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Summary record of the 1792nd meeting

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

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1792nd MEETING

Wednesday, 29 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitul, 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 RAPPORTEUR³ (*continued*)

1. Mr. THIAM said that he would comment only on the general principles set out by the Special Rapporteur in his remarkable first report (A/CN.4/367), since he would have an opportunity of making other observations during the consideration of the proposed draft articles. He would not dwell at length on questions of vocabulary, because the terms used were only provisional, as the Special Rapporteur had explained.

2. With regard to terminology, he did, however, wish to say that in his view the replacement of the term "drainage basin" by the term "international watercourse system" was not entirely satisfactory; a clear distinction between the two concepts would be difficult to make. The reason why the Special Rapporteur had followed his predecessor's example in that regard was that the term "drainage basin" had given rise to controversy. In the Helsinki Rules on the Uses of the Waters of International Rivers,⁴ an international drainage basin had been defined in article II as

... a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus.

The drainage basin had thus been described as an inseparable unit. If emphasis was placed on the territoriality of the drainage basin, there would be a tendency to divide it up into as many parts as there were basin States, which would be contrary to economic facts as seen with regard to

the future. The drainage basin was now coming to be seen, particularly by countries which pursued a policy of economic integration, as a unit to be exploited by co-riparian States; without going as far as exercising joint sovereignty over the basin, those States regarded it as an economic unity to be exploited jointly according to jointly formulated rules. If a watercourse was held to be international, but a drainage basin was not, it might be concluded that every co-riparian State was free to do as it pleased with the drainage basin; that might have serious consequences, particularly if a State acted in such a way as to change the direction of the watercourse. For those reasons, it would be preferable not to depart from accepted concepts in the present draft.

3. The term "shared natural resource" did, of course, appear in many resolutions adopted by international organizations, but it was not necessarily preferable to the term "common natural resource", because something that was shared was usually doomed to disappear, whereas a watercourse that was common property would exist indefinitely.

4. The topic under consideration was undeniably of great importance for some third world countries, especially those of the African continent, where water was a particularly serious problem. Great projects had been undertaken for use of the waters of the major African rivers for irrigation, industry and other purposes. The drought in the countries of the Sahel had made the problem all the more urgent, and the African countries hoped that the draft articles under consideration would be completed as soon as possible. Their aim was to move on from the stage of co-operation to that of integration, to which the Special Rapporteur had referred several times. It was essential not to lose sight of that new and dynamic concept of co-operation in respect of international watercourses.

5. Up to the present, watercourses had been considered, at least in the most important international instruments, as serving primarily for navigation or constituting natural frontiers. In regard to navigation, the co-riparian States of European watercourses had combined against the non-riparian States. On African rivers, European States had until recently been granted freedom of navigation. Moreover, a number of watercourses had been recognized as forming frontiers. What was needed now was an approach that would not create divisions between riparian States, but would enable them to develop their economic potential. Such an approach would, however, inevitably lead to differences between upstream and downstream States, relating mainly to the quantity and quality of water, and attempts would have to be made to settle those differences. The Harmon doctrine, which had been abandoned, had given the upstream State a free hand in the use of water.

6. The Helsinki Rules, which the Special Rapporteur had largely followed—although, in some respects, he had gone into greater detail—proposed the equitable use of the water of watercourses by all co-riparian States. He himself was in favour of those rules, because they proposed balanced and reasonable solutions which took

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

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

³ For the texts, see 1785th meeting, para. 5. 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.*

⁴ See 1785th meeting, footnote 13.

account of all the interests involved. He noted, however, that international case-law was not so consistent. For example, the award in the *Lake Lanoux* case did not take a clear stand on the existence of a principle prohibiting the upper riparian State from altering the waters of a river in circumstances calculated to do serious injury to the lower riparian State.⁵ Hence it could not be said that there was any clear-cut rule of that kind in positive international law. Nevertheless, it was the Commission's task to formulate rules which would make it possible to settle any disputes that might arise; and although he understood Mr. Ushakov's concern (1791st meeting) about the adoption of rules that would be binding on States, he believed that anarchy could not be allowed to prevail. The Commission must at least formulate some guidelines.

7. It was necessary to determine whether, in addition to agreements and arrangements concluded by riparian States, there were any general rules from which those States could not derogate by means of special agreements. One thesis was that riparian States were bound only by agreements which they had concluded; another was that there were general rules to which all riparian States were subject. The first thesis not only led to anarchy in the absence of agreements, but it did not take account of the fact that, with the exception of the State at the source of an international watercourse and the State at its mouth, all the riparian States were both upstream and downstream States, so that any claim by those States that they could use the watercourse as they pleased, without taking account of the interests of the other riparian States, would cut both ways. The only useful approach was to propose moderate solutions, as the Special Rapporteur had done.

