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Summary record of the 1554th meeting

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

Extract from the Yearbook of the International Law Commission:-
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1554th MEETING

Monday, 18 June 1979, at 3.10 p.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

The law of the non-navigational uses of international watercourses (A/CN.4/320 and Corr.1)

[Item 5 of the agenda]

FIRST REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRMAN invited Mr. Schwebel, Special Rapporteur, to introduce his first report on the law of the non-navigational uses of international watercourses (A/CN.4/320 and Corr.1).

2. Mr. SCHWEBEL said that he had approached the topic without preconceived views. Despite its evident scientific and engineering aspects, it had a solid legal content, as illustrated by a large body of State practice and treaties. A study by FAO[1] listed over 2,000 international legal instruments on water resources, dating from the year 805 to 1977. The multiple international legal problems posed by the use of international watercourses were of the utmost interest and practical importance. Water was as vital for life as air, and it was also a universal substance, moving over, through and under national boundaries. In the particular case, water was subject to depletion and degradation. Demand for water would continue to grow with the upsurge in world population, the spread of industrialization and urbanization, the expansion of agriculture and increasing needs for power. In some cases water supplies could be expanded, but in others they might become polluted or exhausted, or simply be inadequate. If unregulated, water could flood, disrupting the lives of thousands.

3. The problems of fresh water were among the most serious confronting mankind. Its importance in the economic and social development of all countries, and even in the very maintenance of life, could not be overstated. The ecological management of water supply was a crucial issue too.

4. Salt-water problems were essentially international, as were some problems relating to fresh water. The problems of fresh and salt water were interrelated through the hydrologic cycle, the interaction of fresh watercourses and salt water, and the fact that fish were creatures of both. A further connexion might be seen in the important role played by the Commission in the United Nations Conferences on the Law of the Sea. He looked to the Commission, with the wealth of experience it had gained in that process of codification and progressive development, for guidance on the extent to which the present codification process must also respond to physical realities, and the extent to which the product of that process should embody co-operative procedures. Certain provisions of the law of the sea treaty now under negotiation might have a significant bearing on the Commission's work on the non-navigational uses of international watercourses.

5. Not all aspects of water problems were of international concern, and so even the scope of the Commission's mandate, which did not extend to fresh water in general, was a matter of contention. Yet if mankind was to manage its enormous water problems effectively, the international community must progressively develop and codify the appropriate principles of international law, lay down procedures for its application and establish institutions for its continuing development. Such a need had been spelt out in recommendation 92 of the 1977 United Nations Water Conference, held in March 1977.[2]

6. The Commission faced a difficult task in progressively developing and codifying the principles of international law relating to the non-navigational uses of international watercourses, for two main reasons. First, the topographical and political configurations of individual watercourses varied, as did the pattern of their uses. That had led such scholars as Brierly and Sauser-Hall, as cited in paragraph 65 of his report, to doubt the feasibility of a universal law of international watercourses. But the diverse nature and uses of international watercourses should not be exaggerated, for they displayed common characteristics as well. It was for the Commission to prove its ingenuity by striking the necessary balance between the particular and the general which it had advocated in its comments on the topic in the report on its twenty-eighth session.[3] It would probably find that certain principles and procedures were already extant, either lying unarticulated in a large body of State practice or, to some extent, forming part of accepted international law.

7. The second main problem facing the Commission was that, although water was a moving unity, States exercised exclusive jurisdiction over their respective territories. They regarded the water that flowed through, over and under their territories as their own. They were cautious about sharing their waters and reluctant to enter into international obligations in respect of them. At times, some States had even supported the Harmon doctrine, which asserted that international law imposed no obligation upon a State

[1] *Systematic index of international water resources, treaties, declarations, acts and cases by basin*, Legislative Study No. 15 (Rome, FAO, 1978).

[2] *Report of the United Nations Water Conference* (United Nations publication, Sales No. E.77.II.A.12), p. 53.

