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Summary record of the 1855th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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needed was an objective and external test, somewhat akin to the test in English law of the "man on the Clapham omnibus". Secondly, it was difficult to know what the precise meaning of "reasonable and equitable" was in the context: reasonable and equitable in the light of the needs of the watercourse State, or reasonable and equitable when such needs were weighed against other needs? It had been suggested that the question should be resolved by negotiation, but it would be hard to convince the State concerned that its use or share of the waters of the watercourse was not reasonable. He therefore suggested that the word "reasonable" should be replaced by the word "fair"; it would be appealing to a State's sense of justice to ask it to be fair and it would, in all probability, respond by acting in a fair manner. The same comment applied to the words "reasonable and equitable" in draft article 7.

30. Referring to draft article 8, he noted that population growth should also be regarded as a major factor in determining what constituted fair and equitable use of the waters of a watercourse. In a letter to *The Times* of London of 3 July 1984, Mr. Frank Vogl of the World Bank had pointed out that, by the middle of the twenty-first century, the population of the poorer nations of the world would be more than double its current level of 3.6 billion and that, as a result, there would be increased pressures on arable land, natural resources, urban conditions and, indeed, on political stability. The situation verged on the inflammable and, in the interests of the entire world, the right balance had to be established between the various needs. He agreed with Mr. Calero Rodrigues that the list of relevant factors should not be incorporated in the text of article 8, but should be left to the commentary.

31. Although he welcomed the Special Rapporteur's initiative in introducing the new draft article 28 *bis*, he considered that the reference to "internal armed conflicts" should be deleted, since it was tantamount to giving advance recognition to insurrection and internal disturbances, wherever they occurred.

The meeting rose at 12.10 p.m.

1855th MEETING

Thursday, 5 July 1984, at 10 a.m.

Chairman: Mr. Sompong SUCHARITKUL

Present: Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz Gonzáles, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov.

Welcome to Mr. Kalinkin, Director of the Codification Division of the Office of Legal Affairs and Secretary to the International Law Commission

1. The CHAIRMAN said that it was his pleasure to welcome Mr. Kalinkin, the newly appointed Director of the Codification Division of the Office of Legal Affairs and Secretary to the International Law Commission. As a member of the United Nations Office of Legal Affairs, Mr. Kalinkin had worked for a number of years on matters relating to the legal aspects of outer space and had been associated in the formulation of the Treaty on Principles governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, and the Convention on International Liability for Damage Caused by Space Objects. Subsequently, he had held a number of important positions with his Government in the field of international law and had taken part in major international legal conferences.

2. Mr. KALINKIN (Secretary to the Commission) said that it was a great honour to be present as Secretary to the International Law Commission, a unique institution of great prestige and distinction. He assured members of his fullest co-operation and looked forward to providing the Commission with all the necessary substantive services.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/367,[1] A/CN.4/381,[2] A/CN.4/L.369, sect.F, ILC (XXXVI)/Conf. Room Doc.4)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*continued*)

3. Mr. BARBOZA said that the chief merit of the set of articles submitted by the Special Rapporteur was that they tried to reconcile the divergent opinions expressed in the Commission; but personally he would have preferred to keep to the former version. In his excellent oral statement (1831st meeting), the Special Rapporteur had pointed out that the subject entrusted to him was not of a purely legal character, but also had political and economic aspects, which were really what the Commission was studying. But the Commission was a body which expressed itself in legal language, by formulating articles to regulate international relations; consequently, its work was concerned with international obligations. Chapter III of the draft, which dealt with co-operation and management, clearly showed the course the Commission should adopt. According to draft article 10, paragraph 2,

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[1] Reproduced in *Yearbook ... 1983*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[3] For the texts, see 1831st meeting, para. 1. The texts of articles 1 to 5 and X and the commentaries thereto, adopted provisionally by the Commission at its thirty-second session, appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 110 *et seq.*

for example, watercourse States "should obtain the appropriate assistance from the United Nations Organization and other relevant international agencies ... at the request of the watercourse States concerned". But that language did not enunciate a legal obligation; it would be more suitable in a General Assembly resolution or in the conclusion of an international conference such as the United Nations Water Conference. Moreover, international organizations would not be parties to the future convention. As to the obligations embodied in draft articles 11 to 14, such as the obligation to notify, they did not derive from the obligation to co-operate, but from the obligation not to cause appreciable harm. It was obvious that the latter obligation had a much more precise content than the rather vague obligation to co-operate, and the whole draft was based on it. It followed that articles 11 to 14 should be placed in a chapter other than chapter III, on co-operation and management. On the other hand, provisions such as those concerning the establishment of commissions and the collection, processing and dissemination of information and data were correctly placed in chapter III.