8. He noted that the aim of all the existing agreements was to propose reasonable compromise solutions with regard to the use of international watercourses and referred to the principle of territorial integrity, which prohibited any use of an international watercourse that might alter the quantity or quality of the water reaching downstream States. Other principles by which States must abide included that of the peaceful settlement of disputes, which prohibited a State from indefinitely failing to heed protests by another State concerning the use of a watercourse, and that of international responsibility. Those principles had been embodied in draft articles 6, 7 and 9. Although they were principles of general international law and the States parties to a dispute must observe them, they should still be stated in the draft. The Commission had to steer a middle course between saying nothing and compelling States to act against their will. On more than one occasion, the Special Rapporteur had recognized that legal rules on the subject did exist, and some of his articles were drafted in mandatory form.

9. It was important not only to ascertain positive law, but also to engage in its progressive development. Most

African States were in favour of solutions directed towards economic integration. Many of them were not large and their frontiers had been drawn contrary to common sense during the colonial era, but the OAU had decided that it was better to work across those frontiers than to change them. From that point of view, international watercourses helped to promote integrated economic development. The same was true of other resources situated in the territory of more than one State, which should not be shared but should be regarded as factors making for integration. In his commentary to draft article 10, the Special Rapporteur had rightly referred to economic integration (A/CN.4/367, para. 107), which entailed the progressive development of international law. Generally speaking, he could endorse the report under consideration.

10. Mr. McCaffrey commended the Special Rapporteur for adopting, in his excellent report (A/CN.4/367), the approach of setting out a draft outline of the entire topic, followed by draft articles with commentaries. That approach was extremely useful for understanding the scope of the topic and the direction in which it was heading. Equally helpful was the Special Rapporteur's method of cross-references, which avoided encumbering the commentaries with lengthy recitations of authorities and rationale contained in earlier reports. Moreover, the whole purpose of the Special Rapporteur's first report was to propose an outline of the topic.

11. The tentative and exploratory nature of the first report, however, did not apply to the provisions already adopted by the Commission, consisting of the note on the international watercourse system⁶ and articles 1 to 5 and X, adopted on first reading at the Commission's thirty-second session. It would considerably delay the Commission's work if a discussion on those provisions were to be reopened now, contrary to the wishes of the General Assembly, which had requested the Commission to move forward on the topic. The Commission would, of course, reconsider the provisions in question when it came to the second reading of the draft articles.

12. Thus no articles need be referred to the Drafting Committee at the present session. Articles 1 and 6, as proposed by the Special Rapporteur, could serve as signposts showing the direction he proposed, but they should not be sent to the Drafting Committee until the first reading of the entire set of articles had been completed. As for the minor changes to articles 1 and 2, they could be considered as approved if no objection was voiced; otherwise, they could be considered on second reading. With regard to the general approach to articles which had not yet been adopted, he agreed that it would be fruitful to start with the fundamental points on which there was general agreement and to work on from them to those points on which there was less agreement.

13. On the question of whether the draft articles should take the form of recommendations of obligations—the choice between “should” and “shall”—the Commission should of course identify as many legal obligations as it

⁵ United Nations, *Reports of International Arbitral Awards*, vol. XII . . . , p. 308, para. 13; see also *Yearbook* . . . 1974, vol. II (Part Two), p. 197, document A/5409, para. 1066.

⁶ *Yearbook* . . . 1980, vol. II (Part Two), p. 108, para. 90.

could so long as they were of a general nature and hence capable of being adapted to specific situations. At the same time, it seemed inevitable, and also desirable, that the Commission should use more hortatory language in appropriate circumstances. The draft took the form of a framework agreement which would have to apply to a variety of systems and circumstances. The rules embodied in it would therefore have to be flexible. The draft articles would essentially provide guidelines from which States could tailor a solution to their specific problems. Thus there appeared to be room for “should” as well as “shall”, and he supported the Special Rapporteur’s general approach in that regard.

