

Document:-
A/CN.4/SR.1785

Summary record of the 1785th meeting

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

Extract from the Yearbook of the International Law Commission:-
1983, vol. I

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

into a positive rule. Inviolability of the diplomatic courier's person meant due respect for his dignity and an obligation for the receiving State and the transit State to protect him. If any wrongful act was committed against a diplomatic courier, the authorities were required to prosecute and punish the person responsible.

31. For the reasons stated in paragraphs 97-98, he agreed with the Special Rapporteur that the diplomatic courier should be granted full immunity from criminal jurisdiction, but that his immunity in civil and administrative matters should be restricted.

32. With regard to draft article 20, which mentioned arrest or detention, he wondered whether paragraph 1 also covered the idea of prosecution. Was the diplomatic courier required to obey a court summons? At that stage of proceedings there was no question of arrest or detention. It might be advisable to add the word "prosecution" in paragraph 1, even though the provision as it stood was modelled on article 27, paragraph 5 of the Vienna Convention on Diplomatic Relations. As to exemption from giving evidence, he approved of the Special Rapporteur's proposal but wondered, in connection with paragraphs 124-125, whether it should not be stated, at least in the commentary, that the diplomatic courier could waive his immunity in that respect, either of his own accord or if authorized to do so by the sending State.

33. He had no comments to make on the essential ideas expressed in draft article 23 and understood the Special Rapporteur's intentions; the Drafting Committee might perhaps be able to refine the wording of the article.

34. Mr. PIRZADA said he fully agreed that, notwithstanding certain difficulties, the draft articles should be extended to cover international organizations and national liberation movements. He favoured the use of the term "recognized movements" which had received wide support.

35. In view of the content of paragraphs 72 and 77 of the report (A/CN.4/374 and Add.1-4) and of the views of some members, he would keep an open mind on draft articles 21 and 22. With regard to draft articles 20 and 23, he agreed in general with Sir Ian Sinclair. If paragraph 2 of draft article 20 was to be deleted, he would have no further comment; but if it was to be retained, the final phrase reading "and shall prosecute and punish persons responsible for such infringements" should be deleted, since it could lead to complications regarding the giving of evidence by the diplomatic courier.

36. As to draft article 23, he noted that paragraph 1 gave the diplomatic courier absolute immunity from the criminal jurisdiction of the receiving State and the transit State. *Prima facie*, however, he was inclined to think that such immunity should at least be restricted to acts performed in the exercise of the official functions of the diplomatic courier. If a diplomatic courier committed a serious offence, such as murder or rape, should he really have absolute immunity? The Commission might wish to consider that point. The immunity from civil and administrative jurisdiction conferred by paragraph 2 was restricted to acts performed in the exercise of the diplomatic courier's official functions. Again, however,

difficulties could arise in connection with the giving of evidence by the courier, and there seemed to be some conflict on that point between paragraphs 2, 4 and 5 which the Commission would do well to consider.

37. The CHAIRMAN, noting that there were no further speakers, said that the Commission would revert to item 3 later in the session.

The law of the non-navigational uses of international watercourses (A/CN.4/348,⁶ A/CN.4/367,⁷ A/CN.4/L.352, sect. F.1, A/CN.4/L.353, ILC(XXXV)/Conf.Room Doc.8)

[Agenda item 5]

**DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR**

38. Mr. EVENSEN (Special Rapporteur) said he intended to present briefly at the next meeting the 39 draft articles of the outline for a draft convention proposed in his report (A/CN.4/367) on the law of the non-navigational uses of international watercourses, which would provide the Commission with a basis for a thorough exchange of views. He would then introduce chapter I of the draft, which consisted of five articles. Article 1 defined the term "international watercourse system" and the four other articles reproduced, more or less word for word, the first articles adopted by the Commission in 1980.⁸

The meeting rose at 12.50 p.m.

⁶ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

⁷ Reproduced in *Yearbook* . . . 1983, Vol. II (Part One).

⁸ 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.*

1785th MEETING

Monday, 20 June 1983, at 3 p.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/348,¹ A/CN.4/367,² A/CN.4/L.352, sect. F.1, A/CN.4/L.353, ILC(XXXV)/Conf.Room Doc.8)

[Agenda item 5]

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

1. The CHAIRMAN invited the Special Rapporteur to introduce his first report on the law of the non-navigational uses of international watercourses (A/CN.4/367).
2. Mr. EVENSEN (Special Rapporteur) said that the topic under consideration had been before the Commission for some 10 years and that he had been preceded as Special Rapporteur first by Mr. Kearney, who had submitted a report at the Commission's twenty-eighth session in 1976,³ and subsequently by Mr. Schwebel, who had submitted three reports, the first at the thirty-first session in 1979,⁴ the second at the thirty-second session in 1980,⁵ and the third at the thirty-fourth session in 1982. Although the Commission had never taken action on Mr. Schwebel's third report (A/CN.4/348), which contained 11 draft articles in addition to the six already provisionally adopted by the Commission in 1980,⁶ that admirable report would continue to provide valuable source material. He had relied on it extensively in preparing the report now before the Commission (A/CN.4/367), but considered that the treatment of the 11 articles proposed by Mr. Schwebel was somewhat unusual as far as treaty texts were concerned and he also took a slightly different view of the substance of the matter.
3. The first point to be borne in mind was the special nature of the topic, which involved not only legal questions but also a delicate political aspect. Each international watercourse had its own special characteristics and its own set of problems, but all international watercourses had features in common and followed general laws that must inevitably leave their imprint on the administration and management of international watercourse systems in general. It was essential to recognize those common features yet accept the limitations that arose out of the unique characteristics of each watercourse. In principle, therefore, he agreed with the approach advocated by Mr. Schwebel in his second report, namely that system agreements should where necessary be drawn up for the detailed regulation of given watercourse systems, something which in no way precluded a modern framework convention laying the

foundations for system agreements of that kind.⁷ It was interesting to note that the Observer for the Asian-African Legal Consultative Committee had recently endorsed that view (1775th meeting).

4. In formulating the draft articles he had borne in mind the need to view the questions involved as a whole, rather than in isolation, given the delicate political nature of the topic. He had also considered that an initial text would help to make the discussion more specific. Only from the reaction to the actual wording of the draft articles would he be able to judge whether he had struck the right balance. Furthermore, there was a growing demand for an appropriate text, as had been apparent from the debate in the Sixth Committee of the General Assembly at its thirty-seventh session (A/CN.4/L.352, sect. F.1). A preliminary discussion of a tentative draft would thus shed light on many of the issues involved. His suggestions were of a preliminary nature only and were made with a view to securing the Commission's guidance. On that basis he had presented 39 draft articles in his report, although further articles might obviously be necessary.

5. The 39 proposed articles constituted the following outline for a draft convention.

CHAPTER I. INTRODUCTORY ARTICLES

Article 1. Explanation (definition) of the term "international watercourse system" as applied in the present Convention

1. An "international watercourse system" is a watercourse system ordinarily consisting of fresh water components, situated in two or more system States.

Watercourses which in whole or in part are apt to appear and disappear more or less regularly from seasonal or other natural causes such as precipitation, thawing, seasonal avulsion, drought or similar occurrences are governed by the provisions of the present Convention.

Deltas, river mouths or other similar formations with brackish or salt water forming a natural part of an international watercourse system shall likewise be governed by the provisions of the present Convention.

2. To the extent that a part or parts of a watercourse system situated in one system State are not affected by or do not affect uses of the watercourse system in another system State, such parts shall not be treated as part of the international watercourse system for the purposes of the present Convention.

Article 2. Scope of the present Convention

1. The present Convention applies to uses of international watercourse systems and of their waters for purposes other than navigation and to measures of administration, management and conservation related to the uses of those watercourse systems and their waters.

2. The use of the waters of international watercourse systems for navigation is not within the scope of the present Convention except in so far as other uses of the waters affect navigation or are affected by navigation.

Article 3. System States

For the purposes of the present Convention, a State in whose territory components/part of the waters of an international watercourse system exist(s) is a system State.

Article 4. System agreements

1. A system agreement is an agreement between two or more system States which applies and adjusts the provisions of the present Convention to the characteristics and uses of a particular international watercourse system or part thereof.

