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**Replies of Governments to the Commission's questionnaire**

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

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# THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

(Agenda item 5)

**DOCUMENT A/CN.4/314**

## Replies of Governments to the Commission's questionnaire

[Original: English/Arabic]  
[23 June 1978]

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## Introduction

1. By paragraph 4 (e) of section I of resolution 3315 (XXIX) of 14 December 1974, the General Assembly recommended that the International Law Commission should continue its study of the law of the non-navigational uses of international watercourses, taking into account General Assembly resolutions 2669 (XXV) of 8 December 1970 and 3071 (XXVIII) of 30 November 1973 and other resolutions concerning the work of the Commission on the topic, and comments received from Member States on the questions referred to in the annex to chapter V of the report of the Commission on the work of its twenty-sixth session.<sup>1</sup> Comments received from Member States pursuant to resolution 3315 (XXIX) were issued in document A/CN.4/294 and Add. 1.<sup>2</sup>

2. By paragraph 5 of its resolution 31/97 of 15 December 1976, the General Assembly urged Member States that had not yet done so to submit to the Secretary-General their written comments on the subject of the law of the non-navigational uses of international watercourses.

3. By a circular note dated 18 January 1977, the Secretary-General invited Member States that had not yet done so to submit as soon as possible their written comments referred to in resolution 31/97.

4. As at 1 June 1978, substantive replies to the above-mentioned note had been received from the Governments of the following Member States: Libyan Arab Jamahiriya, Sudan, Swaziland and Yemen.

5. The present document has been organized along the same lines as document A/CN.4/294 and Add. 1, that is, it contains the replies mentioned in the preceding paragraph, giving first the general comments and observations and then the replies to each of the specific questions reproduced below. When the text of a reply appears to cover more than one question, the reply has been reproduced only once, under the first relevant question, cross-references being used under the others.

6. The text of the questionnaire is as follows:

- A. What would be the appropriate scope of the definition of an international watercourse, in a study of the legal aspects of fresh water uses on the one hand and of fresh water pollution on the other hand?
- B. Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of non-navigational uses of international watercourses?
- C. Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of the pollution of international watercourses?
- D. Should the Commission adopt the following outline for fresh water uses as the basis of its study:

(a) Agricultural uses:

- 1. Irrigation;
- 2. Drainage;

3. Waste disposal;

4. Aquatic food production;

(b) Economic and commercial uses:

- 1. Energy production (hydroelectric, nuclear and mechanical);
- 2. Manufacturing;
- 3. Construction;
- 4. Transportation other than navigation;
- 5. Timber floating;
- 6. Waste disposal;
- 7. Extractive (mining, oil production, etc.);

(c) Domestic and social uses:

- 1. Consumptive (drinking, cooking, washing, laundry, etc.);
- 2. Waste disposal;
- 3. Recreational (swimming, sport, fishing, boating, etc.).

E. Are there any other uses that should be included?

F. Should the Commission include flood control and erosion problems in its study?

G. Should the Commission take account in its study of the interaction between use for navigation and other uses?

H. Are you in favour of the Commission taking up the problem of pollution of international watercourses as the initial stage in its study?

I. Should special arrangements be made for ensuring that the Commission is provided with the technical, scientific and economic advice which will be required, through such means as the establishment of a Committee of Experts?

## I. GENERAL COMMENTS AND OBSERVATIONS

### Libyan Arab Jamahiriya

[Original: Arabic]  
[17 May 1977]

#### *Study of the various aspects of the topic*

The land surface of a State's territory comprises plains, wadis, deserts, elevations, hills and mountains, which form the dry component, and canals, lakes and rivers, which form the aqueous elements. These natural phenomena may lie within the boundaries of the State's territory, and in this case they form a part of this territory and the State exercises over all of them in law the same rights which the State exercises over its territory. Some of these phenomena may themselves constitute the boundaries of the State's territory, while some may extend to territories belonging to more than one State. This latter case is the topic of study with regard to watercourses and wherever natural geographic features extend beyond the territory of one or more States. In international law, concern is restricted to the legal situation with regard to the use of rivers and the rights and obligations of the States through whose territory a river passes.

