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A/CN.4/SR.1978

Summary record of the 1978th meeting

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

Extract from the Yearbook of the International Law Commission:-
1986, vol. I

cepts, such as "limited territorial sovereignty" (*ibid.*, para. 162), which might create further confusion about the "shared natural resource" concept.

14. With regard to the determination of reasonable and equitable use of the waters of an international watercourse, there was no need for the Commission to resume its discussion of article 8, which had already been referred to the Drafting Committee; but it was an important provision and some of the factors listed should indeed be included in the article itself, which should not be confined solely to the first sentence of paragraph 1.

15. He fully agreed with the Special Rapporteur's analysis and conclusions concerning the concepts of injury and equitable utilization (*ibid.*, para. 172, and especially para. 173). The Special Rapporteur had drawn a useful distinction between "factual harm" and "legally recognizable injury", which would entail consequences and lead to compensation.

16. Of the three proposals made by the Special Rapporteur concerning the duty not to cause "appreciable harm" (*ibid.*, paras. 182-184), the first was the least satisfactory, because the use of the term "injury" in the very broad sense might give rise to problems, while the purpose of article 9 was precisely to avoid any problems of interpretation. The idea stated in the second proposal was quite correct, but the wording might have to be amended. Like the Special Rapporteur, he would be in favour of the third proposal (*ibid.*, para. 184), which was much more concise and would be acceptable if the text were amended to remove any ambiguity. As it now stood, the proposed wording appeared to authorize a State to cause harm to another State, although only in exceptional circumstances.

17. The draft articles on the procedural rules to be applied in the event of a dispute between States concerning the utilization of a watercourse related to matters that had already been dealt with both in the draft on State responsibility for wrongful acts and in the draft on international liability for injurious consequences arising out of acts not prohibited by international law. Since those topics related to loss or injury caused in a wide variety of sectors and already provided for general means of solving such problems, the purpose of the draft articles under consideration would be to arrange for more detailed methods to deal with individual situations in the framework of specific agreements, as the Special Rapporteur in fact suggested in his report (*ibid.*, para. 193). The Special Rapporteur, however, apparently ruled out the idea of the need for specific procedures, and he himself had also begun to question whether they were really necessary. The matter thus called for further consideration.

18. Finally, the Special Rapporteur discussed various situations that might arise between States in the utilization of an international watercourse (*ibid.*, paras. 192-197). However, the distinction he made in paragraph 197 between an existing use and a new use of a watercourse was not at all convincing and was quite difficult to imagine. His own doubts would almost certainly be dispelled by explanations from other members of the Commission and the Special Rapporteur, whose conclusions were none the less very interesting.

The meeting rose at 11.30 a.m.

1978th MEETING

Monday, 30 June 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Sucharitkul, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/393,[1] A/CN.4/399 and Add.1 and 2,[2] A/CN.4/L.398, sect. G, ILC (XXXVI)/Conf.Room Doc.4)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

NEW DRAFT ARTICLES 10 TO 14[3] (*continued*)

1. Mr. CALERO RODRIGUES thanked the Special Rapporteur for his second report (A/CN.4/399 and Add.1 and 2) and his oral introduction (1976th meeting). The report itself seemed rather lengthy, although the wish to make it a self-contained document was understandable. In particular, the discussion in no less than 12 paragraphs of the Harmon Doctrine, in favour of which no one would argue seriously, could have been dispensed with. Other parts of the report, such as that under the heading "equitable utilization or 'limited sovereignty' " (A/CN.4/399 and Add.1 and 2, paras. 92-99), could give rise to prolonged discussion. The statement that

> ... leading studies of the law of international watercourses have concluded that the rights and obligations of States in respect of the use of international watercourses are the same whether the watercourse is contiguous or successive (*ibid.*, para. 76)

was open to dispute. The distinction between rights and obligations of States with regard to contiguous and suc-

[1] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

[3] For the texts, see 1976th meeting, para. 30. The revised text of the outline for a draft convention, comprising 41 draft articles contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook ... 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

cessive watercourses had been drawn in the 1933 Declaration of Montevideo concerning the industrial and agricultural use of international rivers,[4] the 1971 Act of Asunción[5] and the 1971 Act of Santiago concerning hydrologic basins.[6] In his report (*ibid.*, para. 93), the Special Rapporteur quoted paragraph 2 of the Declaration of Asunción in support of his argument; but paragraph 1 of that Declaration stated that, in the case of contiguous international rivers which were under dual sovereignty, there must be a prior bilateral agreement between the riparian States before any use was made of the waters. Consequently, the assertion that there was no distinction of any kind was far too sweeping.