4. In his oral statement, the Special Rapporteur had mentioned the need to establish a balance between the interdependence of international watercourse States and their sovereign right to exploit the natural resources of their territories. To do that, the interests of the upstream and downstream States would have to be brought into balance, so as to make them equal in negotiating power. But a downstream State was necessarily in a position of inferiority in regard to the use of the waters of an international watercourse, because the upstream State enjoyed physical priority. That being so, there could be no balance unless the emphasis was on protection of the downstream State. In draft article 13, paragraph 3, that balance was not achieved because, according to that provision, the notifying State could proceed with the planned project if it deemed that its rights or interests or those of one or more other watercourse States might be "substantially affected by a delay". It must then proceed "in good faith and in a manner conformable with friendly neighbourly relations". The Special Rapporteur had chosen that solution rather than requiring the notifying State not to proceed with the project until the outstanding issues had been settled. However, he found the new wording of paragraph 3 dangerous, because it did not provide sufficient safeguards. Perhaps it would be advisable for a duly authorized body to pronounce on the "utmost urgency" and "unnecessary damage" which States might be tempted to invoke. It was true that some situations called for large investments and entailed damage which it was subsequently difficult to repair. In any case, it was important that the Commission should try to establish a better balance in that provision.

5. As the Special Rapporteur had pointed out in his second report (A/CN.4/381, para. 5), the drafting of a framework agreement based on general legal principles seemed to have wide support. Among those principles he had given prominence to good-neighbourly relations and good faith, although good faith was presumed in the performance of treaties and need not be given any special consideration in the present case. He had also introduced a notion which, while not rejected in the previous texts, was not confirmed by them either, namely that of reasonable and equitable sharing by watercourse States in the use of the waters of an international watercourse. That notion should dispel much anxiety.

6. The Special Rapporteur had also abandoned the notion of an "international watercourse system", partly because it might create a legal superstructure from which principles could be deduced that were not confirmed by the draft articles. He had nothing against dropping that notion, in so far as it would help to reconcile opinions, but had the impression that it was a mere change of form, not of substance. It was really a question of determining the scope of the régime being elaborated. In his revised draft articles, the Special Rapporteur did not define an international watercourse, but emphasized the importance of water and indicated that a watercourse comprised a number of components. Those components, which were qualified as "relevant", were not defined either and it might be asked what they were relevant to. Article 1, paragraph 2, made it possible to solve the problem, however, since it provided that the components of a watercourse, when situated in one State and not affected by the uses of the watercourse in another State, were not to be treated as being included in the watercourse. It could be deduced that the components of a watercourse were "relevant" if they were interdependent and formed a whole. The scope of the régime then became clearer: it covered tributaries, lakes, ground-water, springs, snow and glaciers which fed the watercourse, in so far as they were joined together so that the use of the water at one place affected its use at other places. One thus came back to the idea of the watercourse system. In its former version, draft article 1 had not excluded the simultaneous involvement of several systems, considered, for example, from the point of view of pollution or irrigation—a case which the new draft article 1 did not appear to exclude either.

7. The concept of a "shared natural resource", which had been included in draft article 6, had also been abandoned by the Special Rapporteur following the serious controversies to which it had given rise in the Sixth Committee of the General Assembly. At the previous session of the Commission, he (Mr. Barboza) had observed that the concept was not in the nature of a legal principle, but that it expressed a legal reality. [4] In the case of water flowing in the territories of several States, each of which was sovereign in its own territory, it was logical that those States should share the common natural resource. It was from that fact that the real principles applicable and the right of the watercourse State to a reasonable and equitable share in the use of the waters of an international watercourse derived. They did not derive from good-neighbourly relations. Consequently, he was not opposed to abandoning the concept of a shared natural resource, if that would help to reconcile divergent views, but he was against the introduction of other sources of principles which would deprive the draft of its real legal character.

[4] *Yearbook... 1983*, vol. I, pp. 201-202, 1789th meeting, paras. 9-11.

8. It should be noted that the obligations linked with good-neighbourly relations were quite different from those deriving from a condominium. In internal law, the rights and obligations when several persons were co-owners of a piece of land were not the same as when each person was owner of a parcel of land. Similarly, in international law, the rights and duties deriving from the sharing of a common natural resource were very different from those deriving from good-neighbourly relations. Consequently, he was opposed to the introduction of good-neighbourly considerations where they were out of place, as in draft article 7.