[See also below, p. 256, sect. II, question A, Libyan Arab Jamahiriya.]

<sup>1</sup> Yearbook ... 1974, vol. II (Part One), pp. 301–304, document A/9610/Rev.1.

<sup>2</sup> Yearbook ... 1976, vol. II (Part One), p. 147.

*State entitlement to use the waters of an international river: basis of right and source of obligation*

With regard to defining the positions of States traversed by international river water systems insofar as their rights to utilize them and their commitments to one another are concerned, the provisions of international law appear scanty and lacking in exactitude and precision of detail. There are three main prevailing theories on this subject:

(1) *Theory of absolute territorial sovereignty*

The adherents of this theory maintain that every State has the full right to exercise over the portion of an international watercourse which passes through its territory all the rights deriving from its absolute sovereignty over its territory unrestrictedly and unconditionally. It follows from this that a State has an absolute right to establish such legislation as it sees fit for the utilization of the waters passing through its territory in the portion of an international river lying within its frontiers, of whatever kind such legislation may be and whatever effects and consequences it may have for other bordering and neighbouring States into whose territory the course of the international river extends. It is clear that this theory is adhered to firmly only by those States within whose territory the upper reaches of an international river are located, i.e., those States where the source of a river or the portion of the river close to the source is situated, because they have a primary interest in utilizing the waters of the river without being affected by injury arising out of practical adherence to this theory. Perhaps the criticism which demolishes the theory fundamentally is that it equates the land component of territory, which is the staple component, with the water component, which is a mobile component, so that despite their difference in character, both components are subject to one legal rule based on the principle of absolute territorial sovereignty.

(2) *Theory of absolute territorial unity*

The adherents of this theory maintain that a State through whose territory an international river runs is fully entitled to use the water flow of the river as the need arises within its territory with regard to water quantity and quality, because the whole river, from the source to the outlet, is a territorial unit which cannot be divided up by political boundaries. The State cannot exercise absolute sovereignty over the portion of the watercourse which passes through its territory. Rather, the sovereignty which it may exercise over this portion is a sovereignty restricted by the obligation not to interfere with the natural course of the river, and a State may not within its territory change the course of the river or impede the flow of its water to the territory of other States within whose territory the river basin lies. A State may not increase or decrease the flow of river water by artificial

means. In other words, every State is entitled to make use of the waters of the portion of the river which traverses its territory, provided that there is no injury to the rights of the other States through whose territory the river passes. This theory is supported by the majority of international jurists, although they differ regarding the term which they apply to it. It seems clear that this theory establishes a kind of equilibrium between the interests of the various States which the river traverses and prevents any one of them from taking arbitrary action affecting the course and waters of the river in a way detrimental to the rights of the others.

(3) *Joint ownership theory*

This theory is based on the principle that the whole river, from the source to the outlet, is to be regarded as the joint property of all the States through whose territory the river passes, their rights being equal and integral, and no single one of them being exclusively entitled, without the agreement of the other States, to establish legislation for the utilization of the river waters in the portion of the river passing through their territory, where such utilization affects the flow of the river waters, whether by increasing or decreasing them. This theory does not have many adherents among jurists and, furthermore, it has not been reflected in inter-State practice, especially in modern times, when the interests of States differ and conflict, making their utilization of water on the basis of joint ownership a remote possibility.

*The Jamahiriya's opinion on these theories*

However, these three theories have been subject to change, and modern opinion has inclined towards the adoption of improved principles of modern international law which have gained almost unanimous acceptance in legal theory and practice. A State whose territory an international river water system traverses has towards the other States whose territory the river traverses reciprocal rights with regard to water use and mutual obligations with regard to the requirement to respect acquired rights and historical usage rights regarding these waters and to refrain from any action which might be detrimental to the established rights of others.

International responsibility unquestionably lies with any of the States which commits an act injurious to another State, whether deliberately or by error and negligence.

Finally, the question of the distribution of waters among riparian States and the non-navigational uses of these waters must be guided by the principle of equity and equilibrium between the different interests.

[See also below, p. 258, section II, question D, Libyan Arab Jamahiriya.]