2. Mr. Ushakov (1976th meeting) had been right to say that a future convention would be of little use if it was accepted only by non-riparian States, or if it was accepted only in one region or only by upper or lower riparian States. Hence, in preparing the draft articles, the Commission should seek a compromise, refrain from insisting on doctrinal points and make the draft as simple as possible, so that it could serve as a basis for bilateral or regional agreements. On the other hand, having recourse to formulating recommendations, as Mr. Ushakov had suggested, would not provide a solution. In any event, it would be for States to decide whether the draft articles were to be accepted as rules of law or simply as guidelines.

3. He agreed with the Special Rapporteur's recommendation that the Commission should strive for simplicity in drafting articles on the topic and with his point that to provide a great deal of detail or guidance might prove to be counter-productive and unnecessarily time-consuming (A/CN.4/399 and Add.1 and 2, para. 59). On the other hand, he was not sure about the Special Rapporteur's observation (*ibid.*, para. 58) that the Commission's task was the codification and progressive development of legal rules which applied to physical phenomena. The legal rules applied to the conduct of States, not to physical phenomena. Certainly, the review of the physical characteristics of water contained in the first report of the second Special Rapporteur, Mr. Schwebel,[7] was instructive, but it was not fundamental to the topic.

4. As to the definition of an "international watercourse system", the Special Rapporteur recommended (*ibid.*, para. 63) the "withdrawal" of draft article 1, which had been referred to the Drafting Committee in 1984. Such a step would conform to the conclusion reached by the Commission in 1976 that the definition could be left until a later stage. "International watercourse" and "international watercourse system" were not very different concepts if the working hypothesis of 1980 was maintained. According to that hypothesis, an international watercourse system, for the purposes of the draft articles, was not an objectively unitary concept, but a use-related, relative concept. The final part of the working hypothesis was even more categorical, stating that

> ... to the extent that the uses of the waters of the system have an effect on one another ... the system is international, but only to that extent; accordingly, there is not an absolute, but a relative, international character of the watercourse.[8]

5. Reference to the "system" concept instead of that of a "drainage basin" had been considered by many as an unsatisfactory basis for the draft. If the system concept was interpreted in accordance with the working hypothesis, it lost the feature that made it objectionable. However, some doubt then arose as to whether it retained its usefulness. "Withdrawal" of draft article 1 referred to the Drafting Committee in 1984 might be viewed as a rejection of the deletion of "system". Since that was not the intention, the best solution might be for the Commission simply to decide that the Drafting Committee should not take up the question of the definition until the work on the draft was nearing completion.

6. With regard to the possibility of reviving the "shared natural resource" concept, he had consistently maintained that, if the Commission was to succeed in its efforts, it must seek compromises. The inclusion in the draft of the "shared natural resource" concept would act as a stumbling-block, so it would be unwise to insist on retaining it. On the other hand, omitting it would not exclude the two basic principles of "equitable use" and "no harm" already recognized by the Commission. He agreed with the Special Rapporteur's assertion (*ibid.*, para. 74) that replacing the "shared natural resource" concept with an entitlement to "a reasonable and equitable share of the uses of the waters of an international watercourse" gave a more definite legal content to draft article 6 without eliminating any fundamental principle. For those reasons, he was opposed to any revival of the "shared natural resource" concept.

7. He endorsed the idea of simplifying draft article 8, for as he himself had suggested in 1984,[9] the commentary could include the indicative list of factors to be taken into account in determining whether the use of the waters of an international watercourse was exercised in a reasonable and equitable manner. It should be left to the States concerned to decide, in negotiating specific agreements, which factors were to be applied to the situation in hand.

8. The Special Rapporteur raised the question whether the principle contained in draft article 9, namely *sic utere tuo ut alienum non laedas*, should be expressed in terms of an obligation "not to cause injury", rather than "not to cause appreciable harm". In other words, should the Commission discard the material, objective concept of "harm" in favour of the legal concept of "injury"? In his own view, the "no harm" principle was fully satisfactory; indeed, in 1984, he had stated his belief that the whole of the draft articles, including the principle of "equitable utilization", could be deduced from that principle.[10] The Special Rapporteur seemed to believe (*ibid.*, para. 180) that application of the "no

[4] See *Yearbook ... 1974*, vol. II (Part Two), p. 212, document A/5409, annex I.A.

[5] *Ibid.*, pp. 322-324, document A/CN.4/274, para. 326.

[6] *Ibid.*, p. 324, para. 327.

[7] *Yearbook ... 1979*, vol. II (Part One), pp. 145 *et seq.*, document A/CN.4/320, chap. I.

[8] See 1976th meeting, footnote 8.

[9] See *Yearbook ... 1984*, vol. I, p. 237, 1854th meeting, para. 9.

