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A/CN.4/SR.1408

Summary record of the 1408th meeting

Topic:

Law of the non-navigational uses of international watercourses

Extract from the Yearbook of the International Law Commission:-

1976, vol. I

"transparent", in order to protect the interests and rights of private persons.

43. With regard to co-operation in criminal cases, he wished to mention two instruments which had recently entered into force, the first of which related to the recognition and execution of foreign criminal judgements. That convention was not intended to strengthen the enforcement machinery of the State, but, on the contrary, to defend the interests of persons falling foul of the criminal law of a foreign State, who should benefit from the same humanitarian considerations as nationals of that State.

44. Lastly, under the auspices of the Council of Europe a draft convention had been adopted which broke away from an important and almost general principle of international practice concerning extradition—the principle that persons who had acted with political motives were exempt from extradition. That convention listed a certain number of concerted acts of violence which would not be considered as political offences for the purposes of extradition. Consequently, extradition would be mandatory for persons committing those acts, whatever their motives. A similar step had already been taken at The Hague in 1969, against the hijacking of aircraft, but it had not been accepted by the very broad community represented at the International Conference on Air Law held at the Hague in 1970. The draft European convention for the suppression of terrorism had been adopted in the small circle of States members of the Council of Europe, which were now invited to sign and ratify that Convention.

45. All that work might appear very specific to the European States, but it had the same purpose as the work of the International Law Commission: to consolidate and develop the rule of law in international relations. It was to that same end that the European Committee was endeavouring, to the best of its ability, to promote the work of the International Law Commission. Thus, it was shortly to undertake preparatory work for the diplomatic Conference on Succession of States in Respect of Treaties and the diplomatic conference on territorial asylum.

46. He regretted, however, that the Commission had so little time to give him as observer for the European Committee on Legal Co-operation and, especially that its members were too busy with their national and international work to attend the meetings of that Committee. He hoped that the Commission would be represented by its Chairman or by another member at the next session of the European Committee on Legal Co-operation, which was to be held in December 1976.

47. Mr. KEARNEY asked whether the draft European Convention on the service of administrative documents abroad was supplementary to the Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, or whether there was some degree of overlap between the two instruments.

48. Mr. GOLSONG (Observer for the European Committee on Legal Co-operation) said that the system of the draft Convention on the service of administrative documents abroad was based on that of the Convention on the Service Abroad of Judicial and Extra-Judicial Documents. However, it was specifically provided that the draft Convention did not apply to judicial documents but solely to administrative documents.

49. The CHAIRMAN, speaking on behalf of the Commission as a whole, thanked the observer for the European Committee on Legal Co-operation for his instructive account of the Committee's activities. It was gratifying to note that the Committee was dealing with subjects closely related to the Commission's own work, a case in point being its activities regarding water pollution control. The Committee had also taken an active interest in the question of treaties concluded between States and international organizations or between two or more international organizations, and in the topic of succession of States in respect of treaties. He wished to assure the observer for the European Committee that the Commission greatly appreciated and would continue to follow the work of the Committee. He hoped that co-operation between the two bodies would be maintained or even strengthened in the future.

The meeting rose at 1.05 p.m.

1408th MEETING

Friday, 16 July 1976, at 10.25 a.m.

Chairman: Mr. Abdullah EL-ERIAN

Members present: Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/294 and Add.1, A/CN.4/295, A/CN.4/L.241)

[Item 6 of the agenda]

1. Mr. QUENTIN-BAXTER said that, despite its geographical isolation, New Zealand was exposed to many of the problems with which the Special Rapporteur had dealt so movingly and magnanimously in his first report on the law of the non-navigational uses of international watercourses (A/CN.4/295), particularly the problem of pollution. Although pollution was probably felt less acutely there than in almost any other part of the world, New Zealand had, for instance, been concerned over atomic explosions in the atmosphere which, although taking place thousands of miles away, had nevertheless had their effect on its air-space.

2. In weighing its approach to that matter, New Zealand had had to think deeply about the principles of law on which rights and interests were based in cases of that kind. The first such principle was the general duty of States, whether acting inside or outside their own territory, not to breach the rules of law or to commit acts

which were in themselves wrongful. The notion of an internationally wrongful act, which was embodied in the draft articles on State responsibility,[1] was bound to play an increasing part in the development of international law. That notion had been reinforced and magnified by the recent upsurge of interest in the environment, as reflected in the activities undertaken as a result of the United Nations Conference on the Human Environment held at Stockholm in 1972. There was growing recognition of the fact that, in the contemporary world, any act of any State was bound to affect the international community as a whole. He was glad to note, therefore, that the Special Rapporteur had approached the topic of international watercourses in broad terms and not simply in terms of regulating a transnational problem.