¹ Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

² Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

³ *Yearbook* . . . 1976, vol. II (Part One), p. 184, document A/CN.4/295.

⁴ *Yearbook* . . . 1979, vol. II (Part One), p. 143, document A/CN.4/320.

⁵ *Yearbook* . . . 1980, vol. II (Part One), p. 159, document A/CN.4/332 and Add.1.

⁶ Articles 1 to 5 and X. The texts of these articles and the commentaries thereto appear in *Yearbook* . . . 1980, vol. II (Part Two), pp. 110 *et seq.*

⁷ *Yearbook* . . . 1980, vol. II (Part One), p. 169, document A/CN.4/332 and Add.1, para. 65.

2. A system agreement shall define the waters to which it applies. It may be entered into with respect to an entire international watercourse system, or with respect to any part thereof or particular project, programme or use, provided that the use by one or more other system States of the waters of an international watercourse system is not, to an appreciable extent, affected adversely.

3. In so far as the uses of an international watercourse system may require, system States shall negotiate in good faith for the purpose of concluding one or more system agreements.

Article 5. Parties to the negotiation and conclusion of system agreements

1. Every system State of an international watercourse system is entitled to participate in the negotiation of and to become a party to any system agreement that applies to that international watercourse system as a whole.

2. A system State whose use of the waters of an international watercourse system may be affected to an appreciable extent by the implementation of a proposed system agreement that applies only to a part of the system or to a particular project, programme or use is entitled to participate in the negotiation of such an agreement, to the extent that its use is thereby affected, pursuant to article 4 of the present Convention.

CHAPTER II. GENERAL PRINCIPLES:
RIGHTS AND DUTIES OF SYSTEM STATES

Article 6. The international watercourse system—a shared natural resource. Use of this resource

1. To the extent that the use of an international watercourse system and its waters in the territory of one system State affects the use of a watercourse system or its waters in the territory of another system State or other system States, the watercourse system and its waters are, for the purposes of the present Convention, a shared natural resource. Each system State is entitled to a reasonable and equitable participation (within its territory) in this shared resource.

2. An international watercourse system and its waters which constitute a shared natural resource shall be used by system States in accordance with the articles of the present Convention and other agreements or arrangements entered into in accordance with articles 4 and 5.

Article 7. Equitable sharing in the uses of an international watercourse system and its waters

An international watercourse system and its waters shall be developed, used and shared by system States in a reasonable and equitable manner on the basis of good faith and good-neighbourly relations with a view to attaining optimum utilization thereof consistent with adequate protection and control of the watercourse system and its components.

Article 8. Determination of reasonable and equitable use

1. In determining whether the use by a system State of a watercourse system or its waters is exercised in a reasonable and equitable manner in accordance with article 7, all relevant factors shall be taken into account, whether they are of a general nature or specific for the watercourse system concerned. Among such factors are:

(a) The geographic, hydrographic, hydrological and climatic factors together with other relevant circumstances pertaining to the watercourse system concerned;

(b) The special needs of the system State concerned for the use or uses in question in comparison with the needs of other system States, including the stage of economic development of all system States concerned;

(c) The contribution by the system State concerned of waters to the system in comparison with that of other system States;

(d) Development and conservation by the system State concerned of the watercourse system and its waters;

(e) The other uses of a watercourse system and its waters by the State concerned in comparison with the uses by other system States, including the efficiency of such uses;

(f) Co-operation with other system States in projects or programmes to attain optimum utilization, protection and control of the watercourse system and its waters;

(g) The pollution by the system State in question of the watercourse system in general and as a consequence of the particular use, if any;

(h) Other interference with or adverse effects, if any, of such use for the uses or interests of other system States including, but not restricted to, the adverse effects upon existing uses by such States of the watercourse system or its waters and the impact upon protection and control measures of other system States;

(i) Availability to the State concerned and to other system States of alternative water resources;

(j) The extent and manner of co-operation established between the system State concerned and other system States in programmes and projects concerning the use in question and other uses of the international watercourse system and its waters in order to attain optimum utilization, reasonable management, protection and control thereof.

2. In determining, in accordance with paragraph 1 of this article, whether a use is reasonable and equitable, the system States concerned shall negotiate in a spirit of good faith and good-neighbourly relations in order to resolve the outstanding issues.

If the system States concerned fail to reach agreement by negotiation within a reasonable period of time, they shall resort to the procedures for peaceful settlement provided for in chapter V of the present Convention.

Article 9. Prohibition of activities with regard to an international watercourse system causing appreciable harm to other system States

A system State shall refrain from and prevent (within its jurisdiction) uses or activities with regard to a watercourse system that may cause appreciable harm to the rights or interests of other system States, unless otherwise provided for in a system agreement or other agreement.

CHAPTER III. CO-OPERATION AND MANAGEMENT IN
REGARD TO INTERNATIONAL WATERCOURSE SYSTEMS

Article 10. General principles of co-operation and management

1. System States sharing an international watercourse system shall, to the extent practicable, establish co-operation with regard to uses, projects and programmes related to such watercourse system in order to attain optimum utilization, protection and control of the watercourse system. Such co-operation shall be exercised on the basis of the equality, sovereignty and territorial integrity of all system States.

2. System States should engage in consultations (negotiations) and exchange of information and data on a regular basis concerning the administration and management of such watercourse and other aspects of regional interest with regard to watercourse systems.

3. System States shall, when necessary, establish joint commissions or similar agencies or arrangements as a means of promoting the measures and objects provided for in the present Convention.

*Article 11. Notification to other system States.
Content of notification*

1. Before a system State undertakes, authorizes or permits a project or programme or alteration or addition to existing projects and programmes with regard to the utilization, conservation, protection or management of an international watercourse system which may cause appreciable harm to the rights or interests of another system State or other system States, the system State concerned shall submit at the earliest possible date due notification to the relevant system State or system States about such projects or programmes.

2. The notification shall contain *inter alia* sufficient technical and other necessary specifications, information and data to enable the other system State or States to evaluate and determine as accurately as possible the potential for appreciable harm of such intended project or programme.

Article 12. Time-limits for reply to notification

1. In a notification transmitted in accordance with article 11, the notifying system State shall allow the receiving system State or States a period of not less than six months from the receipt of the notification to study and evaluate the potential for appreciable harm arising from the planned project or programme and to communicate its reasoned decision to the notifying system State.

2. Should the receiving system State or States deem that additional information, data or specifications are needed for a proper evaluation of the problems involved, they shall inform the notifying system State to this effect as expeditiously as possible. Justifiable requests for such additional data or specifications shall be met by the notifying State as expeditiously as possible and the parties shall agree to a reasonable extension of the time-limit set forth in paragraph 1 of this article for the proper evaluation of the situation in the light of the available material.

3. During the time-limits stipulated in paragraphs 1 and 2 of this article, the notifying State may not initiate the project and programme referred to in the notification without the consent of the system State or system States concerned.

Article 13. Procedures in case of protest

1. If a system State having received a notification in accordance with article 12 informs the notifying State of its determination that the project or programme referred to in the notification may cause appreciable harm to the rights or interests of the State concerned, the parties shall without undue delay commence consultations and negotiations in order to verify and determine the harm which may result from the planned project or programme. They should as far as possible arrive at an agreement with regard to such adjustments and modifications of the project or programme or agree to other solutions which will either eliminate the possible causes for any appreciable harm to the other system State or otherwise give such State reasonable satisfaction.

2. If the parties are not able to reach such agreement through consultations and negotiations within a reasonable period of time, they shall without delay resort to the settlement of the dispute by other peaceful means in accordance with the provisions of the present Convention, system agreements or other relevant agreement or arrangement.

3. In cases where paragraph 1 of this article applies and the outstanding issues have not been resolved by agreement between the parties concerned, the notifying State shall not proceed with the planned project or programme until the provisions of paragraph 2 have been complied with, unless the notifying State deems that the project or programme is of the utmost urgency and that a further delay may cause unnecessary damage or harm to the notifying State or other system States.

4. Claims for damage or harm arising out of such emergency situations shall be settled in good faith and in accordance with friendly neighbourly relations by the procedures for peaceful settlement provided for in the present Convention.