9. According to draft article 4, watercourse agreements concluded before or after the entry into force of the future convention would be valid if they took account of the principles set out in that instrument. Thus stated, the rule laid down in that article might give the impression of being a curious rule of *jus cogens*, which might not be found acceptable since important interests were at stake, and might raise serious difficulties. In order to ensure the viability of the future convention, it might perhaps be better to delete paragraph 1 of article 4.

10. With regard to draft article 6, Mr. El Rasheed Mohamed Ahmed (1854th meeting) had expressed doubts about the word "reasonable". In principle, every State could freely use the waters in its territory, unless there was a risk of causing appreciable harm to another State. It was precisely the difficulties raised by that risk that the draft was intended to overcome, by establishing a balance between the interests of the States concerned and providing for various procedures.

11. Article 8 enumerated a number of factors to be taken into account in determining whether the use of water was reasonable and equitable. But in matters of equity it was difficult to draw up general rules in the abstract, since equity had sometimes been regarded as the "justice of particular cases". Hence the factors enumerated in article 8 had only an indicative character. He proposed that draft articles 1 to 9 should be referred to the Drafting Committee.

12. Mr. McCaffrey expressed his appreciation of the Special Rapporteur's tireless efforts to produce a generally acceptable set of draft articles. It had rightly been said that water was life itself; it had also been said that there was only one body of water on the planet and that it was vital to the future of mankind. Such fundamental and immutable principles must never be forgotten. Furthermore, as the Special Rapporteur had noted in his second report (A/CN.4/381, para. 2), the lack of adequate fresh water was "a major scourge for more than one third of the population of the world"; and, as Mr. El Rasheed Mohamed Ahmed (1854th meeting) had observed, the increase in population was placing ever greater strains on the world's limited water resources.

13. Those facts highlighted the Commission's responsibility as architect of the framework of principles that would govern the use of water resources; it was akin to a fiduciary responsibility, since the international community had placed in the Commission a trust to be exercised on behalf of all States in which watercourses were located. No matter what term was eventually given to the framework of principles—model rules, code of conduct or convention—it would be relied upon by States and tribunals in settling competing claims for the earth's fresh water.

14. As to the nature of the Commission's task, he believed that, while it could not ignore political considerations, its first step should be to formulate the applicable legal principles, and that only as a second step should it endeavour to temper those principles to the extent necessary to conform to the wishes of the General Assembly. He also believed that, wherever possible, the draft articles should be cast in the form of legal rules rather than hortatory provisions. That did not mean that the Commission should not attempt to formulate procedural rules, which were the core of the draft, but rather that it should endeavour to codify international obligations as revealed in the practice of States.

15. It was not generally a good idea to reopen consideration of draft articles that had already been adopted, even if only on first reading; to do so would not be making the best use of the limited time available to the Commission. That was particularly true in view of the backlog in the Drafting Committee. While he recognized that there were good reasons for reconsidering the six draft articles already adopted[5] and the provisional working hypothesis approved by the Commission in 1980,[6] not the least of which was the fact that the Commission had a new and enlarged membership, it was important for it to make progress in its work and therefore, in principle, not to re-examine articles until they were given a second reading.

16. The Commission should also decide whether the intention was to examine the draft articles in chapters I and II and refer them to the Drafting Committee, or whether it was to have a general discussion on the acceptability of the changes in approach reflected in the Special Rapporteur's second report. Of those two approaches he would opt for the first, but would appreciate clarification on the point.

17. Turning to the draft articles, he said that he had no objection in principle to the deletion from draft article 1 of the term "system", though he considered that the expression "international watercourse system" more accurately described the hydrographic facts with which the draft dealt. The deletion of the term "system" also presented the conceptual problem to which Mr. Barboza had referred, namely that there could be different systems, or régimes, with respect to different uses of the watercourse. That point also required clarification.

18. With regard to paragraph 2 of article 1, it would be more accurate to refer to "uses of components" than simply to "components", since it was uses and benefits that were the focus of the draft. He therefore proposed that, in paragraph 2, the words "uses of" should be added before the word "components", and that the word "they" should be replaced by "such components or parts".

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[5] See footnote 3 above.

[6] See 1854th meeting, footnote 4.