[10] *Ibid.*, para. 5.

harm" principle could have excessively constraining effects in that, where a State engaging in "equitable use" did cause harm, the "harm" could be considered permissible and should not entail a legal "injury" or be "otherwise wrongful". The Special Rapporteur went on to say (*ibid.*, para. 181) that what should be prohibited was not conduct that caused harm, but conduct whereby a State exceeded its equitable share, and that the focus should therefore be on the duty not to cause legal injury (by making a non-equitable use) rather than on a duty not to cause factual harm. That concern might already be covered to some degree by the last part of article 9, whereby a State must refrain from and prevent appreciable harm "unless otherwise provided for in a watercourse agreement or other agreement or arrangement".

9. None of the three alternatives suggested by the Special Rapporteur (*ibid.*, paras. 182-184) seemed better than the existing wording of article 9. The first referred to an obligation not to "cause injury": that was acceptable from the legal point of view, but there was already a general obligation under international law to refrain from causing "injury". The second alternative referred to a State's obligation not to "exceed its equitable share". In some cases, where the problem was a quantitative one, it might be possible to determine what constituted an "equitable share" (yet he himself would prefer the expression "equitable use"). However, in a case like that of the Amazon basin, how was the "share" of the uses to be attributed to upper and lower riparian States to be measured? Harm would be a more practical yardstick for determining the basic obligations of the States concerned. "Equitable use" was, in essence, a use that caused no harm.

10. The third alternative attempted a sort of compromise whereby a State's obligation was not to cause appreciable harm "except as may be allowable within the context of [its] equitable utilization of that international watercourse". That exception might be regarded as too vague, since the determination of an "equitable share" or "equitable use" was not always easy, and might in some instances prove impossible. If an exception to the "no harm" principle was to be admitted, it would be better to express it in more precise terms, as in the existing wording of article 9. Consequently, replacement of the objective concept of "harm" by the legal concept of "injury" in article 9, or even adjustment of the article to include the concept of "equitable share" or of "equitable use", would not be an improvement. While from the drafting point of view the articles submitted by the Special Rapporteur were an improvement on previous articles covering the same subject, from the substantive point of view they focused to a lesser extent on "harm", which would make practical problems more difficult to solve.

11. Draft article 10 submitted by the Special Rapporteur spoke of the obligation to provide timely notice of any proposed new use, including an addition to or alteration of an existing use, that might cause appreciable harm to other States. Some of the terms contained in draft article 11 submitted by the previous Special Rapporteur had been eliminated: reinsertion of the word "project" or "programme" might clarify the new formulation.

12. The new draft article 11, concerning the period for reply to notification, provided for a reasonable period of time within which to study and evaluate the potential for harm, rather than the six months provided for in draft article 12 submitted by the previous Special Rapporteur. That change might be an improvement, in that it could be left to States to decide what constituted a reasonable period.

13. Under the terms of the new draft article 12, the replying State was allowed to determine that the proposed use was likely to cause it appreciable harm or might result in the loss of its equitable share of the uses and benefits of the international watercourse. He was not sure whether such a dual determination would serve any useful purpose. Indeed, it might make the articles less effective. The consequences of a reply unfavourable to the proposed use would be an obligation to consult with a view to confirming or adjusting the "determinations" and, if no agreement was reached through consultations, negotiations with a view to an equitable resolution of the situation by modification of the use or payment of compensation. The previous Special Rapporteur had gone further in that regard by providing, in his draft article 13, for the settlement of disputes and by dealing with the possibility of proceeding with the new use. That was an important point, for it was assumed that all States would act in good faith; but the negotiations might be prolonged simply to prevent the introduction of a new use of a watercourse. Provision should therefore be made to safeguard against such cases.

14. The terms of paragraphs 1 and 2 of the new draft article 13 seemed reasonable. However, the provisions of paragraph 3, namely that a State failing to provide notification of a proposed use as required by article 10 would incur liability for any harm caused to other States by the new use, whether or not such harm was in violation of article 9, appeared to be based on the assumption that article 9 would move away from the realm of harm to the realm of injury. It was to be hoped that such a shift would not limit the responsibility of the State introducing a new use which caused harm. States should be liable for any harm they caused, regardless of whether a breach of a purely legal obligation was involved.

15. In draft article 14, the Special Rapporteur retained the concept of proposed uses of utmost urgency, which was a very delicate question. The wording of that safeguard provision should be considered carefully, otherwise it could clearly give rise to abuse by States, which could invoke utmost urgency almost as a matter of course, thus nullifying the effect of the system being established.