Article 14. Failure of system States to comply with the provisions of articles 11 to 13

1. If a system State having received a notification pursuant to article 11 fails to communicate to the notifying system State within the time-limits provided for in article 12 its determination that the planned project or programme may cause appreciable harm to its rights or interests, the notifying system State may proceed with the execution of the project or programme in accordance with the specifications and data communicated in the notification.

In such cases the notifying system State shall not be responsible for subsequent harm to the other system State or States, provided that the notifying State acts in compliance with the provisions of the present Convention and provided that it is not apparent that the execution of the project or programme is likely to cause appreciable harm to the other system State or States.

2. If a system State proceeds with the execution of a project or programme without complying with the provisions of articles 11 to 13, it shall incur liability for the harm caused to the rights or interests of other system States as a result of the project or programme in question.

Article 15. Management of international watercourse systems. Establishment of commissions

1. System States shall, where it is deemed advisable for the rational administration, management, protection and control of an international watercourse system, establish permanent institutional machinery or, where expedient, strengthen existing organizations or organs in order to establish a system of regular meetings and consultations, to provide for expert advice and recommendations and to introduce other decision-

making procedures for the purposes of promoting optimum utilization, protection and control of the international watercourse system and its waters.

2. To this end system States should establish, where practical, bilateral, multilateral or regional joint watercourse commissions and agree upon the mode of operation, financing and principal tasks of such commissions.

Such commissions may, *inter alia*, have the following functions:

(a) To collect, verify and disseminate information and data concerning utilization, protection and conservation of the international watercourse system or systems;

(b) To propose and institute investigations and research concerning utilization, protection and control;

(c) To monitor on a continuous basis the international watercourse system;

(d) To recommend to system States measures and procedures necessary for the optimum utilization and the effective protection and control of the watercourse system;

(e) To serve as a forum for consultations, negotiations and other procedures for peaceful settlement entrusted to such commissions by system States;

(f) To propose and operate control and warning systems with regard to pollution, other environmental effects of water uses, natural hazards or other hazards which may cause damage or harm to the rights or interests of system States.

Article 16. Collection, processing and dissemination of information and data

1. In order to ensure the necessary co-operation between system States, the optimum utilization of a watercourse system and a fair and reasonable distribution of the uses thereof among such States, each system State shall to the extent possible collect and process the necessary information and data concerning, *inter alia*, water levels and discharge hydrogeological or meteorological nature as well as other relevant information and data concerning, *inter alia*, water levels and discharge of water of the watercourse, ground water yield and storage relevant for the proper management thereof, the quality of the water at all times, information and data relevant to flood control, sedimentation and other natural hazards and relating to pollution or other environmental protection concerns.

2. System States shall to the extent possible make available to other system States the relevant information and data mentioned in paragraph 1 of this article. To this end, system States should to the extent necessary conclude agreements on the collection, processing and dissemination of such information and data. To this end, system States may agree that joint commissions established by them or special (regional) or general data centres shall be entrusted with collecting, processing and disseminating on a regular and timely basis the information and data provided for in paragraph 1 of this article.

3. System States or the joint commissions or data centres provided for in paragraph 2 of this article shall to the extent practicable and reasonable transmit to the United Nations or the relevant specialized agencies the information and data available under this article.

Article 17. Special requests for information and data

If a system State requests from another system State information and data not covered by the provisions of article 16 pertaining to the watercourse system concerned, the other system State shall upon the receipt of such a request use its best efforts to comply expeditiously with the request. The requesting State shall refund the other State the reasonable costs of collecting, processing and transmitting such information and data, unless otherwise agreed.

Article 18. Special obligations in regard to information about emergencies

A system State should by the most rapid means available inform the other system State or States concerned of emergency situations or incidents of which it has gained knowledge and which have arisen in regard to a shared watercourse system—whether inside or outside its territory—which could result in serious danger of loss of human life or of property or other calamity in the other system State or States.

Article 19. Restricted information

1. Information and data the safeguard of which a system State considers vital for reasons of national security or otherwise need not be disseminated to other system States, organizations or agencies. A system State withholding such information or data shall co-operate in good faith with other system States in furnishing essential information and data to the extent practicable on the issues concerned.

2. Where a system State for other reasons considers that the dissemination of information or data should be treated as confidential or restricted, other system States shall comply with such a request in good faith and in accordance with good-neighbourly relations.

CHAPTER IV. ENVIRONMENTAL PROTECTION,
POLLUTION, HEALTH HAZARDS, NATURAL HAZARDS,
REGULATION AND SAFETY, USE PREFERENCES,
NATIONAL OR REGIONAL SITES

Article 20. General provisions on the protection of the environment

1. System States—individually and in co-operation—shall to the extent possible take the necessary measures to protect the environment of a watercourse system from unreasonable impairment, degradation or destruction or serious danger of such impairment, degradation or destruction by reason of causes or activities under their control and jurisdiction or from natural causes that are abatable within reason.

2. System States shall—individually and through co-ordinated efforts—adopt the necessary measures and régimes for the management and equitable utilization of a joint watercourse system and surrounding areas so as to protect the aquatic environment, including the ecology of surrounding areas, from changes or alterations that may cause appreciable harm to such environment or to related interests of system States.

3. System States shall—individually and through co-ordinated efforts—take the necessary measures in accordance with the provisions of the present Convention and other relevant principles of international law, including those derived from the United Nations Convention on the Law of the Sea of 10 December 1982, to protect the environment of the sea as far as possible from appreciable degradation or harm caused by means of the international watercourse system.

Article 21. Purposes of environmental protection

The measures and régimes established under article 20 shall, *inter alia*, be designed to the extent possible:

- (a) To safeguard public health;
- (b) To maintain the quality and quantity of the waters of the international watercourse system at the level necessary for the use thereof for potable and other domestic purposes;
- (c) To permit the use of the waters for irrigation purposes and industrial purposes;
- (d) To safeguard the conservation and development of aquatic resources, including fauna and flora;
- (e) To permit to the extent possible the use of the watercourse system for recreational amenities, with special regard to public health and aesthetic considerations;
- (f) To permit to the extent possible the use of the waters by domestic animals and wildlife.

Article 22. Definition of pollution

For the purposes of the present Convention, "pollution" means any physical, chemical or biological alteration in the composition or quality of the waters of an international watercourse system through the introduction by man, directly or indirectly, of substances, species or energy which results in effects detrimental to human health, safety or well-being or detrimental to the use of the waters for any beneficial purpose or to the conservation and protection of the environment, including the safeguarding of the fauna, the flora and other natural resources of the watercourse system and surrounding areas.

Article 23. Obligation to prevent pollution

1. No system State may pollute or permit the pollution of the waters of an international watercourse system which causes or may cause

appreciable harm to the rights or interests of other system States in regard to their equitable use of such shared water resources or to other harmful effects within their territories.

2. In cases where pollution emanating in a system State causes harm or inconveniences in other system States of a less serious nature than those dealt with in paragraph 1 of this article, the system State where such pollution originates shall take reasonable measures to abate or minimize the pollution. The system States concerned shall consult with a view to reaching agreement with regard to the necessary steps to be taken and to the defrayment of the reasonable costs for abatement or reduction of such pollution.

3. A system State shall be under no obligation to abate pollution emanating from another system State in order to prevent such pollution from causing appreciable harm to a third system State. System States shall—as far as possible—expeditiously draw the attention of the pollutant State and of the States threatened by such pollution to the situation, its causes and effects.

Article 24. Co-operation between system States for protection against pollution. Abatement and reduction of pollution

1. System States of an international watercourse system shall co-operate through regular consultations and meetings or through their joint regional or international commissions or agencies with a view to exchanging on a regular basis relevant information and data on questions of pollution of the watercourse system in question and with a view to the adoption of the measures and régimes necessary in order to provide adequate control and protection of the watercourse system and its environment against pollution.

2. The system States concerned shall, when necessary, conduct consultations and negotiations with a view to adopting a comprehensive list of pollutants, the introduction of which into the waters of the international watercourse system shall be prohibited, restricted or monitored. They shall, where expedient, establish the procedures and machinery necessary for the effective implementation of these measures.