14. Turning to the substance of the topic, he observed that water was essential to life—a point that was well illustrated by the quotation from the European Water Charter of 1968⁷ given in the report (*ibid.*, para. 156). Certain legal obligations clearly resulted from that fundamental fact alone. Thus one co-riparian State could not deprive another of the quantity and quality of water necessary to life. As one moved away from that point of departure, however, the difficulties increased. For example, could the upper riparian State make it more expensive for the lower riparian State to live, or take measures that were merely economically disadvantageous to the lower riparian State? Did the fact that the waters of an international watercourse rose in or passed first through one riparian State give that State some kind of priority in them over a lower riparian State?

15. Those questions explained why the topic was of such vital and immediate interest to the international community. Unlike other topics, it did not involve the elaboration of legal principles in the abstract; the principles, norms and guidelines to be elaborated would apply to a concrete problem—that of reconciling, accommodating and adjusting competing interests in international watercourses.

16. In approaching that task, the Commission would find assistance in the analogous field of the law of riparian rights at the municipal level, which had been described as “a wet version of the law of nuisance”. One of the main predicates of the law of nuisance was the maxim *sic utere tuo ut alienum non laedas*. That fundamental rule, with its close connection to the doctrine of abuse of rights, had found expression in a wide variety of international normative statements, ranging from the *Trail Smelter* arbitration award⁸ to principle 21 of the Stockholm Declaration on the Human Environment⁹ and the Judgment of the ICJ (merits) in the *Corfu Channel* case, in which the Court had spoken of “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”.¹⁰ That ruling, and the maxim on which it was based, demonstrated that the

territorial sovereign rights of States were correlative—they did not exist or operate in a vacuum, but within a framework of interdependence. Further assistance would be provided by the Commission’s work on the topics of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law; for the topic of watercourses was in large measure a concrete application of the other two topics.

17. Before considering individual draft articles, he wished to comment on the concepts of an “international watercourse system” and a “shared natural resource”, which constituted the twin pillars of the present topic. The Commission had already adopted a note describing its tentative understanding of what was meant by the term “international watercourse system”.¹¹ As stressed by the previous Special Rapporteur in his third report, that note constituted a “working hypothesis”, subject to refinement and change, which would give an indication of the scope of the draft articles (A/CN.4/348, para. 7).

18. Two features distinguished the concept of an “international watercourse system” from that of a “drainage basin”: its flexibility and its relativity. The advantage of flexibility could be illustrated by the example of the Garrison Diversion Unit. In order to irrigate some 250,000 acres of farm land, water was to be diverted from the Missouri river basin across the Continental Divide into an area whose waters eventually flowed into the Hudson Bay drainage basin in Canada. Thus there were two drainage basins, one draining essentially south and the other north. It was doubtful whether an effect in Canada of that inter-basin transfer in the United States would be covered by the drainage basin approach. For one thing, there would be no common terminus—an essential feature of the drainage basin concept. But since it had been established scientifically that uses of the waters in one basin could affect the waters in the other, the two basins would qualify as parts of a unitary “international watercourse system”, as that term was explained in the Commission’s note.

19. The feature of relativity was well explained in the concluding portion of the Commission’s note: it determined the circumstances under which a lower riparian State could have an interest in the use being made of the watercourse by an upper riparian State. If the use made by the upper riparian (such as boating) had no effect on the uses by the lower riparian, the watercourse system was, to that extent, not international. That aspect of relativity gave the concept of an international watercourse system, and hence the entire draft, a degree of flexibility that was highly desirable. However, the relative nature of that concept might make it a difficult one to implement, and the Commission might ultimately decide that the desired flexibility could best be achieved through the “appreciable harm” approach.

20. The commentary should make it absolutely clear that all the various hydrographic components of the inter-

⁷ See 1790th meeting, footnote 10.

⁸ United Nations, *Reports of International Arbitral Awards*, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

⁹ See 1788th meeting, footnote 6.

¹⁰ Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 22.

¹¹ See footnote 6 above.

national watercourse system were included, making specific mention of such essential components as glaciers and ground water. In the central valley of California, for instance, ground water was a major source of water for irrigation, and the drought in the mid-1970s had caused an over-draught which seriously threatened agricultural production for years to come, since it took time to replace ground-water supplies. As Mr. Barboza had pointed out (1789th meeting), the withdrawal or pollution of ground water in one State could have very serious consequences for a neighbouring State relying on the same "pool" of ground water.

21. The concept of a "shared natural resource" was already embodied in draft article 5, as adopted by the Commission. In his view, it followed from the *sic utere tuo* maxim that the waters of an international watercourse system constituted a shared natural resource in both the physical and the legal sense. Physically, those waters were shared either simultaneously, as in the case of a contiguous watercourse, or successively, as in the case of a watercourse that was international in the successive sense. The resource was shared in the legal sense because the rights of the system States were not absolute but correlative, at least to the extent that a use of the waters in one system State affected their use in another. For those reasons, the notion that the waters of an international watercourse system were, under certain conditions at least, a shared natural resource seemed to be a justifiable and useful principle on which to base the draft.