## II. REPLIES TO SPECIFIC QUESTIONS

### Question A

*What would be the appropriate scope of the definition of an international watercourse, in a study of the legal aspects of fresh water uses on the one hand and of fresh water pollution on the other hand?*

Libyan Arab Jamahiriya

[Original: Arabic]  
[17 May 1977]

#### *The various definitions and terminology of international watercourses*

It emerges from all the discussions which have taken place at sessions of the General Assembly and those mentioned in the report of the International Law Commission on its twenty-eighth session<sup>3</sup> concerning the law of the non-navigational uses of international watercourses, and from the agreements and treaties referred to in that report, that varying terminology and definitions have been used to express the concept "international watercourse". These are as follows: river basin, drainage basin, international drainage basin, successive or contiguous international rivers.

In view of the numerous differences of opinion on this point, the Commission concluded, on the basis of the views expressed by some States, that there was no reason why the differences of opinion should be any obstacle or grounds for deferring the establishment of objective rules relating to the legal aspects.

Initially, jurists agreed to apply the term "international river" to rivers traversing the territories of two or more States, but a new term replaced the first one, namely, "international water system".

#### *The Jamahiriya's comments and opinion on these definitions*

The Jamahiriya feels that this definition – or all the terminology – is lacking in clarity and precision of expression. The term "river basin" is an incomplete term which may be applied to a river whose basin does not extend beyond the territory of one State, and this definition or term does not indicate the international character implying the extension of the river waters to the territory of one or more other States.

The term "drainage basin" is vague. The term "basin" is vague. A "basin" may contain anything, and the term may be applied to a water basin which is not flowing or extended, i.e., to any body of confined water. The waters of a river are used for various purposes, and there are no grounds for qual-

ifying the term "basin" by the term "drainage", and the same criticism applies to the term "international drainage basin".

The term "successive international rivers" or "contiguous international rivers" requires clarification, because the waters of a river may be contiguous and successive in its course, while remaining within the boundaries of one territory and not extending beyond it to the territory of another State.

The new term, namely, "international water system", likewise requires further definition. The word "water" is a general term which may be applied to the waters of a river or the waters of a sea, and the Jamahiriya therefore considers that this new term requires to be made more specific and suggests that it should be further restricted within the concept of the "international river water system". The appropriateness of this proposed term is clear from the following.

It has clarity of expression, for it implies the regulation and utilization of water, whether this regulation be specific or confined to the waters of rivers exclusively, and also implies the use or regulation at the international level, i.e., it applies to waters which are interconnected in a natural basin where any portion of such waters extends over the territory of two or more States.

#### *Scope and range of the proposed definition*

This definition covers the principal watercourse and also its tributaries, whether contributory or distributary. A consensus has been reached by international jurists that a river basin must be defined so that the term "basin" covers the natural geographic unit which forms the course of its waters and determines the quantity and quality of these waters, the control of the water flow and the character of their regulation, regardless of the volume of the waters or their proximity to or remoteness from established international frontiers. In modern jurisprudence, it suffices, for the purposes of international law, that one of a river's tributaries should be international in order for the river basin to be considered international. There is no reason to exclude successive or contiguous rivers from the scope of the definition of the term "international river water system", provided that the waters of these rivers traverse more than one State.

The Jamahiriya considers it is essential to start with the definition of the concept of international watercourses and to establish a unified terminology for it that is in line with modern international jurisprudence and the principles of international law which have been accepted by a consensus of jurists and legists. This definition or term is the necessary starting point for a study of the topic, and it is impermissible to embark on a study of a topic with all its ramifications before agreeing on its title and terminology.

The Jamahiriya considers that the term "international river water system" is a comprehensive and

<sup>3</sup> *Ibid.*, vol. II (Part Two), p. 153, document A/31/10, chap. V.

unambiguous definition having greater precision of meaning and a greater clarity of expression than any other term.

#### Sudan

[Original: Arabic/English]  
[12 September 1977]

An international watercourse can be defined as a watercourse which is used by all countries for all purposes – other than war – through law enforcement or by agreements with the country through which the watercourse passes.

#### Swaziland

[Original: English]  
[9 March 1977]

The definition of an international watercourse should be a watercourse which crosses boundaries between two or more States or forms a boundary between such States.