3. System States shall to the extent necessary establish programmes with the necessary measures and timetables for the protection against pollution and abatement or mitigation of pollution of the international watercourse system concerned.

Article 25. Emergency situations regarding pollution

1. If an emergency situation arises from pollution or from similar hazards to an international watercourse system or its environment, the system State or States within whose jurisdiction the emergency has occurred shall make the emergency situation known by the most rapid means available to all system States that may be affected by the emergency together with all the relevant information and data which may be of relevance in the situation.

2. The State or States within whose jurisdiction the emergency has occurred shall immediately take the necessary measures to prevent, neutralize or mitigate danger or damage caused by the emergency situation. Other system States should to a reasonable extent assist in preventing, neutralizing or mitigating the dangers and effects caused by the emergency and should be refunded the reasonable costs for such measures by the State or States where the emergency arose.

Article 26. Control and prevention of water-related hazards

1. System States shall co-operate in accordance with the provisions of the present Convention with a view to the prevention and mitigation of water-related hazardous conditions and occurrences, as the special circumstances warrant. Such co-operation should, *inter alia*, entail the establishment of joint measures and régimes, including structural or non-structural measures, and the effective monitoring in the international watercourse system concerned of conditions susceptible of bringing about hazardous conditions and occurrences such as floods, ice accumulation and other obstructions, sedimentation, avulsion, erosion, deficient drainage, drought and salt-water intrusion.

2. System States shall establish an effective and timely exchange of information and data and early warning systems that would contribute to the prevention or mitigation of emergencies with respect to water-related hazardous conditions and occurrences relating to an international watercourse system.

Article 27. Regulation of international watercourse systems

1. For the purposes of the present Convention, "regulation" means continuing measures for controlling, increasing, moderating or otherwise modifying the flow of the waters in an international watercourse system. Such measures may include, *inter alia*, the storing, releasing and diverting of water by means of dams, reservoirs, barrages, canals, locks, pumping systems or other hydraulic works.

2. System States shall co-operate in a spirit of good faith and good-neighbourly relations in assessing the needs and possibilities for water system regulations with a view to obtaining the optimum and equitable utilization of shared watercourse resources. They shall co-operate in preparing the appropriate plans for such regulations and negotiate with a view to reaching agreement on the establishment and maintenance—individually or jointly—of the appropriate regulations, works and measures and on the defrayal of the costs for such watercourse regulations.

Article 28. Safety of international watercourse systems, installations and constructions

1. System States shall employ their best efforts to maintain and protect international watercourse systems and the installations and constructions pertaining thereto.

2. To this end, system States shall co-operate and consult with a view to concluding agreements concerning:

(a) Relevant general and special conditions and specifications for the establishment, operation and maintenance of sites, installations, constructions and works of international watercourse systems;

(b) The establishment of adequate safety standards and security measures for the protection of the watercourse system, its shared resources and the relevant sites, installations, constructions and works from hazards and dangers due to the forces of nature, wilful or negligent acts or hazards and dangers created by faulty construction, insufficient maintenance or other causes.

3. System States shall as far as reasonable exchange information and data concerning the safety and security issues dealt with in this article.

Article 29. Use preferences

1. In establishing systems or régimes for equitable participation in the utilization of an international watercourse system and its resources by all system States, no specific use or uses shall enjoy automatic preference over other equitable uses except as provided for in system agreements, other agreements or other legal principles and customs applicable to the watercourse system in question.

2. In settling questions relating to conflicting uses, the requirements for and the effects of various uses shall be weighed against the requirements for and effects of other pertinent uses with a view to obtaining the optimum utilization of shared watercourse resources and the reasonable and equitable distribution thereof between the system States, taking into account all considerations relevant to the particular watercourse system.

3. Installations and constructions shall be established and operated in such a manner as not to cause appreciable harm to other equitable uses of the watercourse system.

4. When a question has arisen with regard to conflicting uses or use preferences in an international watercourse system, system States shall, in conformity with the principles of good faith and friendly neighbourly relations, refrain from commencing works on installations, constructions or other watercourse projects or measures pertaining to the relevant conflicting uses which might aggravate the difficulty of resolving the questions at issue.

Article 30. Establishment of international watercourse systems or parts thereof as protected national or regional sites

1. A system State or system States may—for environmental, ecological, historic, scenic or other reasons—proclaim a watercourse system or part or parts thereof a protected national or regional site.

2. Other system States and regional and international organizations or agencies should in a spirit of good faith and friendly neighbourly relations co-operate and assist such system State or States in preserving, protecting and maintaining such protected site or sites in their natural state.

CHAPTER V. SETTLEMENT OF DISPUTES

Article 31. Obligation to settle disputes by peaceful means

1. System States as well as other States Parties shall settle disputes between them concerning the interpretation or application of the present Convention by peaceful means in accordance with Article 2 of the Charter of the United Nations and, to this end, shall seek solutions by the means indicated in Article 33, paragraph 1, of the Charter.

2. Nothing in this chapter impairs the right of States Parties (system States) to agree at any time to settle a dispute between them concerning the interpretation or application of the present Convention by any peaceful means of their own choice.

Article 32. Settlement of disputes by consultations and negotiations

1. When a dispute arises between system States or other States Parties concerning the interpretation or application of the present Convention, the parties to the dispute shall proceed expeditiously with consultations and negotiations with a view to arriving at a fair and equitable solution to the dispute.

2. Such consultations and negotiations may be conducted directly between the parties to the dispute or through joint commissions established for the administration and management of the international watercourse system concerned or through other regional or international organs or agencies agreed upon between the parties.

3. If the parties have not been able to arrive at a solution of the dispute within a reasonable period of time, they shall resort to the other procedures for peaceful settlement provided for in this chapter.

Article 33. Inquiry and mediation

1. In connection with the consultations and negotiations provided for in article 32, the parties to a dispute concerning the interpretation or application of the present Convention may, by agreement, establish a Board of Inquiry of qualified experts for the purpose of establishing the relevant facts pertaining to the dispute in order to facilitate the consultations and negotiations between the parties. The parties must agree to the composition of the Board, the tasks entrusted to it, the time-limits for the accomplishment of its findings and other relevant guidelines for its work. The Board of Inquiry shall decide on its procedure unless otherwise determined by the parties. The findings of the Board of Inquiry are not binding on the parties unless otherwise agreed upon by them.

2. The parties to a dispute concerning the interpretation or application of the present Convention may by agreement request mediation by a third State, an organization or one or more mediators with the necessary qualifications and reputation to assist them with impartial advice in such consultations and negotiations as provided for in article 32. Advice given by such mediation is not binding upon the parties.

Article 34. Conciliation

1. If a system agreement or other regional or international agreement or arrangement so provides, or if the parties agree thereto with regard to a specific dispute concerning the interpretation or application of the present Convention, the parties shall submit such dispute to conciliation in accordance with the provisions of this article or with the provisions of such system agreement or regional or international agreement or arrangement.

Any party to the dispute may institute such proceedings by written notification to the other party or parties, unless otherwise agreed upon.

2. Unless otherwise agreed, the Conciliation Commission shall consist of five members. The party instituting the proceedings shall appoint two conciliators, one of whom may be its national. It shall inform the other party of its appointments in the written notification.

The other party shall likewise appoint two conciliators, one of whom may be its national. Such appointment shall be made within thirty days from the receipt of the notification mentioned in paragraph 1.

3. If either party to the dispute fails to appoint its conciliators as provided for in paragraphs 1 or 2 of this article, the other party may request the Secretary-General of the United Nations to make the necessary appointment or appointments unless otherwise agreed upon between the parties. The Secretary-General of the United Nations shall make such appointment or appointments within thirty days from the receipt of the request.

4. Within thirty days after all four conciliators have been appointed the parties shall choose by agreement the fifth member of the Commission from among the nationals of a third State. He shall act as the president of the Conciliation Commission. If the parties have not been able to agree within that period, either party may within fourteen days from the expiration of that period request the Secretary-General of the United Nations to make the appointment. The Secretary-General of the United Nations shall make such appointment within thirty days from the receipt of the request.