16. Mr. LACLETA MUÑOZ thanked the Special Rapporteur for his second report (A/CN.4/399 and Add.1 and 2), which gave an overall view of the work done on the topic. He was not opposed to the idea that the definition of the expression "international watercourse" or "international watercourse system" could be deferred, although in his opinion the draft dealt with

uses of watercourses, not of watercourse systems. He was therefore prepared to accept the definition proposed by the previous Special Rapporteur, Mr. Evensen, but not the system concept, for reasons he had already explained.[11] He had also agreed with Mr. Evensen's decision to remove the "shared natural resource" concept from draft article 6, again for reasons he had already fully explained.[12]

17. It was unquestionably useful to codify general norms stemming from State practice in the use of international watercourses on the basis of the principle *sic utere tuo ut alienum non laedas*, but prevention or reduction of harm should not be confused with optimal use of a watercourse system. International law did not compel States to make optimal use of all watercourse systems, something which would involve major changes in the concrete use of watercourses; yet carrying the "shared natural resource" concept to its extreme would lead to exactly that.

18. With regard to draft article 8, he shared Mr. Calero Rodrigues's view that there was no point in listing in the text of the article all the factors which determined reasonable and equitable use of a watercourse, which were at any rate too vague. It would be sufficient to mention them in the commentary to the article. The question raised by the Special Rapporteur regarding draft article 9 (*ibid.*, paras. 179-187) was of major importance. It was essential to refer to legal "injury", rather than to appreciable harm, which in the strict sense of the term would mean that the downstream States had an absolute right of veto over anything that the upstream States could do; in other words, it would amount to saying that use of the watercourse would be guaranteed in favour of the later users, namely the downstream States.

19. As to the five draft articles submitted by the Special Rapporteur, the question was to what extent the procedural rules set forth therein also applied in the context of chapter II of the draft framework agreement, on general principles, rights and duties of watercourse States, for they seemed to relate solely to co-operation and management in regard to international watercourses. In his opinion, the replacement of the previous draft article 10 (General principles of co-operation and management) by the new draft articles 10 to 14 was a positive step, since that change reflected the need for procedures to determine an equitable use of a watercourse and the concrete application, in each specific instance, of the "no harm" principle. Hence it was an important change, yet one which did not rule out the possibility of reusing the text of the previous article 10 in the "open" part of the draft articles, in other words the articles designed to facilitate and promote not minimum co-operation in order to avoid harm, but co-operation on another level: the co-operation required to arrive at joint utilization with the ultimate goal of the best possible use of the watercourse. For that reason, the ideas contained in chapter III of the report were extremely interesting and merited favourable consideration.

20. Mr. BARBOZA said that his position in favour of elaborating treaty provisions rather than recommendations had already been clearly stated. Consequently, he would simply respond to the questions raised by the Special Rapporteur in his second report (A/CN.4/399 and Add.1 and 2).

21. He approved of the Special Rapporteur's proposal (*ibid.*, para. 63) to postpone the question of defining the concept of an international watercourse or an international watercourse system, in keeping with a long-standing tradition of the Commission. Again, it was an excellent idea to revert to the provisional working hypothesis accepted by the Commission in 1980 (*ibid.*). In 1984, he had found it unfortunate that the previous Special Rapporteur should make the mistake of turning the working hypothesis into an article and, above all, of deleting the system concept as soon as it encountered opposition.[13]

22. The "shared natural resource" concept expressed the legal nature of water as viewed from the standpoint of the Commission's work, and it obviously stemmed from applicable legal principles. It should be borne in mind that the extent and the method of sharing differed, depending on, for example, whether the sharing of a natural resource or good-neighbourly relations were involved. For that reason it was useful to have a definition indicating the true legal nature of the "shared natural resource" concept. Nevertheless, he understood the Special Rapporteur's concern in that regard and was ready to agree that the matter should be considered later on, but he was opposed to the idea of completely eliminating the concept from draft article 6.

23. As to draft article 8, since it was not certain that the "shared natural resource" concept would be retained in the draft articles, it was absolutely essential to develop the concept of reasonable and equitable use, which was rather vague—a comment that also applied to draft articles 7 and 9. It was important to establish, in the body of the draft, principles and norms which explained that expression. Accordingly, the factors listed in article 8 should be retained in the text, not relegated to the commentary, so as to give a concrete idea of the concept of reasonable and equitable use of the watercourse, if only by way of indication.

24. With regard to the Special Rapporteur's question concerning draft article 9, he doubted that the word "harm" could be used in connection with use of a watercourse when a particular need was not met. If a new use fell within the equitable share of uses to which the State incriminated was entitled, it was impossible to speak of harm, whether in the sense of unlawful harm, or injury, or of so-called "lawful" harm. Consequently, it would be better to use another term, such as "deprivation", for the term "harm" had a negative connotation and therefore could not be allied to the concept of reasonable and equitable use. For that reason he preferred the text submitted by the previous Special Rapporteur (*ibid.*, para. 179) and could not agree to any of the three proposals made by the present Special Rapporteur (*ibid.*, paras. 182-184). In any event, only the first proposal might possibly be acceptable.

[11] *Ibid.*, p. 268, 1859th meeting, para. 28.