#### Yemen

[Original: English]  
[13 July 1977]

An international watercourse, for the purposes of a study on fresh water uses and pollution, may be defined as a watercourse which is subject, directly or indirectly, to use or pollution by two or more States.

### Question B

*Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of non-navigational uses of international watercourses?*

#### Libyan Arab Jamahiriya

[See above, p. 256, sect. II, question A, Libyan Arab Jamahiriya.]

#### Swaziland

[Original: English]  
[9 March 1977]

Yes.

#### Yemen

[Original: English]  
[13 July 1977]

### Reply to questions B and C

The geographical concept of an international drainage basin may be an appropriate basis for a study of the legal aspects of the non-navigational pollution of international watercourses; but the concept has little relevance to their use, inasmuch as, in the state of present-day knowledge, it is unlikely to be gainfully utilized, except in conditions which are likely to be complicated, for example, in the field of waste disposal.

### Question C

*Is the geographical concept of an international drainage basin the appropriate basis for a study of the legal aspects of the pollution of international watercourses?*

#### Libyan Arab Jamahiriya

[See above, p. 256, , sect. II, question A, Libyan Arab Jamahiriya.]

#### Swaziland

[Original: English]  
[9 March 1977]

Yes.

#### Yemen

[See above, p. 257, sect. II, question B, Yemen.]

### Question D

*Should the Commission adopt the following outline for fresh water uses as the basis of its study:*

(a) Agricultural uses:

1. Irrigation;
2. Drainage;
3. Waste disposal;
4. Aquatic food production;

(b) Economic and commercial uses:

1. Energy production (hydroelectric, nuclear and mechanical);
2. Manufacturing;
3. Construction;
4. Transportation other than navigation;
5. Timber floating;
6. Waste disposal;
7. Extractive (mining, oil production, etc.);

(c) Domestic and social uses:

1. Consumptive (drinking, cooking, washing, laundry, etc.);
2. Waste disposal;
3. Recreational (swimming, sport, fishing, boating, etc.)?

**Libyan Arab Jamahiriya**

[Original: Arabic]  
[17 May 1977]

*Uses of international rivers*

International river waters are used for non-navigational purposes in various ways which cannot be listed exhaustively for two reasons:

Firstly, these uses differ according to the States concerned and the extent of their needs and also according to their geographical location, economic and social situation and cultural progress. The uses or activities deemed appropriate by one State may not be considered in the same light by another State bordering on it. The one may be concerned about energy and the production of electricity from waterfalls and the industrial prospects ensuing therefrom, while the other may be concerned about lowland agriculture, irrigation and livestock and the resultant manufacture of dairy products, etc.

Secondly, the uses differ and change with the passage of time. The uses deemed appropriate by a State today may be replaced by a variety of others tomorrow.

We only mention the following uses and activities by way of example and explanation. This is not meant to be an exhaustive list and is subject to additions and deletions dictated by differences of viewpoint according to time and place:

(1) Industrial uses, the most important being energy production. Electricity is produced from declivities and waterfalls, and where energy is found, various forms of industry are established.

(2) Mining. Some minerals are extracted from the river's depths or oil may be obtained from the river bed.

(3) Agricultural uses. These uses are connected with irrigation, drainage, plant and crop cultivation, stock-raising deriving from this, dairy products and the wool and hair products on which the weaving industry is based.

(4) Nutritional uses. These are derived from the preceding category. Stock-raising helps to provide meat and dairy products, and there is also the question of optimizing the fish stock living and breeding in the river waters.

(5) Domestic and social uses. Water is necessary for human life, inasmuch as it is essential for drinking, nutrition and cleanliness.

(6) Recreational and sports uses. Portions of a river are used for sports, such as swimming, fishing and boat racing, as well as for other recreational pursuits.