Article 35. Functions and tasks of the Conciliation Commission

1. Unless the parties otherwise agree, the Conciliation Commission shall determine its own procedure.

2. The Conciliation Commission shall hear the parties, examine their claims and objections, and make proposals to the parties with a view to reaching an amicable settlement.

3. The Conciliation Commission shall file its report with the parties within twelve months of its constitution, unless the parties otherwise agree. Its report shall record any agreement reached between the parties and, failing agreement, its recommendations to the parties. Such recommendations shall contain the Commission's conclusions with regard to the pertinent questions of fact and law relevant to the matter in dispute and such recommendations as the Commission deems fair and appropriate for an amicable settlement of the dispute. The report with recorded agreements or, failing agreement, with the recommendations of the Commission shall be notified to the parties to the dispute by the Commission and also be deposited by the Commission with the Secretary-General of the United Nations, unless otherwise agreed by the parties.

*Article 36. Effects of the report of the Conciliation Commission.
Sharing of costs*

1. Except for agreements arrived at between the parties to the dispute through the conciliation procedure and recorded in the report in accordance with paragraphs 2 and 3 of article 35, the report of the Conciliation Commission—including its recommendations to the parties and its conclusions with regard to facts and law—is not binding upon the parties to the dispute unless the parties have agreed otherwise.

2. The fees and costs of the Conciliation Commission shall be borne by the parties to the dispute in a fair and equitable manner.

Article 37. Adjudication by the International Court of Justice, another international court or a permanent or ad hoc arbitral tribunal

States may submit a dispute for adjudication to the International Court of Justice, to another international court or to a permanent or *ad hoc* arbitral tribunal if they have not been able to arrive at an agreed solution of the dispute by means of articles 31 to 36, provided that:

(a) The States parties to the dispute have accepted the jurisdiction of the International Court of Justice in accordance with Article 36 of the Statute of the Court or accepted the jurisdiction of the International Court of Justice or of another international court by a system agreement or other regional or international agreement or specifically have agreed to submit the dispute to the jurisdiction of the Court;

(b) The States parties to the dispute have accepted binding international arbitration by a permanent or *ad hoc* arbitral tribunal by a system agreement or other regional or international agreement or specifically have agreed to submit the dispute to arbitration.

Article 38. Binding effect of adjudication

A judgment or award rendered by the International Court of Justice, by another international court or by an arbitral tribunal shall be binding and final for States Parties. States Parties shall comply with it and in good faith assist in its execution.

CHAPTER VI. FINAL PROVISIONS

Article 39. Relationship to other conventions and international agreements

Without prejudice to article 4, paragraph 3, the provisions of the present Convention do not affect conventions or other international agreements in force relating to a particular international watercourse system or any part thereof, to international or regional watercourse systems or to a particular project, programme or use.

6. The draft took the form of a framework agreement. It included articles setting forth mandatory provisions based on extensive State practice, general principles of international law, and the provisions of the Charter of the United Nations, while other articles were a reflection of the progressive development of international law in matters pertaining to the problems inherent in the use, management and administration of international watercourse systems. At the same time, the draft contained provisions that were to be regarded not as mandatory rules but as recommendations on the way in which riparian States should organize, jointly or unilaterally, the management and administration of such resources.

7. He had taken account of certain basic principles, the first of which was the obligation on States to engage in negotiations in the event of disputes. That obligation had been recognized by the ICJ in 1969, in the *North Sea Continental Shelf* cases,⁸ as one of the methods to be used for the peaceful settlement of international disputes; it was set forth in draft article 4, paragraph 3, and in a number of the subsequent articles. The terms of article 4, paragraph 3, were reproduced verbatim from article 3, paragraph 3, as provisionally adopted by the Commission in 1980.⁹

8. A second basic principle, and one which was a corollary to the obligation to negotiate, was that system agreements should apply whenever necessary or appropriate. The obligation to negotiate, however, could not be extended into an obligation to conclude system agreements, since that would be counter-productive if it were laid down as a principle of law. The Commission might none the less wish to consider whether States should be obliged to submit a dispute over the management and administration of an international watercourse to appropriate peaceful settlement procedures that would provide for speedy, effective and binding solutions. Such a bold course had been taken in the 1982 United Nations Convention on the Law of the Sea.¹⁰

9. A third principle related to the concept of an international watercourse system as a shared natural resource—a concept that was of paramount importance for the administration and management of such a system. It was also a vital and living example of the interdependence of States and their activities. The concept was embodied in draft article 6 but permeated the rest of the draft. In many respects an international watercourse system had to be treated as an integrated whole and the concept of a shared natural resource must necessarily be kept in mind. In that connection, he expressed his appreciation to Mr. Stavropoulos for his note on the UNEP Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States (A/CN.4/L.353).

⁸ Judgment of 20 February 1969, *I.C.J. Reports* 1969, p. 47, para. 86.

⁹ *Yearbook* . . . 1980, vol. II (Part Two), p. 112.

¹⁰ See part XV and annexes V–VIII of the Convention (*Official Records of the Third United Nations Conference on the Law of the Sea*, vol. XVII (United Nations publication, Sales No. E.84.V.3), document A/CONF.62/122).

10. Certain other principles, which he would term "legal standards", had also been applied throughout the draft. Riparian States would be required to observe those standards, although a measure of discretion would be allowed in applying them. One such standard, incorporated in draft articles 6–8, related to "reasonable and equitable participation" in or sharing in a "reasonable and equitable manner" the watercourse system and its uses. A similar formulation—"fair and reasonable distribution"—had been used in draft article 16. Another standard, incorporated in draft articles 7, 19, 27 and 29 for example, was that problems connected with the management and administration of an international watercourse, and negotiations and differences of views in that regard, had to be resolved "on the basis of good faith and good-neighbourly relations". It afforded a very accurate yardstick of the delicate yet practical task of managing and administering a shared natural resource. A third standard, which was incorporated in draft articles 7, 10, 15, 27 and 29 and embodied elements of both fact and law, related to the attainment of "optimum utilization" in management and administration. A fourth basic standard related to the requirement that States should refrain from uses and activities that caused "appreciable harm" to the rights or interests of neighbouring States. The formulations "causing damage", "causing substantial damage" and "causing appreciable damage" were used in a number of conventions, but "appreciable harm" was preferable, since "harm" was more neutral than "damage" in describing the effects of objectionable acts or practices. That principle was reflected in draft articles 9, 11, 20, 23 and 29.

11. Lastly, a principle of fundamental importance was the obligation to co-operate in the joint management and administration of an international watercourse system, a legal obligation that stemmed from the broader and somewhat elusive principles of good-neighbourly relations and the principles laid down in the Charter of the United Nations in Articles 1 and 2 and also Chapter VI, under which Member States undertook to settle their international disputes by peaceful means and in good faith. The principle of co-operation in the joint management of watercourses enjoyed wide support in the practice of States, although it obviously had to be made conditional upon what was practical, reasonable and necessary in each instance.

12. In chapter I of the draft, articles 2–5 reproduced, apart from some minor adjustments, the first four articles provisionally adopted by the Commission in 1980.¹¹ In response to requests made in the Sixth Committee of the General Assembly, he had endeavoured to formulate a definition, or explanation, of the term "international watercourse system" in the new draft article 1. The definition ought to be concrete and avoid an approach based on the concept of the drainage basin, a concept that would not be acceptable as the starting-point for the draft convention. The purpose of such a definition should not be to create a superstructure from which legal principles

could be extracted, since that would defeat the object of drafting principles that were sufficiently flexible to be adapted to the special features of individual international watercourses. For similar reasons, he had not itemized the constituent elements of an international watercourse system: in his view, the terms "international watercourse system" and "system States" were sufficiently comprehensive to provide the necessary guidance. By the same token, the word "components" was preferable to the word "part" in draft article 3, which set out the definition of system States. He would be particularly interested in having the Commission's comments on the proposed definition in draft article 1.