22. In that connection, he was in full agreement with the Special Rapporteur in rejecting the Harmon doctrine of "absolute sovereignty" (A/CN.4/367, para. 84). Indeed, as pointed out by the previous Special Rapporteur in his third report, that doctrine was contrary to customary international law and had never been followed by the United States (A/CN.4/348, para. 54 and footnote 98).

23. It seemed clear that the concept of a shared natural resource had nothing to do with the common heritage of mankind. The two concepts applied to wholly different circumstances and were designed to meet entirely different needs. Furthermore, the concept of a shared natural resource was not inconsistent with that of permanent sovereignty over natural resources. On that point, he associated himself with the remarks of Mr. Balanda (1789th meeting). The two concepts served entirely different purposes, as was clear from a reading of the preamble and operative paragraph 5 of General Assembly resolution 1803 (XVII) on permanent sovereignty over natural resources, as well as of article 3 of the Charter of Economic Rights and Duties of States.¹² Finally, the concept of a shared natural resource could be taken as an expression of the fact that nature did not respect political boundaries, as reflected in the 1929 Agreement concerning the waters of the Nile,¹³ which provided that the waters of the Nile river system "must be considered as a single unit" (see A/CN.4/348, para. 60).

24. Turning to the draft articles, he noted that article 6 stated the principle that the waters of an international watercourse system were a shared natural resource to the extent that their use in one system State affected their use in another. That article had already been provisionally adopted by the Commission as the former draft article 5.

25. Article 7 was, in a way, the corner-stone of the entire draft; for without good faith and good-neighbourly relations, all the principles, mechanisms and institutions in the world were of little help. Those principles went beyond the *sic utere tuo* rule, as explained in the award rendered by the arbitral tribunal in the *Lake Lanoux* case (see A/CN.4/367, para. 90). Obviously, it was practically impossible to impose upon a State a "real desire" to co-operate and "to reconcile the interests of the other riparian with its own", to use the language of that award.¹⁴ An obligation to act in good faith in relations with other system States was probably as much as could be achieved in that direction. The experience of the United States of America and Canada with regard to the Poplar River power plant was also relevant. That project had involved construction of a power plant in Canada some 10 miles north of the border with the United States, an open-pit coal-mine to provide coal for power generation and a dam on the Poplar River. There had been concern in the United States that the project would result in pollution of the reservoir created by the dam in Canada and thereby affect irrigation waters across the border. The matter had been referred to an intergovernmental group, which had adopted a solution that was generally considered innovative and creative, provided—as a Canadian spokesman had said—that the parties concerned acted with good will towards one another. It was that good will which was essential to the solution of international watercourse problems, but which it was impossible to impose on States. The Special Rapporteur, however, spoke of the "obligation of system States to co-operate" (*ibid.*, para. 88). In article 7, that obligation was specifically directed towards co-operation in the development, use and sharing of an international watercourse system, which States were required to carry out "in a reasonable and equitable manner". As indicated by the use of the verb form "shall", article 7 imposed a binding legal obligation, which flowed both from the *sic utere tuo* principle and from the international decisions and instruments implementing it.

26. He endorsed the approach adopted in article 8 that what constituted reasonable and equitable use in any specific situation should be determined not in accordance with rigid rules, but by reference to a range of policy factors. But he also agreed with other speakers that the list of relevant factors should be carefully reviewed, so as to make it objective and to give due weight to the rights of upper and lower riparian States. With regard to paragraph 2 of article 8, he agreed that system States had

¹² General Assembly resolution 3281 (XXIX) of 12 December 1974.

¹³ See 1788th meeting, footnote 7.

¹⁴ United Nations, *Reports of International Arbitral Awards*, vol. XII . . . , p. 315, para. 22; see also *Yearbook* . . . 1974, vol. II (Part Two), p. 198, document A/5409, para. 1068.

an obligation to negotiate. That obligation was well founded, being based on the rulings given in the *North Sea Continental Shelf* cases,¹⁵ the *Fisheries Jurisdiction* cases¹⁶ and the *Lake Lanoux* case, and on the UNEP draft principles (A/CN.4/L.353).