*Problems relating to the non-navigational uses of international watercourses*

The use of international river waters was originally confined to drinking, irrigation and drainage, but

subsequently developed into use for energy production and the supplying of various industries. There then arose a conflict of interests between the States on the upper reaches, the States on the middle reaches and the States on the lower reaches of one and the same river, and, in many cases, there were difficulties involved in the conclusion between the States concerned of agreements and treaties to establish an equilibrium between the different interests and aspirations, to reconcile them and to achieve various goals. Thus, problems arose with regard to the non-navigational use of international river waters, some of them arising out of deliberate intent on the part of a State and others being the result of error and negligence. We mention below some of these problems and difficulties by way of example:

(1) The causing of water pollution. Pollution is caused by refuse disposal or the infiltration of substances and liquids harmful to human or other terrestrial or aquatic animal life, which may be destroyed; pollution may also cause human bodily defects. Factories may get rid of their refuse by dumping it in a river, or a State may deliberately pollute water in order to injure a neighbouring State or to destroy its economic assets and its resources or its very existence.

(2) An endeavour by a State to make changes in the region where a river traverses its frontiers to pass into the territory of a neighbouring State.

(3) A State's alteration of the natural character of the waters in a way detrimental to other States.

(4) The undertaking by a State of public works on its territory which lead to the flooding of the river in the territory of another State.

(5) A State's arbitrary use or blocking of the waters of a river to a degree which produces a drop in the natural level of the river in a neighbouring State.

(6) The undertaking by a State of any operation which may lead to the suspension or obstruction of navigation on the river.

*The Jamahiriya's opinion on how to deal with and eliminate these problems*

The Jamahiriya considers that international positive norms concerning the use of international river waters should derive from the agreements concluded between the States through whose territories the river waters flow. A number of agreements on this topic have been concluded setting forth the respective rights and obligations of States on the lower reaches of a river and those on the upper reaches. The aim of these agreements is usually to establish an equilibrium between the various, and sometimes conflicting, interests.

In all cases, international responsibility unquestionably lies with any of these States which changes a watercourse in a way injurious to other States, whatever the degree of the injury caused.

This same principle applies wherever the kind of water use and method of water exploitation gives rise to such injury, and it is on this basis that international responsibility is apportioned in any of the instances mentioned above under the heading "Problems relating to the non-navigational uses of international watercourses".

It is not possible to define and list exhaustively the uses of international river waters because they vary according to States' circumstances, geographical location and economic situation and decrease or increase with the passage of time.

#### Sudan

[Original: Arabic/English]  
[12 September 1977]

Irrigation should be the basis of study by the Commission since it is the means of providing food for the world. Accordingly, energy production is also important for the development of the world.

Transportation other than navigation has to be specified and restricted and controlled in such a manner as to keep the river course navigable and safe for the type of vessels used for transportation on that river and to provide safeguards against any risks or damage to navigation signs, beacons, routes and harbours. Bridges and dams should be built taking due account of the dimensions of vessels, so as not to impede free passage.

With reference to question D (b) 7, concerning extractive uses such as mining and oil production, we would like to add that the Government of the Democratic Republic of the Sudan is engaged in extensive activities in the field of the extraction of petroleum and natural gas and of mineral concentrates on the shores and bed of the Red Sea.

In recent years, the State has concluded numerous agreements with many petroleum companies for oil prospecting and extraction on the shores of the Red Sea. Many of these agreements are still in effect and prospecting continues.

The Government of Sudan is greatly concerned with the question of the extraction and exploitation of Red Sea mineral concentrates, and the State has entered into joint agreements with the Kingdom of Saudi Arabia for the exploitation of these raw materials.

#### Swaziland

[Original: English]  
[9 March 1977]

Item (b). 3. *Construction.* Does this include storage dams, barrages, etc. which can alter the flow regime of a river? We should think so.

Item (b). 4. *Transportation other than navigation.* The meaning of this is not clearly understood. All transportation on a watercourse would surely be navigation.

#### Yemen

[Original: English]  
[13 July 1977]

*Item a. Agricultural uses:* Aquatic food production does not properly belong to agricultural uses, and should be dealt with separately. The other categories listed under this heading are correct.

*Item b. Economic and commercial uses:* Transportation other than navigation should be omitted from this list of uses. The other categories are acceptable.

*Item c. Domestic and social uses:* Recreational aspects should not appear under this heading. The two remaining categories may stand.