13. Chapter II, which related to general principles governing the rights and duties of system States, consisted of draft articles 6–9. Apart from minor changes, draft article 6 reproduced draft article 5 as provisionally adopted in 1980¹² and provided that the waters of an international watercourse system should be considered as a shared and shareable natural resource. Draft articles 7–9 then sought to provide some guidelines in the delicate matter of applying the principle laid down in draft article 6. He had tried to display some caution, as would be apparent from the use in draft article 7, for example, of the words "in a reasonable and equitable manner", "good faith", "good-neighbourly relations" and "optimum utilization". In amplification of the legal standards laid down in draft article 7, draft article 8 contained a list, which was not exhaustive, of the factors that might be relevant in determining an equitable sharing in the uses of an international watercourse system and its waters. The list was intended to serve solely as an example of certain factors frequently encountered in bilateral and multi-lateral system agreements; article V of the Helsinki Rules on the Uses of the Waters of International Rivers adopted by the International Law Association in 1966¹³ contained a similar enumeration. Paragraph 2 of draft article 8 reiterated the obligation to negotiate "in a spirit of good faith and good-neighbourly relations" and also provided that, if the States concerned had not been able to solve the problems of an equitable sharing of uses, they should resort to other peaceful settlement procedures provided for in chapter V of the draft.

14. Draft article 9 laid down one of the most important principles in the draft, namely that a system State should refrain from uses or activities that might cause appreciable harm to the rights or interests of other system States. It was a principle that was generally applicable not only in the utilization of international watercourse systems but also in the broader relationships between neighbouring countries and it was assuming ever-growing importance in an era of high technological development. The intention was that the principle as laid down in draft article 9 would be wider and more general in scope than

¹² *Ibid.*, p. 120.

¹³ ILA, *Report of the Fifty-second Conference, Helsinki, 1966* (London, 1967), pp. 484 *et seq.* (the text of the Rules is reproduced in part in *Yearbook* . . . 1974, vol. II (Part Two), p. 357, document A/CN.4/274, para. 405).

¹¹ *Yearbook* . . . 1980, vol. II (Part Two), pp. 110 *et seq.*

had previously been the case, in that it would apply to watercourse systems as well as to their waters.

15. Chapter III contained provisions on co-operation and management procedures in regard to international watercourse systems. It was self-evident that co-operation would normally be essential, and it was also being increasingly recognized that such international co-operation would have to be institutionalized both by setting up the necessary organs for the watercourse in question and by entrusting multilateral organizations and, more and more, the United Nations family of organizations, with tasks relating to such shared resources. On the other hand, too broad or too rapid a transfer of responsibility to institutions could lead to the creation of supranational authorities which would be unacceptable to many Governments. He had of course tried to take account of those somewhat conflicting concerns.

16. Thus, in draft article 10, the general principle was tempered by a caveat in paragraph 1 to the effect that co-operation in the management and administration of a watercourse system should be established "to the extent practicable", and a second sentence had been added specifying that such co-operation "shall be exercised on the basis of the equality, sovereignty and territorial integrity of all system States". Paragraphs 2 and 3 of draft article 10 provided for regular consultation and exchange of data and information and the establishment of joint commissions or other co-operative institutions or agencies. Measures of that kind had been included in a number of agreements and had proved indispensable for the efficient administration of particular international watercourses.

17. One essential aspect of international co-operation involved notification of programmes planned by one system State that might cause appreciable harm to the rights and interests of another system State. The relevant provisions were to be found in draft articles 11–14 and the basic elements derived from established principles of international law, such as the obligation to act in good faith and in keeping with good-neighbourly relations, the obligation not to cause appreciable harm to neighbouring States and the obligation to solve outstanding issues exclusively by peaceful means.

18. A significant matter with regard to the co-operation and joint management of international watercourse systems was the clear trend in State practice and in the work of the United Nations family of organizations towards institutionalization of the requisite machinery, something that frequently involved the establishment of joint commissions and the collection, processing and exchange of information and data on a regular basis. Since those issues were highly relevant, he had dealt with them in some detail in draft articles 15–19.

19. Chapter IV, consisting of draft articles 20–30, covered a number of environmental aspects relating to watercourse systems. The provisions of draft articles 20–25 were not confined to the international watercourse system as such but extended to the surrounding area forming an ecological whole with the system concerned.

Those draft articles laid down legal obligations that stemmed from established principles of international law.

20. He wished to draw special attention to the definition of pollution contained in draft article 22, and it would be seen from the wording of draft article 23, on the obligation to prevent pollution, that he had rejected the distinction sometimes made between "existing" pollution and "new" pollution. If pollution caused appreciable harm to other States, a distinction between old and new sources of such harm did not seem justified.

21. Draft articles 26 and 27 dealt with protection of the environment of a watercourse from a different point of view. Article 26 imposed an obligation on States to co-operate in preventing or mitigating hazardous water-related conditions by introducing joint measures and régimes. The list of such hazards in paragraph 1 was not meant to be exhaustive, although it obviously included the more important ones. Since floods and drought were among the worst scourges that afflicted man in many regions of the world, he wondered whether more emphasis should not be placed on flood control and measures to combat drought by imposing an obligation not only on system States to engage in co-operation but also on the appropriate international organizations and indeed on mankind as a whole to provide the necessary assistance in abating those scourges, which were particularly damaging to the developing world. He would be grateful for any guidance the Commission could give him on those issues.

22. Draft article 27 included among the measures to regulate international watercourse systems the "storing, releasing and diverting of water by means of dams, reservoirs, barrages, canals, locks, pumping systems or other hydraulic works" and paragraph 2 provided that system States should co-operate in a spirit of good faith and good-neighbourly relations in preparing the appropriate plans for such regulations.

23. As for draft article 28, relating to the safety of international watercourse systems, installations and constructions, he had much sympathy for the suggestions in Mr. Schwebel's third report (A/CN.4/348, paras. 393 *et seq.* and draft article 13) regarding a draft article on protection of watercourses in the event of armed conflict. However, he had grave doubts about the wisdom of including such a provision in the present draft, for it might easily be construed as an attempt to change or extend the content of the two 1977 Geneva Protocols on the protection of victims in armed conflicts,¹⁴ which had been agreed after lengthy and delicate negotiations. The end result might be to create unforeseen difficulties for the Commission's work on a difficult topic. For that reason he had hesitated to include an appropriate provision in the draft, but the Commission's guidance in the matter would be very welcome. However, it was essential to include

¹⁴ Additional Protocols to the Geneva Conventions of 12 August 1949, adopted on 8 June 1977. Protocol I relates to the protection of victims of international armed conflicts; Protocol II relates to the protection of victims of non-international armed conflicts (United Nations, *Juridical Yearbook 1977* (Sales No. E.79.V.1), pp. 95 *et seq.*).

provisions relating to the establishment of safety standards, operating manuals and maintenance procedures for installations and constructions pertaining to watercourse systems, and draft article 28 was therefore confined to those matters.

24. Draft article 29, relating to use preferences, laid down a general principle in paragraph 1 that no specific use or uses should have automatic preference over other uses, except as provided for in system agreements, other agreements or other legal principles and customs applicable to the watercourse system in question. Historically, navigation had been the use on which interest had been focused in early agreements between States, but the emphasis had shifted away from navigational issues in recent years. The basic point draft article 29 sought to make was that system States must negotiate in good faith in order to settle problems relating to conflicting uses. In that connection, paragraph 4 of the article provided that, when such a question arose, system States should, in conformity with the principles of good faith and friendly neighbourly relations, refrain from commencing work on watercourse projects that would aggravate solutions to the question at issue. In such situations, the general principles laid down in chapter II, and particularly in draft article 8, would of course be applicable. In his opinion, draft article 30, providing for the establishment of international watercourse systems or parts thereof as protected national or regional sites, also had its place in the draft. Other system States and regional and international organizations should assist the country concerned in maintaining such sites in their natural state.

25. In chapter V, relating to the settlement of disputes, he used as a natural point of departure the obligations laid down in Articles 2 and 33 of the United Nations Charter. Having examined a large number of multilateral and bilateral treaties, he had concluded that the provisions of part XV and annexes V–VIII of the 1982 United Nations Convention on the Law of the Sea¹⁵ were highly relevant, although they should not always be applied uncritically to international waterways. The 1949 Revised General Act for the Pacific Settlement of International Disputes,¹⁶ the 1957 European Convention for the Peaceful Settlement of Disputes¹⁷ and other regional arrangements of a general nature likewise afforded useful guidance.