[3] *Yearbook... 1976*, vol. II (Part Two), p. 162, document A/31/10, para. 164.

towards other States in its exercise of sovereign power over waters within its jurisdiction, even though those waters also flowed through the territory of another State. But the Harmon doctrine was now recognized to be obsolete. It had been repudiated by the United States of America, for instance, and a leading international jurist had severely criticized it, emphasizing that territory not only conferred rights but also imposed obligations on a State.[4] That writer espoused the principles of the community of interests and equality of rights of all riparian States and the duty of a State to prevent substantial injury to the rights of a neighbouring State; along with other modern authorities, he looked to the equitable apportionment of the benefits of the waters of international watercourses.[5]

8. The sensitivity of States with regard to waters found in their territories brought the Commission to the crux of its second main problem: how to define an international watercourse. The replies to the Commissions' questionnaire[6] made it clear that a significant number of States rejected the geographical concept of the international drainage basin as being the appropriate basis for the Commission's study, notwithstanding the fact that the waters of a drainage basin interacted to comprise ground as well as surface waters, and the fact that a substantial number of other States—as evidenced by various modern treaties and by bodies such as the Institute of International Law and the International Law Association—regarded the drainage basin as fundamentally characteristic of the international watercourse. The States in question relied on the definition of an international river given in the Final Act of the Congress of Vienna, namely, "a river that separates or traverses the territory of two or more States".[7] But that definition, drawn up when knowledge of the hydrologic cycle was in its infancy, did not meet the needs of the present-day international community, with its unprecedented demands for fresh water. If the Commission relied on such an outdated concept, it would lay itself open to the charge of regressive rather than progressive development of the law.

9. A further argument advanced by a number of States, including major riparian countries, was that a large body of treaties, admittedly dealing mainly with navigation alone, treated international watercourses as contiguous and successive international rivers. Relying once again on the Congress of Vienna definition, which they claimed was generally accepted as customary international law, those States contended that to adopt a drainage basin approach would or could subject large areas of both water and land to international obligations that were not only unacceptable but also unnecessary. A State into which water drained from a foreign part of the basin need complain only if the quantity or properties of the water actually were adversely affected by activities in that part of the basin; there was no certainty that such was the case. The arbitral award in the *Lac Lanoux* case[8] had been cited in support of that contention.

10. Between the positions of States which either espoused or rejected the drainage basin view were other approaches. One was that the international watercourse should be defined in terms of the river basin, namely, the river and its tributaries, excluding groundwater. That concept had much to commend it, and had been supported by the previous Special Rapporteur for the topic.[9] Another approach, discernible from the replies of countries such as Canada, France and Nicaragua, was to accept contiguous and successive international rivers as a minimum working definition, but to supplement it by the concept of the drainage basin in respect of specific uses or abuses of water. Yet another approach was that of States which objected to any obligation being imposed on them through a definition based on the drainage basin, but would not necessarily object to the idea of obligations that they could enter into freely regarding a specific drainage basin. That was a pursuasive point, well put in the Polish reply, and the Commission might wish to pursue it. The draft articles had been so cast that advantage could be taken of that approach.

11. A further possibility was to provide States with a kind of framework convention supplemented by additional articles stipulating how they could undertake specific obligations relating to a particular watercourse, and to combine that with an optional clause whereby States parties to the convention could define the scope of their watercourse obligations under the convention by reference either to successive and contiguous international rivers, lakes and canals, or to the foregoing plus their tributaries, including tributaries found wholly in the territory of one State, namely, the river system, or to the foregoing plus groundwater, namely, the drainage basin. At all events, the Commission must fully heed the differences of opinion among States about taking the concept of the drainage basin as the foundation for its work, which would be to no avail if its draft articles failed to attract support from a significant group of riparians. There were many other areas on which States could agree, and in any case the Commission had decided at its twenty-eighth session that it would proceed without tackling the definition question at the outset.[10]

[4] E. Jiménez de Aréchaga, "International law in the past third of a century", *Recueil des cours de l'Académie de droit international de La Haye, 1978-I* (Alphen aan den Rijn, Sijthoff and Noordhoff, 1979), vol. 159, p. 192.

[5] *Ibid.*, pp. 192–200.

[6] See *Yearbook... 1976*, vol. II (Part One), pp. 147 *et seq.* document A/CN.4/294 and Add.1; and *Yearbook... 1978*, vol. II (Part One), document A/CN.4/314.

[7] See A/CN.4/320, para. 43.

[8] See United Nations, *Reports of International Arbitral Awards*, vol. XII (United Nations publication, Sales No. 63.V.3), p. 281.

[9] See A/CN.4/320, para. 47.

[10] *Yearbook... 1976*, vol. II (Part Two), p. 162, document A/31/10, para. 164.