27. Article 9 set out the obligation to avoid causing appreciable harm. In a sense, that was already implicit in the relativity aspect of the concept of an international watercourse system. There was, of course, an element of relativity in the concept of appreciable harm itself, as illustrated by the 1927 judgment of the Constitutional Court of Germany¹⁷ quoted by the Special Rapporteur (A/CN.4/367, para. 92). In that context, the meaning of the adjective “appreciable” called for elucidation, and the previous Special Rapporteur had dwelt on it at some length in his third report (A/CN.4/348, paras. 130-141), where he had explained that “appreciable” stood for more in quantity than was denoted by “perceptible”, but meant less in quantity than such terms as “serious” or “substantial”.

28. Chapter III could be split into two or three separate chapters, since articles 11–14 concerned notification, while articles 16–19 concerned information and data collection, and article 15 stood on its own.

29. In article 10, paragraph 1, he thought the obligation to co-operate ought to be stated with less qualification. He was thinking in particular of the use of the expression “to the extent practicable” in the first sentence. Paragraph 2 appeared to be merely an illustration of the manner in which States should co-operate. Paragraph 3, on the establishment of joint commissions, should be co-ordinated with article 15.

30. Articles 11–14 dealt with notification requirements and the consequences of failure to comply with them. Those articles constituted perhaps the most important part of the draft. The duty to notify was the requirement that really set the wheels of co-operation in motion; it did more than any other single requirement to ensure that projects with potential effects on other system States would not be undertaken unilaterally, without regard for their extraterritorial impact.

31. Article 11 really covered more than the “content of notification” mentioned in the title. The words “may cause appreciable harm”, in paragraph 1, raised two questions. That criterion was important because it triggered the whole notification process. It should therefore be sufficiently broad to cover all potential harm, not only immediate and direct, but also future and indirect harm. The first question was whether a State had a duty to notify under article 11 if no immediate or direct harm would result from the proposed project or use. It should

be noted that article 13, on procedures in case of protest, applied only if a notification had been received. If there had been no notification, it might well be too late to act effectively. As he saw it, the language used in article 11, “may cause appreciable harm to the rights or interests of another system State or other system States,” could indeed be interpreted to include future and indirect harm, particularly in view of the use of the words “may” and “interests”. The position should, perhaps, be made clearer either in the article itself or in the commentary.

32. The second question related to the extent to which the language used entailed the requirement for an assessment of extraterritorial impact. Clearly, the State contemplating a project would necessarily have to assess its impact on other system States; that was the only way for it to ascertain whether it had a duty to notify. As to the legal foundation for the duty to notify under article 11, he agreed with the Special Rapporteur that that principle was “an expression of a prevailing principle of international law” (A/CN.4/367, para. 111). The proposition was amply supported by the authorities quoted by the previous Special Rapporteur (A/CN.4/348, paras. 170 *et seq.*). There was also a clear analogy between the duty to notify in the circumstances contemplated in article 11 and the duty to warn of known dangers that was recognized by the ICJ in 1949 in the *Corfu Channel* case.¹⁸

33. He was in general agreement with article 12, on time-limits for reply. In particular, he believed that the suspensive effect provided for in paragraph 3 was necessary to allow States receiving notification to evaluate adequately the potential effects of the proposed project. The criterion of a reasonable period of time should give adequate protection to the notifying State by ensuring that other States would not abuse the suspensive effect.

34. With regard to article 13, he questioned the desirability of restricting the application of the procedures to a system State that had received notification. A system State might well learn of a planned project in some other way, arrive at the conclusion that it could cause appreciable harm, and wish to invoke the procedures provided for in article 13. As to paragraph 2 of the article, he agreed with other speakers that it would be desirable to require the parties to resort to compulsory procedures for the settlement of disputes in the event of inability to reach agreement. It should perhaps also be considered whether the extent to which provisional measures were available, in the sense of Article 41 of the Statute of the ICJ, should have a bearing on the suspensive effect of paragraph 3. The notifying State should probably be allowed to proceed with the project if the tribunal allowed it to do so. The interpretation of the expressions “utmost urgency” and “unnecessary damage or harm” in paragraph 3 was apparently left to the sole discretion of the notifying State. It might be better to provide for that determination to be made through a compulsory procedure for the settlement of disputes. It was necessary to balance the interest of the notifying State in proceeding with a critical

¹⁵ See 1785th meeting, footnote 8.

¹⁶ *Fisheries Jurisdiction (United Kingdom v. Iceland)*—(*Federal Republic of Germany v. Iceland*), Judgments of 25 July 1974, *I.C.J. Reports* 1974, p. 32, para. 75, and p. 201, para. 67.