[12] *Ibid.*, para. 33.

[13] *Ibid.*, p. 242, 1855th meeting, para. 6.

25. He failed to see why the new draft articles 10 to 14 should be included in chapter III of the draft, entitled "Co-operation and management in regard to international watercourses". A clear division had to be made between matters relating to causing harm, which were covered by draft article 9, and matters relating to co-operation, which were governed by the previous draft article 10. Perhaps it would be better to set aside a special chapter for the rules of procedure applicable in each case.

26. With regard to the new draft article 10, he took the view that efforts should be made to ensure that the cost of the search for information did not fall to the notified State in cases where the notifying State had furnished insufficient information. The concept of a reasonable period of time, mentioned in draft article 11, was somewhat vague and it would be preferable to stipulate a period of six months, which could be extended at the request of a State. He endorsed the text of draft article 13 and also, in principle, that of draft article 14, for the new wording was an improvement over the previous text. Mr. Calero Rodrigues's comments on article 14 were highly relevant, and more thought should be given to that article.

27. Lastly, he shared Mr. Mahiou's opinion (1977th meeting) that there might be a link between the present articles and the question of responsibility, both for wrongful acts and for acts not prohibited by international law. Obviously, in the case of the former it was necessary to turn to the general rules established in the draft on State responsibility, but matters were more difficult in the case of acts not prohibited by international law. The obligations of States in matters pertaining to the use of watercourses were to prevent any harm. In the event of an accident, the State causing it would not be deemed to have committed a wrongful act if it could prove that it had taken reasonable steps to prevent it. The question was whether the State concerned would be exempt from all responsibility, something which would be contrary to the principles set forth in chapter V of the draft, or whether it would be compelled to negotiate in order to compensate the victim of the harm caused. In that case the compensation would not be the same as the amount required if the State had committed a wrongful act, for it would be subject to the modifications made necessary by the balance of interests and all the factors which entered into consideration. More thought should be given to that question.

28. Mr. RIPHAGEN said that the rules on the non-navigational uses of international watercourses lay between those on international liability for injurious consequences arising out of acts not prohibited by international law and those on State responsibility. All three sets of rules were by and large residual, leaving a large measure of choice to the States concerned. Moreover, whereas the Commission's whole effort in drafting the rules on State responsibility could be described as making a straight line more elliptical, its work on the topic under consideration really involved making the ellipse of the rules on international liability for injurious consequences more circular.

29. With luck, activities carried out within a territory would give rise only to inboundary harm, whereas the use of an international watercourse system necessarily involved transboundary harm. The harm in question lay in human conduct in using the watercourse and, by the same token, in the relative scarcity of water. It was precisely within that context of "uses" and "scarcity" that the problem of international law arose. Consequently, distinctions must be drawn between actual and potential users and between what were known in French as *privatif* and *non privatif* uses. Those distinctions were very relative, since the actual use shaded into the potential use, according to circumstances, and the *non privatif* into the *privatif*.

30. The negative aspect of the "shared natural resource" concept was acceptable in so far as it meant that the territorial division of watercourses was not the full answer to the problem. Yet the concept did err on the other side in that it suggested the idea of common territory, something which might of course go much too far. Everything shared must eventually be divided, but the point was that the territorial division must be replaced by a functional division, which was the basis of the concept of equitable utilization.

31. However, what did equitable distribution of uses mean? In draft article 8, it was stated that "all relevant factors" must be taken into account, which actually meant nothing at all, since no one would advocate taking irrelevant factors into account. Nor did it seem very helpful to mention a large number of relevant factors without saying anything about the solution of conflicts as between those factors. It would in fact be more helpful to mention irrelevant factors and/or exclude particular solutions to conflicts. In any event, if and when the equitable distribution was known, in other words when it was accepted by all the system States, the question of partition could be treated in the same way as the territorial partition which underlay most "normal" rules of international law, including the rules of State responsibility. Any conduct on the part of one system State which took something away from the equitable share of another system State inflicted injury on the latter and was an internationally wrongful act.

32. Nevertheless, the situation was seldom as simple as that, if only because an equitable distribution might become inequitable as a result of a natural event constituting a fundamental change of circumstances. Even if a system agreement existed, its provisions would seldom if ever provide for an automatic quantitative solution for all situations. Naturally the problem was even more complicated in the absence of any system agreement or if not all the system States participated in such an agreement. In cases of that kind, it might be said that maintenance of the quantitative *status quo* of factual uses was lawful and that certain changes of the *status quo*, such as human interference creating a fundamental change of circumstances, were unlawful. The latter could be described as causing "appreciable harm", provided it was understood that that term covered only acts resulting in a manifestly inequitable distribution. In such circumstances, the law was forced to deal with a substitute, namely the procedural conduct of States designed to arrive at *ad hoc* or more permanent systems arrangements. In most instances, the ideal solution was a permanent organization permitting *ad*

hoc solutions, particularly in cases of changes resulting from natural events. Such an organization did not necessarily entail adoption of the "shared natural resource" concept. Only an organization that did not permit any use of water without sharing it would ultimately imply acceptance of that concept. One example was the International Sea-Bed Authority established under the 1982 United Nations Convention on the Law of the Sea. Nothing of that kind had as yet been suggested by the Special Rapporteur.

