, under article 5, of becoming parties to a user agreement in regard to that watercourse. If they did so, paragraph 1 of article 6 would apply, in other words, the user agreement would have to be in conformity with the fundamental rules. Moreover, under paragraph 2 of article 6, any matters not regulated by the user agreement would be subject to the fundamental rules residually. Yet article 7 would bring the articles into force for a given international watercourse only if two States were parties to them. On what basis, therefore, could the articles be imposed on States B, C and D in a situation in which only one of the partners concerned, namely, State A, was a party to the articles?

27. Of course, if the articles embodied customary rules of international law, they would apply to States B, C and D, regardless whether they were parties to the articles. But that was quite different from the Special Rapporteur's novel proposition of saying that, if States B, C and D decided to enter into a user agreement, it must be in accordance with the fundamental rules even if those States were not parties to the articles. That would be of no practical value and would also be an entirely false basis for linking fundamental and particular law. If the purpose of a user agreement was to give autonomy to the parties, so that they could take account of the special characteristics of their international watercourse by treating it as they deemed appropriate, fundamental law should not be imposed on them unless they were parties to that law. Nor could the problem be resolved by replacing the words "one or more user States" in draft article 5 by "two or more user States", since the legal problem remained, namely, how to impose an obligation on States adjoining an international watercourse to abide by fundamental rules that they had not accepted. The short answer was through the device of consent, since such States had the option of becoming parties to the

articles; but that was a matter of persuasion, which was not the same as a legal requirement.

28. The Special Rapporteur had explained at the 1554th meeting why he had drawn a distinction in draft article 7 between the general and particular entry into force of the draft articles and why, in that connexion, the Convention relating to the development of hydraulic power affecting more than one State,[9] had been ineffective. In his view, the Convention could have been effective in practice only if it had truly embodied customary law, and that would apply to the rules to be drafted by the Commission as well. In that connexion, he fully endorsed the statement in paragraph 109 of the report to the effect that, to the extent that the draft articles codified customary international law, they formulated law binding on all States, whether or not parties to the articles. For the time being, therefore, the Commission should perhaps concentrate on the quality of the fundamental rules it was seeking to develop. His own experience was that the regulation of a particular international watercourse had always been settled under general international law. In any case, it was unnecessary to make the entry into force of the rules conditional on ratification or accession by merely two States. The only precedent he could find for that was in article 20 of the 1965 Convention on Transit Trade of Land-locked States,[10] but in that case the provisions on entry into force were of general and not particular application.

29. In the light of those considerations, he suggested that the Commission should revert to draft articles 5, 6 and 7 after it had dealt with the substantive issues involved.

30. Draft articles 8, 9 and 10 concerned important questions of co-operation and economic development. Paragraph 1 of article 9 imposed an obligation on contracting States to make data available to co-operating States and other contracting States. In his view it would be better for any such obligation to be regulated by a user agreement, in line with general practice, rather than under fundamental rules. The examples cited in paragraph 129 of the Special Rapporteur's report supported that view. Moreover, paragraph 1 of article 9, by referring to paragraph 2 of article 8, turned an indication of what was desirable into a binding obligation. He none the less agreed with the broad principles underlying the provisions on collection and exchange of data, although they might perhaps be expanded and inserted later in the draft articles.

31. In conclusion, he urged the Commission to concentrate on the substantive law of non-navigational uses of international watercourses before entering into the question of the nexus between fundamental law and user agreements.

32. Sir Francis VALLAT said it was his impression that members of the General Assembly probably had more real interest in the topic under consideration than in any other with which the Commission was currently concerned. It would therefore be most regrettable if the Commission failed to report on the topic positively. He suggested that the debate on the item should not yet be closed and that the Commission should set itself a minimum target for the current session, which in his view should be the adoption of an article on the scope of the draft articles. In addition, since the technical information furnished by the Special Rapporteur showed clearly that the contribution of water, within the meaning of draft article 2, was indivisible from that of the use of water, he believed the Commission would agree that the concept of contribution could be written into the concept of use of water, as put forward in draft article 1, so as to form the basis of a key article for consideration by the General Assembly at its next session.

33. In his view, draft article 3, which provided that the articles could be supplemented by user agreements, must be examined in conjunction with draft articles 4 to 7, since they all involved the same relationship problem. He agreed that those articles, and the question of the definition of an international watercourse, should be considered later. The case for establishing some kind of relationship between the articles and user agreements had been adequately made out by the Special Rapporteur, although how the relationship was to be expressed and exactly what it should be was difficult to foresee. The Commission would have to give further consideration to the substance of the draft articles before it could reach any conclusion on that point. It was clear, however, from the wealth of information available on existing agreements, that it was essential to draft the articles in such a way that those agreements would be given adequate scope. In general, therefore, he could agree with the concept of a framework agreement. That aspect of the matter should be pinpointed in the Commission's report.

34. In considering the question as a whole, the Commission should concentrate on the use of the water of international watercourses rather than on international watercourses in the abstract sense. Also, in its report, it should ask the Special Rapporteur to examine more closely the various uses of water, to recommend to the Commission in 1980 the order in which the different aspects of the topic might be considered, and possibly to propose some further draft articles. He was grateful to the Special Rapporteur for having already submitted a series of draft articles. It was important that the Commission should not be asked to decide on isolated articles and that they should be able to see the articles in perspective. He hoped the Special Rapporteur would be able to broaden that perspective in time for the Commission's next session.

35. Mr. TABIBI endorsed the views expressed by Sir Francis Vallat on how the Commission should proceed. He suggested that the Commission's timetable might be adjusted to allow members more time for consideration of the item.

The meeting rose at 1.10 p.m.

[9] See A/CN.4/320, para. 86.

[10] United Nations, *Treaty Series*, vol. 597, p. 3.