19. He believed it was proper to include the examples of hydrographic components of an international watercourse given in the Special Rapporteur's second report (A/CN.4/381, para. 24), some of which should perhaps be examined more closely to determine whether they should form the subject of separate articles or at least of a more detailed commentary. He had in mind, in particular, canals and ground water. In the case of canals, it seemed obvious that one canal could rapidly widen the scope of a given international watercourse, as defined in article 1, and could have consequential effects on the watercourse States involved. The Danube Canal and the Garrison Diversion Project, to which he had referred in his statement (1851st meeting) on Mr. Quentin-Baxter's topic, were examples of how two different watersheds could be connected and, arguably, under the terms of article 1, form one international watercourse for the purposes of the draft. It was perhaps necessary to consider whether that was desirable and whether such situations called for a special régime.

20. In regard to ground water, which was dealt with by the Special Rapporteur (A/CN.4/381, paras. 26-36), he would merely ask whether the scientific and legal aspects of that component had been sufficiently examined to enable the Commission, on the one hand, to identify so-called independent ground-water resources, and, on the other, justifiably to exclude such resources from the scope of the draft. His initial reaction was that, in view of their importance, such resources should not be excluded merely because the law in that area was relatively undeveloped. He noted that the fact that a given aquifer might be totally independent and unrelated to a specific surface watercourse would apparently be taken into account in any equitable apportionment of either the surface watercourse or the waters of the aquifer (*ibid.*, para. 30).

21. Draft article 4, paragraph 1, was generally acceptable to him, although Mr. Calero Rodrigues' point (1854th meeting) regarding the conditions laid down for the validity of special watercourse agreements merited further consideration. He doubted that the proposed provisions rose to the level of norms of *jus cogens*, but recognized the attractiveness of building the same protection into the draft for States that were or had been disadvantaged *vis-à-vis* their treaty partners. That seemed to be one of the effects of the conditions laid down in the first clause of paragraph 1; that point too deserved further consideration.

22. In paragraph 2 of article 4 he would suggest that the word "should" be replaced by the word "shall". The second sentence of the paragraph was not very clear; he assumed that the intention was that the States concerned should be permitted to enter into a special watercourse agreement provided that it did not adversely affect use by other watercourse States. If so, the idea could perhaps be expressed in more direct terms.

23. Draft article 5, paragraph 1, as he read it, covered watercourse agreements that applied to the watercourse as a whole and hence entitled every watercourse State not only to participate in the negotiation of such agreements, but also to become parties to them. Paragraph 2, on the other hand, covered watercourse agreements that applied to only part of an international watercourse or to a particular project, programme or use. Thus, assuming that a river rose in State A and ran successively through States A, B and C, with a tributary running through States A and B but not State C, and assuming further that State A decided to construct a dam on the tributary, an agreement between States A and B in that regard would presumably fall under paragraph 2, since it would relate to only part of the international watercourse concerned. Furthermore, paragraph 2 entitled a watercourse State whose use of the waters of the watercourse was affected "to an appreciable extent" to participate in the negotiation of such an agreement, but not to become a party, as under paragraph 1. Accordingly, State C could participate in the negotiation of the agreement, provided that its implementation would appreciably affect State C's use of the waters of the river, but would not be entitled to become a party.

24. His first question, therefore, was why such States were not given the right to become parties to such agreements, since by definition their use of the waters would be appreciably affected by the agreements. Since agreements concerning part of an international watercourse, or a particular project or use of an international watercourse, were likely to form the bulk of watercourse agreements, the point should perhaps be given further consideration. It might also be worth while reconsidering the usefulness of the distinction between agreements applicable to a watercourse as a whole and those applicable to only part of a watercourse.

25. He would also like to know what was meant by the expression "appreciable extent" and how it related to the definition of an "international watercourse" in article 1 and of "watercourse States" in article 3. If, and in so far as, a State's uses of the waters of an international watercourse were not affected, article 1, paragraph 2, read in conjunction with article 3, would indicate that such a State was not a watercourse State. He therefore wondered what was added by the word "appreciable". If an effect was so slight as not to be appreciable, then it was inconsequential. He doubted that the effect required under article 5 was of a greater degree than that required under article 1, but he would be grateful for clarification.

26. Referring to chapter II of the draft, he observed that, while the principle of equitable sharing of the waters of an international watercourse was dealt with in articles 6 to 8, the methods of ensuring equitable apportionment were dealt with in chapter III; ideally, therefore, the two chapters should be considered together.