¹⁷ *Donauversinkung* case (1927) (*Annual Digest of Public International Law Cases, 1927–1928* (London), vol. 4 (1931), case No. 86, p. 128).

¹⁸ See footnote 10 above.

project against that of the recipient State in avoiding unnecessary harm.

35. He wondered whether some provision should not be made in article 14 for harm that was unforeseen or unforeseeable by the recipient State or States. What was the exact meaning of the words "not apparent" in the second subparagraph of paragraph 1? Not apparent to whom? As worded, the article meant that the notifying State was not responsible to other States for harm caused if recipient States failed to reply within the time-limit laid down in article 12. It would be desirable to introduce some flexibility into the article so that relations between system States would not be worsened by legitimizing or perpetuating a situation that was unforeseen or unforeseeable, but none the less injurious.

36. He also wondered whether the acute emergency situations referred to by the Special Rapporteur in his commentary (A/CN.4/367, para. 130) could be covered by article 33 of part 1 of the draft articles on State responsibility, which related to a state of necessity.¹⁹ In other words, might a State undertaking a project in conditions of acute emergency claim that a state of necessity precluded wrongfulness of the act as well as responsibility for any consequences? Some consideration should perhaps be given to fashioning a *lex specialis* to govern the situation in the context of international watercourses.

37. He fully supported article 15, which dealt essentially with the institutionalized management of the international watercourse system, and considered that the approach it embodied was a logical outgrowth of the principle of co-operation. In his commentary (*ibid.*, para. 132), the Special Rapporteur rightly referred to the importance of institutionalizing co-operation and also to the work of the International Joint Commission of Canada and the United States (*ibid.*, para. 133). The treaty establishing that commission was described in some detail in the Commission's 1974 *Yearbook*.²⁰ The Commission might wish to consider adding impact assessment as one of the functions of commissions set up under article 15, although that was probably covered by paragraph 2 (a) and (b) of the article.

38. Article 18, dealing with special obligations in regard to information about emergencies, could usefully be compared with article 25, on emergency situations regarding pollution. Whereas article 25 used the mandatory form "shall", article 18 used the word "should". In his view, the verb in both cases should be "shall". Again, there was a clear analogy with the duty to warn, recognized in the *Corfu Channel* case.

39. Chapter IV of the draft was vital, because it dealt with environmental protection. In that connection, he quoted an extract from a paper by Professor Handl advocating minimum standards for the protection of the environment. Draft article 20 went some way towards achieving that desirable and practical goal, but it could perhaps be strengthened by amending the phrase "shall to

the extent possible take the necessary measures", in paragraph 1, to read "shall take necessary and reasonable measures". With regard to paragraph 2, he wondered whether the standard, namely avoidance of appreciable harm, was not too low in the context of environmental protection, and would suggest that it might be better to introduce the notions of protection, preservation and improvement. The rare or fragile ecosystems referred to in article 194, paragraph 5, of the United Nations Convention on the Law of the Sea²¹ were not really covered in the draft and he considered that provision for their protection should be included, since they could be crucial for the life of an entire watercourse system.

40. Article 23 used the phrase "cause appreciable harm", which he agreed should be interpreted to cover potential, indirect and future harm as well as direct and immediate harm. He noted, however, that the article did not prevent a non-system State from polluting the waters of the system. Since long-distance transport of air pollution was an all too frequent occurrence, the Commission might wish to include some provisions on that point. He also agreed that no distinction should be drawn between existing and new pollution.

41. In draft article 28, he agreed that the Commission should avoid the question of armed conflict, which could give rise to questions concerning possible interference with the 1977 Geneva Protocols.²²

42. There seemed to be a lacuna at the end of article 29 which could perhaps be filled by including a reference to the procedures for dispute settlement. In regard to article 30, he wished to be associated with Mr. Jagota's remarks (1790th meeting) and trusted that the article would be approved by acclamation. In his view, it should be taken as an encouragement to establish protected areas, rather than as merely permissive in its terms; possibly the article could be reworded to make that clear. In that connection, members would note that the previous Special Rapporteur had mentioned in his third report that a protected river boundary had been established between the United States and Canada (A/CN.4/348, footnote 825).

43. Referring to chapter V of the draft, on settlement of disputes, he expressed his support for compulsory conciliation, which was essential for the smooth operation of the entire framework agreement which the Commission was drawing up and without which many of the other procedures would be merely nugatory.