33. Short of such international management of an international watercourse system, the difficult problem that arose in connection with national measures was the time factor, in other words the question as to how long procedure could delay proposed action, particularly in cases of so-called "utmost urgency", which were dealt with in draft article 14. Such cases might be compared with a state of necessity as dealt with in article 33 of part 1 of the draft articles on State responsibility. The rules set out in that article might perhaps help to avoid the risk of abuse referred to by Mr. Calero Rodrigues.

34. Mr. EL RASHEED MOHAMED AHMED said that his first general comment was on Mr. Ushakov's pertinent question (1976th meeting) about the real purpose underlying the work on the present topic. Of course, the General Assembly had urged the Commission to expedite completion of its study and, as Mr. Flitan had pointed out (1977th meeting), if the draft took the form of a framework agreement, States would be able to identify the rules of international law that could assist them in resolving their problems or disputes.

35. Perhaps a more pertinent answer was provided in the statement by the Observer for UNIDROIT at the twenty-fifth session of the Asian-African Legal Consultative Committee, held at Arusha in February 1986:

> The Observer for UNIDROIT was of the view that it may be appropriate to reconsider the subject of international rivers in the light of the progress registered in recent years. He pointed out that, whilst the International Law Commission had considered the subject from the viewpoint of the bilateral and multilateral agreements for non-navigational uses of international rivers, recent practice revealed the creation and functioning of international commissions and organizations for the sharing of water resources of such international rivers as the Senegal, Niger ... and La Plata. In his opinion the new postures and tendencies should review the old and traditional law and contribute to the progress in the field of regional and subregional co-operation in the sharing of international rivers. ...[14]

It was in that light that the five new draft articles submitted by the Special Rapporteur should be considered.

36. At the Commission's thirty-sixth session, Mr. Reuter had observed in connection with the content of the draft that:

> ... The Commission was divided between two contradictory alternatives: to prepare draft articles which, because of their lack of precision, would not mean much, but would be favourably received; or to draft a precise text which would raise difficulties because of its precision. He would prefer the second course ...[15]

Sir Ian Sinclair had supported that view.[16] Hence it seemed that the draft articles should be based on generally recognized principles of law, an attitude the Special Rapporteur himself appeared to adopt, since he suggested in his report that "at least initially, the Commission [should] concentrate on the elaboration of the basic legal principles operative in this area" (A/CN.4/399 and Add.1 and 2, para. 59).

37. As to the four questions raised by the Special Rapporteur (1976th meeting), he agreed that the issue of defining the term "watercourse" should be deferred. He had been particularly troubled by the omission of the term "system", although it was to be found in several places in the report under consideration. Again, in the new draft article 10, the term "watercourse" had been placed between square brackets before the word "State". In paragraph (3) of the comments on that article, the Special Rapporteur explained that the term "watercourse" appeared in brackets when used as an adjective to modify the word "State(s)", pending the Commission's decision on the use of the term "system". It was a point that would have to be taken up in the future.

38. At the thirty-sixth session, he had accepted the geographical definition, but had called for technical advice in order to amplify it.[17] He had had in mind at the time the fact that a river like the Nile had its source in a complex of lakes in Central Africa (Victoria, Kyoga, Edward, Mobutu and Turkana) and some five tributaries from the Ethiopian Plateau, some of them permanent and some seasonal or semi-seasonal. Clearly, technical knowledge of hydrology was essential if the Commission was to deal with the issues invovled. Furthermore, other factors might well have to be taken into consideration after completion of the study.

39. The "shared natural resource" concept had been rejected both in the Commission and in the Sixth Committee of the General Assembly. Upper riparian States were not ready to yield their sovereignty, but they were prepared to recognize the right of the lower riparians to a share in the waters. In that regard, concepts such as "reasonable", "equitable" or "fair", despite their vagueness, had been preferred. As he saw it, the "shared natural resource" concept was not satisfactory and he would rather opt for a balance-of-interests formula such as that advocated by the Special Rapporteur for the topic of international liability for injurious consequences arising out of acts not prohibited by international law in his second report (A/CN.4/402, para. 54). Indeed, support for such an approach had been expressed during the discussions in the Sixth Committee:

> Some representatives, however, considered that efforts should focus on achieving a correct balance between the rights and duties of all riparian States, an objective which the Commission had not yet achieved. ... (A/CN.4/L.398, para. 452.)