27. He had no strong objection to the deletion of the concept of a "shared natural resource" from draft article 6. Equitable use was, however, an elusive concept, and he wished to refer to certain aspects of practice in the United States of America which threw some light on the way in which that concept had been interpreted. The first case in which the doctrine of equitable apportionment had appeared was *Kansas* v. *Colorado* (1902),[7] in which the State of Kansas had filed suit against the State of Colorado over the Arkansas River. The Supreme Court of the United States, which had recognized that principles of international law were applicable,

[7] *United States Reports*, vol. 185 (1910), p. 125.

had opined that one cardinal rule underlying all relations between States was that of equality of right. It had further opined that neither State could force its law upon the other and that each was entitled to an equitable apportionment of the benefits. It was important to note, however, that that did not mean a literal division of the water of the river, but rather a division of the benefits from the flow of the river. The Supreme Court had never laid down a definition of equitable apportionment and it was difficult to construct one from the few cases on the subject. As had rightly been observed, the very notion of equity implied a response to an individual situation, not the application of a fixed rule. Apportionment could, however, involve the assignment of a benefit to one State and the denial of a benefit to another. Thus water, electric power and fish had been held to be divisible benefits, whereas instream benefits such as estuarine oyster fisheries, anadromous fish runs, navigation and recreation were tied to particular places. Conditions of time and place also shaped apportionment.

28. Paragraph 1 of article 6, as reformulated, was preferable to the original wording, because it provided that a watercourse State was entitled to an equitable share in the uses of the waters of a watercourse, rather than to a share of the water itself. The provision could perhaps be further improved, however, if the term "uses" were replaced by the wider term "benefits", to make it clear that the article guaranteed more than a share in the water itself. Share benefits could include, for example, electricity, money generated by a project or paid in compensation for detriment caused by a project, fish, navigation and environmental benefits. He was not certain, however, whether the phrase "within its territory" was intended to exclude any of those benefits; if it was, he was not sure why they should be excluded.

29. Paragraph 2 of article 6 made the obligation to share contingent upon the use in one State affecting uses in another State. Again, it seemed to him that without an effect there would be no obligation to share, because the States concerned would not be watercourse States within the meaning of articles 1 and 3, and article 6 would consequently not apply.

30. His only question in regard to draft article 7 concerned the expression "optimum utilization", which seemed to have the economic connotation of most efficient use. Since it was presumably not intended to award priority to the most efficient user, the last part of the article could perhaps be rephrased to read: "with a view to attaining maximum benefits for each watercourse State from its share of the resource consistent withdequate protection and control of the international watercourse and its components".

31. With regard to draft article 8, he believed, unlike Mr. Calero Rodrigues, that it would be helpful to provide a non-exhaustive list of factors to be taken into account by negotiating States in determining what was reasonable and equitable use in their particular situation. The factors in question were not binding, in the sense that their relative importance would vary according to the situation concerned; in many situations some of the factors listed would not be relevant, while factors not listed might well be crucial. He agreed with other speakers that several factors might usefully be added to the list, without, however, purporting to make it any more exclusive. Such additional factors included regional and special agreements and the effect on navigation of a particular project or particular use.

32. Draft article 9, which prohibited activities that might "cause appreciable harm", should be reconsidered. It would be more appropriate to proscribe "exceeding a State's equitable share" or "depriving another State of its equitable share" of the benefits of the waters of an international watercourse. Another solution, suggested by Mr. Ni (1854th meeting), would be to revert to the formula employed in article 8 (Responsibility for appreciable harm) as proposed by the previous Special Rapporteur in his third report, [8] which provided that a State had a "duty not to cause appreciable harm", except as might be "allowable under a determination for equitable participation for the international watercourse system involved".

33. The term "harm" raised the question of the relationship between "harm" and equitable allocation. A conflict could arise between the concept of an "equitable share", under article 6, and that of not causing "appreciable harm", under article 9. It was implicit in the concept of an equitable allocation of benefits that probably neither party would get all it wanted. If that were so, they could both claim to have been "harmed"—unless the concept of "harm" was itself defined in the context of equitable allocation, so that a State could not be considered to be harmed by an equitable allocation of the benefits of an international watercourse.

34. The "no harm" rule seemed in effect to create a prior appropriation system that could result in a far from equitable division of benefits. That point could be illustrated by the example of an upper riparian State and a lower riparian State each planning a large project when there was not enough water for both. If the upper riparian moved first, it could claim (*a*) that it was exercising its right under article 6; (*b*) that it was causing no harm under article 9; (*c*) that it had no obligation to notify under article 11. The lower riparian State would then find that its project was precluded for lack of water supply. If, on the other hand, the lower riparian acted first, it could assert that it was causing no harm and owed no duty of notice. If the upper riparian State then initiated its project, the lower riparian would be able to claim that it was being harmed.