#### Question E

*Are there any other uses that should be included?*

#### Libyan Arab Jamahiriya

[See above, p. 258, sect. II, question D, Libyan Arab Jamahiriya.]

#### Sudan

[Original: Arabic/English]  
[12 September 1977]

Rivers in nearly all countries are used for many purposes besides navigation and transportation. It is of great importance for the Commission to take into account their navigational use in relation to uses such as the construction of dams and bridges on them, the generation of hydro-electric power, the production of drinking water, irrigation or the operation of various industrial plants.

#### Swaziland

[Original: English]  
[9 March 1977]

It is considered that flood control should be included.

#### Yemen

[Original: English]  
[13 July 1977]

The list is fairly exhaustive.

#### Question F

*Should the Commission include flood control and erosion problems in its study?*

**Sudan**

[Original: Arabic/English]  
[12 September 1977]

The Commission should include flood control and erosion problems in its study, because flood protection is vital to safeguard life and property and protection against erosion will keep the watercourse continuously suitable for all uses.

**Swaziland**

[Original: English]  
[9 March 1977]

Yes.

**Yemen**

[Original: English]  
[13 July 1977]

Flood control and erosion problems form a vast subject in themselves, highly technical, and should be the subject of a separate study by a special commission.

**Question G**

*Should the Commission take account in its study of the interaction between use for navigation and other uses?*

**Sudan**

[Original: Arabic/English]  
[12 September 1977]

We recommend that the Commission take account of interaction between the use of watercourses for navigation and other uses. We suggest the consideration of the following:

(1) In the building of dams, bridges, etc., account should be taken of the necessity of free passage for vessels and their dimensions i.e., bridge span and height, size of dam locks, etc.;

(2) Water pollution or contamination should be prohibited in rivers usually used for drinking and irrigation;

(3) Dams and hydro-electric power installations should not impede the navigable course of the river (course depth, width).

We draw attention to the four types of rivers:

- (a) A river that is wholly inside one country;
- (b) A river that passes from one country to another through one border;

(c) A river that passes along the borders of two neighbouring countries (the river being the border);

(d) A river that passes through one country from point A to point B and during its course between A and B passes wholly into another neighbouring country, or winds from one country to another.

**Swaziland**

[Original: English]  
[9 March 1977]

Yes.

**Yemen**

[Original: English]  
[13 July 1977]

Navigational and other uses necessarily react on each other, and this subject-matter should be included in the study.

**Question H**

*Are you in favour of the Commission taking up the problem of pollution of international watercourses as the initial stage in its study?*

**Libyan Arab Jamahiriya**

[Original: Arabic]  
[17 May 1977]

In the Jamahiriya's opinion, the problem of pollution should take precedence in the study, because of its gravity and its appalling consequences, which may include the destruction and annihilation of human life, in addition to other drawbacks and dangers to health; it is perhaps unnecessary to mention the fact that the use of a thing presupposes its initial cleanliness and wholesomeness.

**Swaziland**

[Original: English]  
[9 March 1977]

Yes.

**Yemen**

[Original: English]  
[13 July 1977]

Yes.

**Question I**

*Should special arrangements be made for ensuring that the Commission is provided with the technical, scientific and economic advice which will be required, through such means as the establishment of a Committee of Experts?*

**Sudan**

[Original: Arabic/English]  
[12 September 1977]

Technical, scientific and economic advice are important for the Commission to fulfil its task.

**Swaziland****Libyan Arab Jamahiriya**

[Original: Arabic]  
[17 May 1977]

With regard to the question whether special arrangements should be made for ensuring that the Commission is provided with technical, scientific and economic advice, the Jamahiriya considers that it would be appropriate to establish a committee of experts on the various legal, cultural, economic and other aspects of the topic, to collaborate with the Commission, following the precedent of the Committee of Experts established to assist the Commission in studying some aspects of the law of the sea and related agreements.

[Original: English]  
[9 March 1977]

There is probably no need for a committee of experts, but the Commission should be empowered to call on the services of specialized consultants as required.

**Yemen**

[Original: English]  
[13 July 1977]

Technical, scientific and economic advice for the International Law Commission would be essential for the proper discharge of its functions.