12. Turning to the report itself, he said that its purpose was to set out a conceptual and tactical framework for dealing with the law of the non-navigational uses of international watercourses, but not to deal with the substance of that law except in connexion with draft articles 8, 9 and 10, relating to data. If the basic approach of the report and draft articles were found acceptable, further articles might be prepared on the categories of uses of international watercourses; on specialized questions such as flood control, erosion, sedimentation, salt water intrusion, coastal waters and estuaries, and possibly drought; on interrelationship and priorities among categories of uses; and on the interrelationships between questions such as flood control and erosion and between specific uses such as irrigation and specialized problems like erosion. Pollution might be dealt with in connexion with particular uses. General principles of the law of international watercourses should find their place, but they would be best addressed and derived from prior consideration of particular uses.

13. The Commission would have to consider institutional arrangements for the co-operative use of international watercourses and provisions for the settlement of disputes. With regard to institutional arrangements, it might seek the views of the interested institutions; reactions to the present and subsequent reports might usefully be sought from bodies such as the international river commissions, international banks, like the World Bank and the Inter-American Development Bank, and such United Nations or regional institutions as UNDP, ESCAP, ECE and OECD. A promising study on the operations of international river commissions was in course of preparation under the auspices of a Canadian foundation.

14. Dealing with chapter I of his report, he said that civilization had initially grown up around rivers like the Nile, the Tigris, the Euphrates, the Indus, the Yellow River and the rivers of Persia and Peru. Important areas of water law had been developed by ancient civilizations and their considerable efforts to regulate rivers had been widely successful. Not until the seventeenth and eighteenth centuries, however, had man begun to understand the hydrologic cycle, and it had taken modern science to demonstrate fully the relationship between surface and groundwater and the unity of the drainage basin.

15. Paragraphs 8–31 of the report outlined some of the salient characteristics of water with a view to providing the basis for a scientifically informed approach by the Commission to the problems of international watercourses. The draft articles must respond to the physical realities of fresh water, and therefore the Commission should know what those realities were. It would need technical advice, but the basic facts were set forth in standard works, quotations from which he had cited in the report.

16. Paragraphs 9–21 of the report summarized the hydrologic cycle, which was the process whereby water fell from the atmosphere to the earth, ultimately returned to the atmosphere and then fell again as precipitation. According to scientific estimates, the water in the atmosphere was released to the earth and replaced once in every 12 days. The cycle was maintained in a variety of ways: water could be absorbed into the earth, eventually merging with groundwater; it could be channelled into streams or rivers; or it could return to the atmosphere through transpiration or evaporation. It replenished surface streams and lakes by falling directly upon a watercourse, by travelling over or through the soil as run-off, or by percolating into the earth until it reached groundwater. Groundwater was found beneath the earth, retained by layers of impermeable bedrock, and was normally characterized by a slow, steady flow. The role of the watercourse in the hydrologic cycle was to channel surface water and groundwater to the sea. Surface run-off was the most visible course of moisture for watercourses, but it was less important than groundwater, which was believed to constitute some 97 per cent of the water on earth, excluding oceans, ice-caps and glaciers; if groundwater were to cease moving, the quantity of water in watercourses would be drastically reduced. As explained further in paragraph 21 of the report, there was a compelling case for including groundwater as well as surface water in the scope of the international watercourses to be considered by the Commission. Processes of evaporation, aeration, filtration and dilution enabled water to cleanse itself. Individual watercourses were marked by differences in quantity, quality and rate of flow and registered seasonal variations.

17. The international consequences of the physical characteristics of water were clear: first, water was not confined within political boundaries and, secondly, its nature was to transmit to one region changes occurring in another. The extent of the transnational impact of water had already been described in a United Nations study.[11]

18. Chapter I of the report thus laid the scientific basis for the Commission's consideration of the topic, it emphasized the first main point requiring the Commission's attention, namely, the contrast between the common characteristics and the diversity of watercourses, but at the same time it looked ahead to the second, namely, the definition of an international watercourse. Chapter II dealt specifically with that second problem. States had been asked whether the concept of the drainage basin was the appropriate basis for a study of the legal aspects of the uses and pollution of international watercourses. Although hydrologic facts appeared to favour the drainage basin approach, some States took the classical view that an international watercourse was a river that separated or traversed the territory of two or more States. A refined form of the drainage basin concept known to water

[11] See United Nations, *Management of international water resources: institutional and legal aspects—Report of the Panel of Experts on the legal and institutional aspects of international water resources development*, Natural Resources/Water Series No. 1 (United Nations publication, Sales No. E.75.II.A.2), paras. 21 and 22.

specialists as the "international water resources system" took account of the fundamental role of water in the atmosphere and the effect on water supplies of weather modification activities. However, the report did not examine that idea, and stayed within the confines of the Commission's earlier consideration of the matter.