3. At the same time, activities of the sort he had referred to were inevitably analysed also in terms of national sovereignty. States did not regard an atomic explosion merely as an international wrong, but also considered whether it would produce injurious consequences in their own territory and encroach upon their sovereignty. The elements of the crossing of national frontiers and of sovereignty were still very strong and fundamental in contemporary concepts of law. It was extremely important that, at the present early stage of its work on international watercourses, the Commission should not view those two notions as being opposed to one another and, as it were, reduce the problem to an irreconcilable conflict between global interests and narrow national interests. On the basis of the Special Rapporteur's report and the valuable legal material supplied by the Secretariat, it was entirely possible to reconcile the two notions.

4. In that connexion, he drew attention to the earlier work on the law of the sea. While individual States had been anxious to protect their national interests and concerned with questions of sovereignty and boundaries, the international community, through the General Assembly, had recognized that the sea-bed belonged to mankind as a whole.[2] Although, owing to the multitude of agencies and influences involved, progress on subjects relating to the human environment would inevitably be somewhat irregular, it would from time to time, under the stress of circumstances, be generally recognized that there was a common interest so great that it transcended any interests which could be expressed in terms of national frontiers: at the same time, because the world was, and would long remain, a world of sovereign States, legal concepts would be developed through the interplay of sovereign interests.

5. It seemed to him that the history of international co-operation in regard to international watercourses held out great hopes for the formulation of global rules designed to protect the environment. In no other area had sovereign States pursued their own interests in such enlightened fashion. It had come to be a widely accepted principle that a downstream riparian State possessed rights regarding the quantity and quality of the water it received, and the principles of law governing that matter could be said to be more advanced than, for instance, those relating to the access of land-locked States to the sea. Moreover, an examination of agreements between States concerning international watercourses, and of the rare but significant judicial decisions on the subject, revealed principles of equity which could be extracted from State practice. It was true that such agreements normally provided that the specific arrangements concluded were without prejudice to general rules, but the insistence on non-principled settlements could not conceal the fact that a pattern of generally recognized and usable principles existed.

6. In his view, the Commission should not be unduly concerned with the definitional element, that was to say, the question whether the basic unit for its work should be the international watercourse or the river basin. In their replies (A/CN.4/294 and Add.1) to the questionnaire (*ibid.*, para. 6) sent to Members States, Governments had shown no inclination to adopt an unduly restrictive approach. For instance, no State had maintained that pollution originating in a tributary which subsequently flowed into an international watercourse was not a source of State responsibility. There were many cases in which two or more States sharing a particular river basin had combined to uphold their common interests, and that process should, and undoubtedly would, continue.

7. It was clear that, where water lay upon or crossed an international boundary, there was a set of rights and obligations which needed to be developed in particular contexts, according to physical and economic interests. The degree of responsibility did not depend on proximity to the boundary. In the modern world, States would clearly be unwilling to create a condominium over every river basin that crossed an international boundary. They would increasingly be able to provide, however, that the responsibility of the riparian States extended to all that happened in such river basins and that damage or, conversely, increased advantages through development, were matters requiring equitable adjustment.

8. On the whole, Governments' replies to the questionnaire were not inadequate and revealed a very widespread recognition of the fact that there were global interests at stake. They also recognized that such interests could be promoted by careful study of, and abstraction of principles from, State practice as revealed in bilateral and multilateral arrangements.

9. He congratulated the Special Rapporteur on his broad approach to the topic and expressed the hope that the new Special Rapporteur to be appointed by the Commission would proceed with his work in the same open context.

10. The CHAIRMAN, speaking as a member of the Commission, said there was one point in the Special Rapporteur's report which had not been mentioned in the discussion, namely, the question of form. On that question he fully endorsed the view expressed by the Special Rapporteur in paragraph 42 of his report that

[1] For the text of the articles adopted, see *Yearbook... 1975*, vol. II, p. 59, document A/10010/Rev.1, chap. II, sect. B, 1.

[2] See the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction (General Assembly resolution 2749 (XXV)), para. 1.

"It is a fact of international life that States are more willing to support a course of conduct in a charter that is considered a statement of political intent rather than in a treaty which imposes a legal burden to take action instead of positions. The Commission's task is to draw up a set of draft articles which may be adopted in treaty form".