35. That example showed that the first developer, whether the upper riparian or the lower riparian, acquired the better right. It was undesirable to encourage that type of race, since it would allow the State with the greater capability, or the one which acted quickest, to acquire superior rights to the water. In order to avoid that unintended result, he had suggested, at the previous session, [9] that the expression "appreciable harm to the rights or interests" of other watercourse States should be interpreted as including not only present harm to existing uses and benefits, but also future harm, in the sense of lost

[8] See 1854th meeting, footnote 5.

[9] *Yearbook ... 1983*, vol. I, p. 221, 1792nd meeting, para. 31.

opportunity to carry out a project, for example. It was essential to take such "opportunity costs" into account, in order to provide some protection against loss of future benefits by one State as a result of action taken by another State. If opportunities were to be made the basis for allocating an equitable share of the unused water to a State, then the lower riparian State would have a legal basis for requesting that some water be left for it.

36. In any event, a rule to the effect that a State could not exceed its equitable share, or deprive another State of its equitable share, would present far fewer difficulties than the rule that a State must not cause appreciable harm; it could also be more easily construed to include the requirement that future benefits must be taken into account.

37. Chapter III dealt with an aspect of the draft which the experience of the United States of America, at both the international and the internal levels, had shown to be most important for smoothing and harmonizing relations between co-riparian States. That chapter provided procedures for arriving at an equitable apportionment, for the building of régimes and for the establishment of joint commissions, and United States experience was particularly rich in that respect. He need only mention the International Joint Commission established by Canada and the United States, and the International Boundary and Water Commission between Mexico and the United States. A reference to the first of those commissions was contained in an interesting passage of the fifth report of the Special Rapporteur on international liability for injurious consequences arising out of acts not prohibited by international law (A/CN.4/383 and Add.1, para. 23).

38. As he saw it, joint commissions provided the best, if not the only way out of the dilemma posed by the parallel freedoms of upper and lower riparian States, which were of equal dignity. That dilemma was illustrated by the different views which had been expressed on the procedures proposed in draft article 13. If the duty to co-operate and the principles of good-neighbourliness and friendly relations were to have any real meaning in the context of international watercourses, they called for States to use their best efforts to build régimes and establish joint commissions.

39. The procedures set out in draft articles 11 to 14, dealing with such matters as notice, reply and liability, seemed to him very unrealistic. Among other things, they were tort-oriented, *post hoc* and quasi-judicial; they placed the emphasis on action taken after the event. It would be much better to start at an earlier stage and eliminate the possibility of a quarrel arising at all. What was really needed was some mechanism for determining in advance the share of each State or whether a particular project was allowable, and for establishing the rights of the States concerned.

40. His suggestion for a better procedure would be to create a mechanism for determining, by agreement or adjudication, the equitable share of each State. That could be done by expanding articles 10 and 15 into a system of prior clearance of projects. Article 16 could also be expanded to encompass the modern concept of water planning, raised to the international level—a move which would go far towards achieving watercourse peace and harmonious development, without need of regulation or sanctions. There could be procedures for review of each project by an international agency, which would follow the various stages of conception, feasibility study, formulation of project design, preparation of construction blueprints, etc., at each stage studying alternatives, making choices, setting trade-offs and avoiding causes of conflict. Procedures could be established for negotiating agreements to identify the shares of States. There could be powers to decide the equitable shares in the water to be allocated among the States concerned. The operations of the International Joint Commission between Canada and the United States provided a valuable example. A useful United States model for an international river agency was also provided by the Delaware River Basin Commission.

41. Mr. REUTER said that he had kept silent on the draft articles under consideration for a long time, but he thought it better to speak late than never. He had three general comments to make. The first concerned the content of the draft articles. The Commission was divided between two contradictory alternatives: to prepare draft articles which, because of their lack of precision, would not mean much, but would be favourably received; or to draft a precise text which would raise difficulties because of its precision. He would prefer the second course and thought that, in trying to establish a balance between the two, the Commission should not take the easy way out.

42. Like other members of the Commission before him, he noted the non-legal character of some of the provisions. He fully appreciated that the Commission was bound to use general terminology which had little binding force. But while he was not opposed to the notions of good faith and good-neighbourly relations, they were certainly very vague. He recognized that general formulations were sometimes useful, as in the 1982 United Nations Convention on the Law of the Sea, but he wondered whether it would ever be possible to establish the breach by a State of its obligation to co-operate, for example. He seemed to be the only member of the Commission to have reservations on that aspect of the draft.