Such a balance of interests would naturally be based on the conditions and circumstances prevailing in each riparian State. In recent years, very great demographic changes had occurred in Africa and they had to be carefully assessed before conclusions could be drawn.

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[14] Asian-African Legal Consultative Committee, *Report of the Twenty-fifth Session, held in Arusha from 3rd to 8th February 1986* (New Delhi, 1986), summary record of the seventh plenary session of 5 February 1986, para. 2.

[15] *Yearbook ... 1984*, vol. I, p. 246, 1855th meeting, para. 41.

[16] *Ibid.*, pp. 255-256, 1857th meeting, para. 19.

[17] *Ibid.*, p. 240, 1854th meeting, para. 26.

40. The material compiled and analysed by the Special Rapporteur appeared to indicate a preference for "equitable distribution", "equitable rights" or "reasonable and equitable rights". Those expressions were not identical with the "shared natural resource" concept, a controversial concept which was best avoided. The right of a riparian State was governed by the duty not to cause harm, and an equitable use, on a balance-of-interests basis, would be in keeping with the principle *sic utere tuo ut alienum non laedas*, as the Special Rapporteur himself recognized (A/CN.4/399 and Add.1 and 2, para. 173). If the concept were retained, it would also be necessary to eliminate the "system" concept, in the interests of consistency.

41. In regard to the list of factors given in draft article 8, the deletion of which had been proposed at the thirty-sixth session, the factors themselves did not in fact contain any legal principles, nor did they provide any criteria for determining the reasonable and equitable use of a watercourse. Accordingly, the list should be placed in an annex, as had been done in the case of the 1982 United Nations Convention on the Law of the Sea, or it should be included in a schedule of rules appended to the draft instrument.

42. Like the Special Rapporteur, he preferred the third of the proposed formulations for draft article 9 (*ibid.*, para. 184), but saw no immediate reason for omitting the proviso "unless otherwise provided for in a watercourse agreement or other agreement or arrangement". In that connection, the question arose of the test of equitable utilization, a variable which depended on circumstances and could not be gauged quantitatively or qualitatively. The Special Rapporteur conceded that there was no mechanical formula for determining what was equitable and suggested that the matter could be regulated by a system of procedural rules under chapter III of the draft (*ibid.*, paras. 185-186). That method afforded a practical solution, provided it was coupled with enforcement machinery, such as the Permanent Joint Technical Commission for Nile Waters.

43. The five draft articles submitted by the Special Rapporteur were not new in substance. As he had already stated, the procedures and rules they embodied would be effective if the appropriate machinery were established. Mr. Reuter had commented at the thirty-sixth session[18] that it would not be possible to apply the draft articles in practice unless more important functions were assigned to international organizations, a point that could well be the crux of the matter, inasmuch as the practical result would boil down to cooperation, development, conservation and just and proper utilization of the waters available for all the co-riparians. UNDP had taken the initiative of inviting the Nile Basin countries to a workshop organized by the Mekong River Committee secretariat at Bangkok in January 1986 and, at the close of the proceedings, the countries in question had requested UNDP assistance to study, propose and set up appropriate machinery for co-operation.

44. In general, he had no objection to the new draft articles and would simply like further explanation on two points. First, in the case of draft article 10, who was to decide that appreciable harm might be caused? For instance, the notifying State embarking on a project for a new use of a watercourse might well fail to see that the project could cause any harm to anybody. Secondly, in connection with paragraph 3 of draft article 14, was it the Special Rapporteur's intention to introduce the concept of strict liability?

45. Mr. REUTER said that he was struck both by the length of the Special Rapporteur's second report (A/CN.4/399 and Add.1 and 2) and by the detailed questions on which the Special Rapporteur wished to have the Commission's views. The report took the Commission back to its point of departure, and a pessimist might well feel that the Commission was getting nowhere, since the initial positions had not changed. Yet the situation could also be looked at in another way: like the eagle flying in ever-wider circles, the Commission was constantly rising higher.

46. Regarding the various positions, he doubted whether the Harmon Doctrine had disappeared, for territorial sovereignty was very much an enduring concept. Indeed, the hesitation shown by members in that respect was a reflection of the very real problems experienced by downstream States, which felt threatened by upstream States.

47. As to terminology, certain terms were no longer neutral, such as the expression "shared resources", which had originated in Latin America and raised the question whether the resources were already shared or were to be shared. Terms such as "system" had an excellent pedigree, and there was no doubt that the solutions adopted by the Supreme Court of a country such as the United States of America were ideal. Nevertheless, in the modern world and in the present state of things such results could not, unfortunately, be expected on an international scale. Some terms had also taken on an emotional connotation, as had "supranationality" recently in Europe.