11. The concise, lucid and rich report submitted by the Special Rapporteur mentioned a number of multilateral instruments which could be extremely useful to the Commission in its work, including those relating to the Niger and Senegal rivers and the Chad Basin,[3] the Declaration of Asunción on the use of international rivers[4] and the European Water Charter of 1968.[5]

12. Speaking as Chairman, he said that the Commission's debate had been extremely thorough and of a very high standard. Mr. Tammes had rightly pointed out[6] that the topic afforded a unique opportunity for the Commission to consider and develop the concept of international co-operation, while the Special Rapporteur himself, in his opening statement,[7] had made a very convincing plea for co-operation between States to preserve the quantity and quality of the vital natural resource constituted by water. Sir Francis Vallat had addressed a moving appeal[8] to the Commission not to lose sight of the humanitarian aspects of the matter. Mr. Sette Câmara had made a masterly statement[9] with an approach different from that adopted by the Special Rapporteur. Further valuable statements had been made at the two previous meetings by Mr. Ushakov, Mr. Tabibi, Mr. Ramangasoavina, Mr. Quentin-Baxter, Mr. Calle y Calle and Mr. Hambro. In connexion with the question of sovereignty referred to by Mr. Hambro,[10] it should be borne in mind that sovereignty, like property, was not an absolute concept, but was subject to the restrictions of the law and the interests of the community.

13. With regard to the scope of the Commission's work on the topic, the Special Rapporteur appeared to favour the drainage-basin concept, whereas Mr. Sette Câmara had proposed[11] that the Commission should proceed on the basis of existing practice and of the time-honoured and traditional definition of an international watercourse adopted in the Final Act of the Congress of Vienna of 1815.[12] As was pointed out, in paragraph 8 of the Special Rapporteur's report, a useful point had been made by the Government of Hungary, which had argued that there was no general geographic term that could be applied to all of the legal relations relating to waters that were on the territory of more than one State, and that consequently the need was not to study the meaning of terms, but to consider whether a term was suitable for the regulation of certain legal relations. An equally interesting point had been made by the Special Rapporteur in paragraph 21 of his report when, commenting on the definition adopted by the Congress of Vienna in 1815, he had observed that "A definition devised for purposes of navigation is not necessarily the best choice for the requirements of the wide range of uses other than navigation". Mr. Ustor had suggested that the Commission should follow the inductive method and should take stock of existing law and practice before proceeding to formulate general rules. In his view, the Commission would be well advised to leave the question open for the time being and content itself with its thorough discussion of the topic, which would provide a basis for eliciting the views of governments.

14. With regard to the question of pollution, he wished to draw attention to the statement of the Government of Poland that "the problem of water pollution should be considered simultaneously with its cause, i.e. domestic, agricultural and commercial uses" (A/CN.4/294 and Add.1, section II, question H). He fully concurred with the view expressed by the Special Rapporteur in paragraph 46 of his report that "it would seem appropriate for the Commission to concentrate upon uses at the outset and to consider particular aspects of pollution in the context of specific uses". There was agreement that pollution should be considered eventually, if not at the outset since, not only in international watercourses but also in the seas and the oceans, it presented a grave problem which should certainly command the Commission's attention, and the process of industrialization was likely to make water pollution an even more acute problem in the future.

15. As to whether a committee of experts should be set up to assist the Commission in its work, it should be noted that it had not been considered necessary to appoint such a body for the Commission's earlier work on the much wider topic of the law of the sea, although some experts had been consulted on an individual basis. The proper course of action, he believed, would be to leave it to the Special Rapporteur to inform the Commisision what kind of technical assistance and advice he required.

The meeting rose at 11.25 a.m.

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[3] See A/CN.4/295, paras. 31-35.

[4] *Ibid.*, paras. 37-40.

[5] *Ibid.*, para. 41.

[6] See 1407th meeting, para. 28.

[7] See 1406th meeting.

[8] See 1407th meeting, para. 22.

[9] See 1406th meeting.

[10] *Ibid.*, para. 39.

[11] *Ibid.*, para. 15.

[12] For the text of the Final Act, see A. Oakes and R. B. Mowat, eds., *The Great European Treaties of the Nineteenth Century* (Oxford, Clarendon Press, 1918), p. 37.

1409th MEETING

Monday, 19 July 1976, at 3 p.m.

Chairman: Mr. Paul REUTER
later: Mr. Abdullah EL-ERIAN

Members present: Mr. Ago, Mr. Bilge, Mr. Calle y Calle, Mr. Hambro, Mr. Kearney, Mr. Njenga, Mr. Pinto, Mr. Quentin-Baxter, Mr. Ramangasoavina, Mr. Rossides, Mr. Šahović, Mr. Sette Câmara, Mr. Tabibi, Mr. Tammes, Mr. Tsuruoka, Mr. Ushakov, Mr. Ustor, Sir Francis Vallat, Mr. Yasseen.