43. Similarly, while he could not be accused of hostility to humanitarian law, he was opposed to the introduction into the draft of a provision such as draft article 28 *bis*. That article was far from being sufficient to settle the difficult problem of armed conflicts. "Water war" was not something purely theoretical; if it had happened that a State had set its capital on fire to make the enemy retreat, could not other States break open their dams for the same purpose? Thus article 28 *bis* did not meet the needs that might arise. Similarly, paragraphs 2 and 3 of draft article 10 had been conceived with good intentions. but they were not binding; and developing countries, like international organizations—which, moreover, would not be parties to the future instrument—lacked the necessary resources to implement those provisions.

44. Secondly, it was true that the substance of the articles, the procedures provided for and the provisions on settlement of disputes were linked, so that it was difficult to study questions of substance until the procedures had

been established and the Commission had some idea of the method to be adopted for settling disputes; hence the reservations on the part of members of the Commission. What was more, procedures were especially important in that context and came into play as early as draft article 5. The procedures outlined in the draft articles should therefore be refined. Furthermore, in his opinion it would not be possible to apply the draft articles in practice unless more important functions were assigned to international organizations. He was not sure that recourse would be had to arbitration and to international justice as often as he would wish. Some of the provisions could not be applied without an international organization being responsible for the functions of a secretariat, mediation, information and consultation. An example was provided by the 1982 United Nations Convention on the Law of the Sea, the negotiators of which had had the felicitous idea of anticipating the action of international organizations. [10]

45. Thirdly, he regretted the insufficiently concrete character of the draft articles. It was true that a universal instrument was bound to be abstract, but he wondered whether all the uses of watercourses other than navigation had been included. For instance, had any attention been given to timber floating? The uses of watercourses were of two kinds: some, such as human consumption, agriculture and industrial uses, took the form of withdrawals which could go so far as exhaustion of the resources and thus have dramatic consequences; others, such as hydroelectric power production, fishing and timber floating, which were of a temporary nature, could raise technical problems which, although difficult, were relatively amenable to solution. He had the feeling that the Special Rapporteur had had the first kind of uses in mind when drafting certain provisions calling for the sharing or distribution of water, and the second kind when drafting rather scientific articles. But he would like the Commission to adopt an even more differentiated approach, in order to take account of those two kinds of use, even though it might be objected that they sometimes overlapped.

46. Commenting next on individual articles, he said he was glad to see from draft article 1 that the Special Rapporteur was willing to change the terminology used if it caused difficulties, though he wondered whether the drafting difficulties in question did not conceal a more serious problem. The Commission would not be able to avoid defining the expression "an international watercourse in its entirety", used in several draft articles. The fundamental problem was that a "floating", totally relative definition of an international watercourse restricted, for each problem, the number of States concerned and consequently reduced the servitude of States; that was an important factor. The question was whether the system could work and whether it was not too complicated. Even if the provisions remained abstract, it would be essential to give examples in the commentary. Did the proposed definition cover a case in which the international watercourse included everything that had formerly been called the "system"? Serious pollution, for example, if it came from sources in the upstream State, would still be felt at the river mouth and all the riparian States would be concerned; but if the pollution was not serious, it would have disappeared for the downstream State at the river mouth. Perhaps it would be possible to think of another situation in which all the watercourse States would be concerned if there were rules providing for the establishment of a water consumption balance sheet, but he was not quite sure and would like to have a more concrete view of the matter.

47. In draft articles 2 and 3, a distinction appeared to have been made between watercourses and their waters. Was that entirely a matter of drafting? Should the expression "watercourse" be taken to refer to the different uses and the word "waters" to refer to consumption?

48. Draft article 4 contained the expression "international watercourse in its entirety", which remained to be defined. He did not quite see the need for paragraph 3 of that article, and he had reservations about the reference to *jus cogens* in the Special Rapporteur's commentary (A/CN.4/381, para. 38).

49. Draft article 5 dealt more with the uses of water than with the watercourse. He understood the article, but feared that its practical application might raise problems. It was an entirely new and even extraordinary text, since it provided for a right which did not exist in international law, namely the right to participate in the negotiation and conclusion of a treaty binding only a few States. That problem did not arise in the case of universal treaties concluded under the auspices of the United Nations; but what would be the situation in regard to universal instruments negotiated outside the United Nations? By what machinery would the participation be brought about? In order to overcome that difficulty, he thought it essential to provide for an organized structure, if only a simple one. In his view, draft article 5 was the pivot on which the procedures hinged.

50. He noted that draft article 6 referred to the uses of water, but not of the watercourse. Perhaps there were reasons for that wording.

51. The drafting of article 9 raised a problem, because it was necessary to take account of the cases envisaged by Mr. Quentin-Baxter, for example the collapse of a retaining dam. At present, draft article 9 referred only to regular and continuous uses of water which could themselves cause harm.