48. Similarly, he was disturbed by the questions of "injury", "harm" and "responsibility for wrongful acts or lawful acts". On a related subject, namely the sharing of the continental shelf, it had been recognized in determining the status of the shelf that the act of delimitation was purely declarative. Consequently, a State had from the outset exercised sovereignty over the portion of the shelf attributed to it, since no arrangement had been made for an intermediate period during which sovereignty had not been shared. It had thus been recognized that, ultimately, the State had always had sovereign rights over the portion in question. But the case of a zone under dispute raised the problem of its status prior to the dispute. In answer to the question whether rights and obligations regarding use were fixed for all time, he would be inclined to reply in the negative. If the lawful act which governed the status of the waters was of a constitutive and not a declarative nature, it followed that, when a State altered the natural state of the waters in question, since their status was not determined the State was not violating any rule of law, except in exceptional cases.

[18] *Ibid.*, pp. 246-247, 1855th meeting, para. 44.

49. In that connection, he advocated caution regarding terminology: rather than speak of injury or harm, the Commission should consider using the word "change" for the time being. Uses of watercourses raised problems only at such times as they harmed nature or substantially changed the watercourse régime. He was therefore in favour of removing from the initial draft articles the idea of qualifying a change by reference to a rule of law, especially if the rule was not enunciated.

50. The legal act which must establish the status of the waters was, in his opinion, something which could be decided in the internal legal system by the legislator alone, and not by arbitrators or judges. The examples of arbitral awards which sprang to mind were all linked to a convention, and everyone knew what kind of use could be made of a convention! Such conventions, moreover, did not exist among the developing countries. Consequently, he seriously doubted whether solutions of that type could be envisaged.

51. However, he agreed with the idea that, through mediation, independent men of integrity could intervene discreetly in negotiations, for which reason draft article 8 was indispensable. Naturally, the terms of the article would have to be weighed very carefully. It was, of course, difficult to find new terminology which did not too quickly become loaded with inferences that would condemn it in the eyes of the Sixth Committee of the General Assembly. Apart from article 8, the Commission would be dealing with a text that was essentially one of procedure. If the rules of procedure were so precise that they might in some instances give rise to a problem of traditional responsibility in the event of their non-observance, it should always be remembered that the courts rarely held that there had been a breach of the obligation to negotiate. Normally, neither party incurred responsibility when negotiations failed. Hence it was necessary to go beyond information, consultation and negotiation. He noted the tendency in that respect to set "reasonable periods of time" in the negotiation procedures when the subject did not lend itself to the determination of specified periods. In the modern world, rivers were not suitable for impromptu projects and the building of dams or power stations was the result of lengthy work by experts; thus the six-month period originally proposed was justified.

52. With regard to organizational matters, in view of the current financial situation of the United Nations, the idea of creating a permanent institution attached to the United Nations, rather than a regional organization, was perhaps not the best one. On the other hand, the option of mediation was essential and the Commission should lay the appropriate foundations in its draft. Mediation could play a paramount role, especially for developing countries, as the World Bank had proved in the case of India. Mediation would thus fill out the range of options open to the parties to a dispute of a quasi-territorial nature; providing only for negotiations between the parties was not an entirely satisfactory solution. The Commission should avoid any emotional terminology, but not any of the substance; that was why the previous Special Rapporteur had deleted the word "system" without abandoning the system concept. The Commission should also examine procedure very closely. If it was to draft a provision on a temporary régime, it would have to define a régime that was fairly flexible. Lastly, it would have to agree to some work on the organizational aspect and make use especially of the concept of mediation.

The meeting rose at 12.45 p.m.

1979th MEETING

Tuesday, 1 July 1986, at 10.10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Ushakov, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/393,[1] A/CN.4/399 and Add.1 and 2,[2] A/CN.4/L.398, sect. G, ILC(XXXVI)/Conf.Room Doc.4)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

NEW DRAFT ARTICLES 10 TO 14[3] (*continued*)

1. Mr. BALANDA congratulated the Special Rapporteur on his very clear second report (A/CN.4/399 and Add.1 and 2), which contained a wealth of material. The importance of the topic was plain for everyone to see. Watercourses provided a wide variety of resources which were capable of contributing to the development of States and justified the formulatio of a set of rules to govern their uses, which might be for drinking-water supplies, the construction of dams for rural electrification, fishing, irrigation, or the mining of precious raw materials.

2. The members of the Commission appeared to agree that the draft should take the form of a framework agreement providing guidelines for co-operation among States. He had no objection to the pragmatic approach

[1] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

[3] For the texts, see 1976th meeting, para. 30. The revised text of the outline for a draft convention, comprising 41 draft article contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook ... 1984*, vol. II (Part One), p. 101, document A/CN.4/381.