26. In chapter V of the draft, article 31 set out the unconditional obligation laid down in Articles 2 and 33 of the United Nations Charter that system States as well as other States Parties must settle their disputes by peaceful means. The provisions of the article were virtually identical to those of article 279 of the United Nations Convention on the Law of the Sea. Draft article 32 went on to prescribe consultations and negotiations as a first and general means of peaceful settlement and also as a legal obligation. Draft article 33 elaborated on that basic procedure by providing that the parties to a dispute might

agree to appoint a Board of Inquiry or a special mediator or mediators to assist them, although the provision was based on the agreement of the parties and was not drafted as a legal obligation.

27. Draft articles 34–36 were concerned with conciliation as an expeditious and relatively inexpensive settlement procedure. The fact that the recommendations of a conciliation were not binding could be advantageous politically, since it relieved the Government concerned of some of the burden of complying with too stringent a judicial solution and, at the same time, meant that it did not suffer any loss of face. Unlike article 297 and annex V, section 2, of the United Nations Convention on the Law of the Sea, draft article 34 did not provide for compulsory conciliation. He would be grateful to learn from the Commission whether it considered that compulsory conciliation should be provided for on a general basis or only for specific issues pertaining to the management and administration of an international watercourse system.

28. Draft articles 37 and 38 dealt with adjudication by the ICJ, other international courts or a permanent or *ad hoc* arbitral tribunal. He had not deemed it advisable to make the provisions of those articles compulsory, although articles 286–299 of the United Nations Convention on the Law of the Sea did provide for compulsory procedures entailing binding decisions in a large number of conflicts involving the interpretation or application of the Convention. For all that, there were a number of exceptions. Compulsory jurisdiction by the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea was also provided for under articles 186 *et seq.* of the Convention in connection with disputes arising out of activities in the international Area. In his view, those provisions involved a special approach to certain problems of the Convention and he doubted whether any useful analogy could be drawn between them and the present draft.

29. However, the Commission on the limits of the Continental Shelf, set up under article 76 and annex II of the Convention, afforded an interesting example of one specific type of settlement procedure. In drawing up the outer limits of the continental shelf, coastal States had to submit all the particulars, together with supporting scientific and technical data, to that Commission, which was then required to submit its recommendations regarding the delimitation to the coastal State concerned and to the Secretary-General of the United Nations. Those recommendations were not final and binding on the coastal State concerned but article 76, paragraph 8, of the Convention stipulated that the limits of the shelf established by a coastal State on the basis of those recommendations should be final and binding. On the other hand, article 9 of annex II to the Convention also expressly provided that the actions of the Commission on the Limits of the Continental Shelf should not prejudice matters relating to the delimitation of boundaries between States with opposite or adjacent coasts. Annex II further provided that that Commission should consist of 21 members elected by the United Nations for a five-year term. The Convention presupposed that that Commission

¹⁵ See footnote 10 above.

¹⁶ United Nations, *Treaty Series*, vol. 71, p. 101.

¹⁷ *Ibid.*, vol. 320, p. 243.

would have special expertise in the question of delimitation of marine areas and continental shelves in particular. Although it was not analagous to the problems arising in connection with the management and administration of an international watercourse system, the question of the establishment of an expert body or commission to make recommendations to system States in cases of disputes deserved consideration and he would welcome the Commission's views on the matter.

30. Lastly, it would be gratifying to learn from members whether he had omitted any essential issues, what their reactions were to his general approach to the topic and to the general principles he had outlined, whether he had struck a reasonable balance between the various interests, whether chapter V on settlement of disputes was too detailed, and whether provisions should be included for a compulsory conciliation procedure. In addition to a more general discussion on those points, members might wish to devote some time to considering specific articles. For the time being, however, he would suggest that the Commission should concentrate on chapter I of the draft, which consisted of draft articles 1–5.

31. The CHAIRMAN said that, since draft articles 2–5 reproduced virtually word for word the articles already provisionally adopted by the Commission,¹⁸ members might wish to focus attention on draft articles 6–9.

32. Sir Ian SINCLAIR, supported by Mr. KOROMA, suggested that the Commission should proceed to a general discussion of the report as a whole and, within that framework, should discuss the content of draft article 1, which laid down a definition of the terms “international watercourse system”, and of draft article 6, which established that an international watercourse system was a shared natural resource.

It was so agreed.

33. Mr. EVENSEN (Special Rapporteur) said that, in formulating a definition of the term “international watercourse system” in draft article 1, he had endeavoured to be as specific as possible and to avoid a doctrinal approach. For that reason he had omitted any reference to the river basin. He also deemed it advisable to omit any enumeration of the constituent elements of such a system. Accordingly, the first clause of the article contained the bare statement that an “international watercourse system” is a watercourse system ordinarily consisting of fresh water components, situated in two or more system States”. The second clause in paragraph 1 had been included in express terms, since it was important to make clear that the types of watercourses in question were frequent occurrences in many parts of the world. The third clause in paragraph 1 had been inserted to take account of the fact that, while a watercourse system normally had mainly a fresh water component, deltas, river mouths or other similar formations containing brackish or salt water formed a natural part of the system. Paragraph 2 of the draft article was self-explanatory.

34. He would await members' reactions to draft article 1 before introducing draft article 6.

35. Mr. STAVROPOULOS said that, in 1970, the General Assembly had recommended that the Commission should take up the study of the law of non-navigational uses of international watercourses with a view to its progressive development and codification.¹⁹ Since that time, three Special Rapporteurs had submitted five reports, including the present one, six articles proposed by the second Special Rapporteur in his second report had been provisionally adopted by the Commission, and 11 additional articles had been submitted in the second Special Rapporteur's third report (A/CN.4/348). Only now, however, was the Commission beginning to deal with the substance of the topic.

36. In paragraph 39 of his report (A/CN.4/367), the Special Rapporteur stated that he had studied the previous Special Rapporteur's third report (A/CN.4/348) with the greatest admiration and respect. The same could be said of the report under consideration, for it too commanded admiration and respect and was a truly monumental achievement. It contained a complete draft convention consisting of 39 articles, together with appropriate comments. Both the previous and the present Special Rapporteur had attempted to maintain a delicate balance between rules which would be too detailed to be generally applicable and rules which would be so general that they would not be effective. They had followed the General Assembly's recommendation to engage in codification and progressive development of the law on the topic and both of them had endeavoured to present principles of international law which had or were acquiring the character of custom. The Special Rapporteur, greatly assisted by the previous Special Rapporteur's third report, which had closely followed the Helsinki Rules adopted in 1966 by the International Law Association,²⁰ and by other sources, had also innovated in many cases in order to make the draft articles more accessible and to express different views on substance. On the whole, the present report could not fail to facilitate the Commission's task.

37. Chapter I of the draft contained the introductory articles, the first of which gave an explanation or tentative definition of the term “international watercourse system”. In presenting that definition, the Special Rapporteur had relied on the relevant note adopted by the Commission in 1980.²¹ In its simplicity, that definition was quite adequate for the purpose it was intended to serve. It clearly described what was involved, but did not attempt to suggest a doctrinaire approach. As the Special Rapporteur had rightly pointed out, draft articles 2–5 were the natural starting-point for the topic, since they defined the scope of the draft and introduced the important and valid concept of “system States”.

38. Chapter II of the draft was, to his mind, the most important chapter of all. It reflected the prevailing

¹⁸ See footnote 6 above.

¹⁹ General Assembly resolution 2669 (XXV) of 8 December 1970.

²⁰ See footnote 13 above.

²¹ *Yearbook . . . 1980*, vol. II (Part Two), p. 108, para. 90.

principles of international law that applied to the rights and duties of the co-riparian States of an international watercourse system. Thus an international watercourse system must be regarded as a shared resource to be used and distributed in an equitable manner among the system States concerned; a watercourse and its waters must be developed, used and shared by system States in a reasonable and equitable manner on the basis of good faith and good-neighbourly relations; and activities with regard to an international watercourse system which caused appreciable harm to other system States were prohibited. Those general legal principles were binding upon system States unless otherwise provided for in the draft or in system agreements.