44. Lastly, he fully agreed that, for ease of reference, footnotes should be placed at the bottom of the page rather than at the end of the report.

45. Mr. QUENTIN-BAXTER said that he had benefited greatly from listening to those members who came from continental areas where the problem of international watercourses loomed large, and who were therefore particularly aware of the vital problems that turned

¹⁹ *Yearbook* . . . 1980, vol. II (Part Two), p. 34.

²⁰ *Yearbook* . . . 1974, vol. II (Part Two), pp. 72 *et seq.*, document A/5409, paras. 154-167.

²¹ Part XII of the Convention (Protection and preservation of the marine environment) (see 1785th meeting, footnote 10).

²² See 1785th meeting, footnote 14.

upon the use and management of rivers. He was also encouraged by the fact that the spirit in which the Commission tackled the subject and its success in that work were likely to influence the contribution that the law could make in matters relating to the new international economic order. In that respect, he shared in the sense of indebtedness to Mr. Evensen and his predecessors as Special Rapporteur.

46. In his view, the whole topic could be reduced to the question of finding a balance, first, between the principle of avoiding harm and the principle of sharing, and secondly, between matters of procedure and matters of substance. As an initial proposition he would suggest that in matters of substance the draft was very gentle, whereas in matters of procedure it was very harsh. So far as the two principles of sharing and avoiding harm were concerned, article 6 enunciated the principle of reasonable and equitable participation; article 7 used the phrase “in a reasonable and equitable manner”; and article 8, emulating article V of the Helsinki Rules,²³ contained a non-exhaustive enumeration of factors which collectively tended to establish that any legitimate interest ranked with any other, unless the parties had agreed otherwise. Basically, however, the substance of sharing, as dealt with in the draft, was contained in the phrase “reasonable and equitable participation”.

47. Article 9, which dealt with the duty not to cause harm to one's neighbour, laid down a far more clear-cut obligation, the articulation of which was governed by the term “appreciable harm”. That, as had rightly been pointed out, was a relative concept and therefore not one that could be dealt with by knife-edge rules unless the parties had first agreed on what constituted harm. He shared Mr. Flitan's concern (1791st meeting) that the term denoted a high degree of harm. Admittedly, in its ordinary meaning it simply meant a measurable and more than perceptible amount of harm. Mr. Flitan's concern, however, pertained not to the natural meaning of the words, but to the natural instinct of anyone formulating such an article to take account of all the variables; the tendency then was to make such a phrase encapsulate more than it was capable of bearing.

48. In regard to the two major principles of the need to share and the need to avoid causing harm, therefore, the draft did not offer firm guidance. What it lacked on that score, however, it made up for in the rigidity of the procedures laid down in articles 11–13. In his view, there was every reason to be somewhat anxious about the balance between substance and procedure at that stage, for if the draft did not provide States with guidance as to their substantive rights, apart from indicating that when they could not agree they would have to submit to dispute-settlement procedure, it would invite a certain reluctance on the part of States to commit themselves. The problem was particularly acute in the context of rivers, and it was therefore necessary to endeavour once again to find a balance between substance and procedure

and between the principles of sharing and of not causing harm.

49. In considering the topic with which he had been entrusted as Special Rapporteur—international liability for injurious consequences arising out of acts not prohibited by international law—he had never placed the harm principle at a lower level than the sharing principle. They were awkward but none the less inseparable companions, particularly in the case of international watercourses. Thus it might not be a bad idea to revert to Mr. Ushakov's notion (1788th meeting) that what the Commission was closely concerned with was water crossing an international frontier; if that were coupled with a reference to the abandonment of the Harmon doctrine, it would provide a point at which to begin. Once the Harmon doctrine was dismissed, the principle of sharing was instated and it was recognized that the downstream State had a right to something. Until that was recognized there was little point in talking about harm, since it was not possible to be harmed by not receiving something which there was no right to receive.