52. Draft article 8 contained an accumulation of unrelated elements, and he found it unacceptable. He could accept the reference to equitable and reasonable principles, even though the wording implied a failure, but he would suggest going further and classifying the fundamental elements by which equity and reason could be established, two of which were of exceptional importance, namely the needs referred to in paragraph 1 (*b*) and the contribution of water referred to in paragraph 1 (*d*). There might be other elements, but they were of secondary importance. The text of the article should therefore be drafted differently. Why refer to geographic, hydrographic and hydrological factors? It was obvious that

[10] Annex IX of the Convention (see 1831st meeting, footnote 6).

the negotiators would have them in mind. Like Mr. Calero Rodrigues (1854th meeting), he preferred a more austere style. He also had doubts about the meaning of the expression "optimum utilization", which suggested a rather naïve view of things. To express an opinion on draft article 8 he would need concrete examples, showing that in a particular case a court had attached so much importance to one factor and so much to another. So it mattered little whether draft article 8 was reduced to a single sentence or disappeared altogether; it was the Commission's commentaries that were important. He suggested referring to factors "whose relative importance will vary depending on all the circumstances".

53. In draft article 29 (now draft article 15 *ter*), which excluded preferential uses, he was surprised to see a text which did not recognize the priority of a State whose supply of water was a matter of survival, if it requested priority. That omission was most unfortunate.

54. In conclusion, he expressed full confidence in the Special Rapporteur, who had been most self-sacrificing. If the Special Rapporteur throught it opportune to refer the draft articles to the Drafting Committee, he would have no objection.

The meeting rose at 1 p.m.

1856th MEETING

Friday, 6 July 1984, at 10 a.m.

Chairman: Mr. Sompong SUCHARITKUL

Present: Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/367,[1] A/CN.4/381,[2] A/CN.4/L.369, sect. F, ILC (XXXVI)/Conf.Room Doc.4)

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*continued*)

1. Mr. RIPHAGEN said that the topic under consideration had much in common with the topic of international liability for injurious consequences arising out of acts not prohibited by international law. Both were concerned with rules of international law which offset the effects of the arbitrary division of the world into many individual States. It was for that purpose that Grotius had devised the legal construction of *jus communicationis*, which dealt with human movement across borders.

2. Since the territories of the States through which international watercourses flowed were not watertight compartments and the waters of those watercourses were essential for human life, State practice in respect of their use had taken shape long ago. There was thus a body of rules which established the substantive and procedural rights and obligations of watercourse States. Those obligations included the duty not to overstep certain limits in the exercise of territorial sovereignty, the duty to co-operate and, in some cases, the duty to ensure that the watercourse would be managed jointly as an integrated whole.

3. In view of the limits on territorial sovereignty, vague concepts such as what was "reasonable", "fair" and "equitable" had to be used to qualify the right to exercise such sovereignty. With regard to the obligation of a watercourse State to prevent within its territory any interference with the uses of water in the territory of another State, it was necessary to resort to the very vague term "to an appreciable extent". The flexible concepts of "good faith" and "good-neighbourliness" were also used to describe the way in which the duty to co-operate should be fulfilled.

4. The limitation of the right to exercise territorial sovereignty over an international watercourse was in fact the mirror image of the definition of the obligations of watercourse States. That point had important drafting implications because it was, for example, not clear that the prohibition provided for in draft article 9 was the mirror image of the right of all watercourse States to a reasonable and equitable share of the use of the waters of the watercourse in their territories.

5. The notions to which he had referred were open to divergent interpretations. Priorities therefore had to be set with regard to water uses. High priority had to be given to drinking-water supplies, but the use of water for the disposal of industrial waste had low priority. It was also clear that the existence of a use did not in itself confer any priority. Nor should an existing use be the basis for a claim to participation in the negotiation of watercourse agreements or the exercise of other procedural rights.

6. The question of alternative uses and compensation also had to be taken into account in determining what was fair, equitable and reasonable. In some cases, such a determination could lead to the prohibition of certain uses or activities, particularly in view of the needs of future generations. The concept of the conservation of a resource by non-use thus implied the joint management of that resource as an integrated whole.

[1] Reproduced in *Yearbook ... 1983*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1984*, vol. II (Part One).

[3] For the texts, see 1831st meeting, para. 1. The texts of articles 1 to 5 and X and the commentaries thereto, adopted provisionally by the Commission at its thirty-second session, appear in *Yearbook ... 1980*, vol. II (Part Two), pp. 110 *et seq.*