39. Chapter III of the draft enunciated the general principles of co-operation and management in regard to international watercourse systems and set out a number of important provisions in that regard, as did chapter IV, relating to environmental protection and use preferences. Chapter V dealt with the matter of settlement of disputes, and the sole article in chapter VI reproduced an article that had already been provisionally adopted by the Commission.²²

40. He disagreed with the Special Rapporteur's decision not to provide in the draft for a procedure for the compulsory settlement of disputes, something that was strange in view of the right and proper emphasis placed on consultations and negotiations. In the absence of such a procedure, what would happen if one or more system States proved recalcitrant and ignored the principle of good faith and the spirit of good-neighbourliness, with the result that all reasonable attempts to negotiate were unsuccessful? In such a case, it might not be possible to establish equity or to prevent further complications.

41. The Special Rapporteur had stated that, although he was in favour of compulsory international court procedures, he had deemed it inadvisable to introduce compulsory jurisdiction. Such a realistic approach was understandable, for it was based on the current practice of the international community, but he found it regrettable that the Special Rapporteur had not tried to establish speedy, effective and binding procedures. It was gratifying, however, that the Special Rapporteur had suggested in his oral introduction that, in some cases, the draft should follow the example set in the United Nations Convention on the Law of the Sea. At least one of the methods for the settlement of disputes referred to in the draft, namely conciliation, should be compulsory if one of the parties to the dispute requested it. Of course, the recommendations of a conciliation commission would not be binding on the parties to the dispute. A compulsory conciliation procedure might prove to be politically acceptable and of great value in some cases.

42. Theoretically, States could be divided for the purposes of the topic under consideration into three groups: neutral States, upstream States and downstream States. The Special Rapporteur came from an upstream

State and was to be congratulated on producing a very balanced report worthy of someone who was neutral. On the basis of that report, the Commission should now proceed with a sense of equity and fairness to attempt to satisfy all competing interests and to prevent "vetoes" from any side in the hope of improving, rather than worsening, existing conditions.

43. Mr. EL RASHEED MOHAMED AHMED said that he agreed with the Special Rapporteur's practical approach. The need existed for a draft convention to codify the existing law of the non-navigational uses of international watercourses, but the Commission should none the less take care to avoid establishing excessively detailed provisions that would not be generally acceptable to States.

44. One of the international watercourse systems which had not been mentioned by the previous Special Rapporteur was the Nile, which had been governed by legal rules since the time of the Pharaohs. The 1959 Agreement between the United Arab Republic and the Sudan for the full utilization of the Nile waters²³ related primarily to agricultural uses and a Permanent Joint Technical Commission had been set up under the Agreement of the co-riparian countries.

45. The geographical definition of an international watercourse system proposed in draft article 1 should not give rise to any controversy and the Special Rapporteur was quite right to point out that a definition of international watercourses based on a doctrinal approach to the topic would be counter-productive. Similarly, he could support the view expressed by the second Special Rapporteur and quoted in the present report (A/CN.4/367, para. 19) that there was no need to make a distinction between the use of the watercourse and the use of the water of the watercourse. Furthermore, the obligation on States to negotiate in good faith to settle disputes was based on solid legal grounds to be found in State practice and international precedents. In that connection, he agreed with Mr. Stavropoulos that conciliation should be compulsory, as was provided for in the Convention on the Law of the Sea.

46. Subsystem agreements were obviously necessary, particularly in the case of long rivers, as pointed out in the report (*ibid.*, para. 27). That was entirely true in the case of the Nile, for example. However, on the question of the right of co-riparian States to participate in the negotiation and conclusion of system agreements, it was not desirable to establish the condition that a State's use and enjoyment of the waters of the international watercourse system in question must be affected "to an appreciable extent" (*ibid.*, para. 31). The words "to an appreciable extent" were imprecise and would not serve as a reliable guideline. In his opinion any of the co-riparian States should be entitled to participate in the negotiation and conclusion of a system agreement.

47. He agreed with the Special Rapporteur's approach to the important matter of water resources and installation safety (*ibid.*, paras. 45-46) but was opposed to the

²² Art. X (Relationship between the present articles and other treaties in force) (*ibid.*, p. 136).

²³ United Nations, *Treaty Series*, vol. 453, p. 51.

decision not to take account of questions pertaining to the law of armed conflict, which had been dealt with in draft article 13 as proposed by the previous Special Rapporteur (A/CN.4/348, para. 415). Moreover, provisions on use preferences might not be acceptable in the case of long rivers, such as the Nile, in connection with which the agreements concluded by Egypt and the Sudan, for example, related mainly to agricultural uses.

48. Lastly, if draft article 1, paragraph 2, was worded positively, draft article 6 could be reduced to a single sentence, reading: "An international watercourse system is a shared natural resource."

49. Mr. REUTER said it was probably the first time in the Commission's history that a Special Rapporteur had, in his first report (A/CN.4/367), outlined the essentials of his thinking and submitted a complete set of draft articles. The report under examination bore witness to the author's constructive attitude, his clarity and his caution. Indeed, the Special Rapporteur was displaying caution firstly because it was a natural quality that had earned him a justified reputation at major and lengthy international conferences; secondly, because the largest possible measure of agreement should be achieved on a particularly difficult and delicate subject; and lastly, because it was preferable that members of the Commission should acquaint the Special Rapporteur with their points of view on the principal difficulties before he adopted a position. The result was that several of the proposed texts side-stepped difficulties rather than resolved them. He (Mr. Reuter) proposed to state his views on what he regarded as an accessory issue, that of the relationship between the law on international watercourses and the law on armed conflicts, and then to make a general comment from which other observations would derive.

50. The Special Rapporteur was right to have refrained from going into the question of the law of armed conflicts. The problems that might result from armed conflicts in the matter under consideration were all too easy to imagine, but the Commission did not have to concern itself with all the possible uses of the waters of international watercourses for destructive military ends. In that connection, he recalled that towards the end of the Second World War certain belligerents had striven to destroy some very important hydraulic installations in order to cause a major catastrophe. Fortunately, the two 1977 Protocols to the 1949 Geneva Conventions²⁴ had now been ratified by some 25 States.

51. The general comment from which other observations would derive concerned the balance in the draft between law and what might be termed "non-law". For a long time, Governments had on occasions inserted in treaties certain wishes or affirmations which involved no obligation and had no legal character. The Hague Conventions of 1899 and 1907 and the 1982 Convention on the Law of the Sea were cases in point. As an expert not representing a Government, he had no sympathy for draft provisions that involved no obligation. He was in favour of excluding not only recommendations, but also

the use of the conditional. The reason why the Convention on the Law of the Sea contained wishes expressed in the conditional was that the Governments that had adopted the Convention had thought it good enough for those States that had been completely passed over in the apportionment of the advantages under that instrument. Personally, he would be against any article drafted in the conditional. Similarly, he would be opposed to any phrase such as "as far as possible" or "if Governments so desire", which would transform an article into a purely potestative clause. He had nothing against an international conference expressing certain wishes, or the Commission suggesting in a report that a conference might do so; but when drafting articles the Commission should state the actual rules it believed it was in a position to state. Admittedly, some rules might seem rather vague, but even the very general rule that States should co-operate with one another implied an obligation, one which, however vague, forbade complete refusal to co-operate. A distinction should therefore be drawn between formulations which were very general but contained a small element of obligation and those which contained none at all. Draft articles which included formulations of the latter kind should be rewritten. In the case of obligations expressed in very vague terms and bordering on non-law, the Commission should consider whether it could not go a little further and spell out their precise meaning.

52. The more general the obligations laid down by the Commission in the draft, the greater would be the need for a third party to intervene in resolving disputes. It did not seem possible to impose a general obligation requiring compulsory settlement for each and every dispute; otherwise the Commission's work would be paralysed by disagreements from the start. It would be better to proceed in the same way as for the law of the sea and try to identify some straightforward or fundamental cases for which an attempt might be made to provide for the compulsory settlement of disputes.

The meeting rose at 6.05 p.m.

1786th MEETING

Tuesday, 21 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

²⁴ See footnote 14 above.