50. It had always been clear that a violation of sovereignty could be invoked to deal with transboundary harm, and it was being increasingly recognized that a substantial element of pollution in a downstream flow might, on the basis of the principle established in the *Trail Smelter* case,²⁴ amount to a violation of sovereignty, or at any rate be wrongful. But the right to receive the quantity and quality of water that normally flowed through a given channel across an international frontier was a matter not so easily related to a violation of sovereignty. It went to the very essence of the sharing principle, so that, bearing in mind the doubts expressed, he was inclined to ask whether a watercourse system was not so much a starting-point as a response to the need to modify the principle that there was a right to receive across a frontier the quantity and quality of flow that nature intended for the country in question. After all, if it was possible to set up the antithesis of the Harmon doctrine and to postulate that there was always a right to receive what nature intended, there would be little need to go much further. The downstream State would have the assurance it had always wanted, but the upstream State would be extremely limited in what it could do. It could not, for instance, build a dam, far less set up an irrigation scheme, because of the impact upon the lower riparian State. In his view, it was neither realistic nor fair to ask any riparian State to accept an absolute denial of its sovereign right to use the water within its territory while it was there. Consequently, in dealing with the basic issue of the flow of water across an international boundary, modifications had to be introduced, and that was feasible only under a framework agreement between the States directly affected. What was needed, therefore, was a convention that would promote system agreements taking due account of the community of interests of the States bordering the river.

²³ *Ibid.*, footnote 13.

²⁴ See footnote 8 above.

51. So far as the procedural provisions of the draft were concerned, it was absolutely vital to distinguish fact-finding from negotiation, and negotiation from dispute settlement. While he favoured the inclusion in the draft of provisions for dispute settlement, they should not be such as to invite States in difficulty to submit themselves to what was in effect a lottery, in which elements of fact and law were so interwoven that any sovereign State would be reluctant to submit itself to the judgment of others. He would therefore urge the Commission to reconsider the immediacy with which the provisions of chapter III, relating to machinery, led on from the articulation of the principle of avoiding harm in article 9. It was highly desirable that, in each particular situation, neighbouring States should be able to agree on what constituted appreciable harm, since a simple overall definition was quite impossible. The degree of harm depended on whether the boundaries were in urban or rural areas, on the prevailing winds, and on all kinds of other natural phenomena; its determination required careful thought, good faith and patience. Those factors could produce the kind of system agreement that would pave the way for an orderly settlement of differences, in most cases long before they developed into a dispute.

52. In regard to the comparison between the rules of State responsibility and the rules to be articulated for his own topic, article 9 had much to commend it. If there was one area in which it was becoming clear that trans-boundary harm was wrongful, it was that of pollution, particularly when water-borne, because it was within the capabilities of modern science and technology to avoid such pollution. Article 9 did not relate liability solely to the occurrence of consequences, but referred to uses or activities "that may cause appreciable harm to the rights or interests of other system States". To that extent it applied an objective test of what might cause harm and it could be contrasted with the International Law Association's Montreal Rules, adopted in 1982²⁴ which related the wrongfulness of pollution to its actual occurrence and not to a course of conduct that permitted it to occur. He doubted, however, whether it would be helpful in arriving at a settlement to provide, in effect, that any disagreement between neighbouring riparian States as to whether the action of one of them was likely to cause harm would be tantamount to an accusation of a breach of international law. In his view, it was extremely important to keep the phases of fact-finding separate, for it was by compromise that a solution to the problem would be found, not by applying Draconian rules. There was never any justification for using procedure as a means of concealing uncertainty about substance. In cases where a rule could not be formulated in clear terms, the parties should not be expected to settle their differences through litigation.

The meeting rose at 1 p.m.

²⁴ See I.L.A., *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 158 *et seq.*

1793rd MEETING

Thursday, 30 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, 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 RAPPORTEUR³ (*continued*)

1. Mr. MAHIOU congratulated the Special Rapporteur on submitting a consistent and well-structured set of draft articles to the Commission. For the time being, he would make only preliminary observations because it would be impossible to deal with every aspect of the subject. His comments would, moreover, relate only to the Special Rapporteur's first report (A/CN.4/367), since the summary record of the 1785th meeting at which the Special Rapporteur had given his oral introduction was still not available.
2. The uses of watercourses gave rise to problems commensurate with the role rivers had always played. Not only had rivers been of great importance in the economic life of countries, they had also had a major impact on human life and had even given birth to civilizations, as in the case of the Nile in Pharaonic Egypt, which some historians did not hesitate to describe as a "water society". Literary works had also described the influence of rivers such as the Don and the Mississippi.
3. Referring to the example of the temporary watercourses in his country, which were known as "wadis" and had been mentioned by Mr. Schwebel and Mr. Evensen, he said that Algeria had an enormous ground-water horizon which covered several States and was a "shared natural resource" which had to be used with the greatest care because it took thousands of years to recharge. The scarcity of water in the Sahara had, moreover, been a decisive factor in attempts to formulate a system of customary rules for the distribution of water. The difficulties experienced by Algerian jurists in codifying

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

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

³ For the texts, see 1785th meeting, para. 5. 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.*