19. He would be grateful for the Commission's views on his understanding of the scientific facts relating to the extent of international watercourses, and also on the Asian-African Legal Consultative Committee's draft proposals on the law of international rivers.[12] Those proposals incorporated the definition of an international drainage basin given in the Helsinki Rules on the Uses of Waters of International Rivers, adopted by the International Law Association in 1966.[13] He hoped the Commission would give due weight to the Helsinki Rules, which applied the concept of the international drainage basin, and to the principles concerning utilization of non-maritime international waters formulated in 1961 by the Institut de droit international.[14] He likewise hoped the Commission would fully heed the fact that the drainage basin concept was embodied in a number of modern treaties, including the Treaty for Amazonian Co-operation,[15] the Act regarding navigation and economic co-operation between the States of the Niger basin,[16] the Convention relating to the general development of the Senegal river basin,[17] the Mekong basin Treaty[18] and the Treaty between China and the Soviet Union on the Argun and Amur rivers.[19]

20. The Commission would however realize from what he had said earlier, and from paragraph 55 of his report, that he had felt bound to take account in his draft not only of the divided views of States on what constituted an international watercourse but also of the Commission's decision at its twenty-eighth session to defer the question of a definition of an international watercourse.[20]

21. Nevertheless, he had thought it advisable to propose in chapter II of the report an initial article on the scope of the draft, for a number of reasons. In the first place, the history of the topic revealed the existence of significant differences among States on that point. Failure to establish a common point of departure would therefore impede the development of a coherent body of rules. Secondly, a statement indicating that the draft articles would deal with international watercourses, even though that term was not defined, would make it clear that rain, water in the oceans, clouds, fog, snowfall and hail were excluded. The formulation of paragraph 1 of the opening article took account of certain problems related to water use, and in doing so reflected suggestions made by States in their replies to the Commission's questionnaire. The article might be expanded to deal with the effect of international watercourses on estuaries and coastal waters, perhaps along lines compatible with allied provisions of the articles on the law of the sea. An article on the scope of the draft was also needed to establish that it was the fact of water use and not the person of the user that would bring the draft articles into play, as explained in paragraph 59 of the report.

22. Draft article 1 opened with a reference to "uses" rather than "non-navigational uses", because the replies of States to the Commission's questionnaire had rightly indicated that the draft articles must take account of interactions between non-navigational uses and navigation. Navigational requirements affected the quantity and quality of water available for other uses. That was the basis for the terms of paragraph 2 of the article.

23. Chapter III of the report grappled squarely with the Commission's first main problem, that of the diversity of watercourses. The general rules drafted in that connexion by the Institut de droit international and the International Law Association, particularly the latter's Helsinki Rules, were discussed in the report (paras. 66–84) for the sole purpose, at the present stage, of illustrating that such general rules might have to be supplemented by rules tailored to a particular watercourse. The Commission had already recognized that at its twenty-eighth session.[21]

24. In paragraphs 86 *et seq.*, the report reviewed the first modern treaty which implemented the concept of watercourse development on the basis of the basin, namely, the Convention relating to the development of hydraulic power affecting more than one State (Geneva, 1923).[22] That Convention was of particular interest in that it contemplated further agreements to be entered into by States jointly concerned in the development of hydraulic power, agreements that could be termed "implementing" or "user" or "system" agreements, which would give pointed obligation to the general commitments under the Convention and might deal with any of the eight subjects enumerated in paragraph 89 of his report. Supplementary agreements of that kind concerning specific uses of particular watercourses could complement articles setting forth general principles in regard to international

[12] Asian-African Legal Consultative Committee, *Report of the Twelfth Session, held in Colombo from 18th to 27th January 1971* (New Delhi, 1972), chap. IV, annex 1.

[13] See A/CN.4/320, para. 34.

[14] *Annuaire de l'Institut de droit international, 1961* (Basel), vol. 49, t. II, pp. 370-372.

[15] American Society of International Law, *International Legal Materials* (Washington, D.C.), vol. XVII, No. 5, September 1978, p. 1045.

[16] See A/CN.4/320, para. 98.

[17] See *Yearbook... 1976*, vol. II (Part One), p. 188, document A/CN.4/295, para. 33.

[18] *Legislative texts and treaty provisions concerning the utilization of international rivers for other purposes than navigation* (United Nations publication, Sales No. 63.V.4), p. 267.

[19] *Ibid.*, p. 280.

[20] See *Yearbook... 1976*, vol. II (Part Two), p. 162, document A/31/10, para. 164.

[21] *Ibid.*

[22] See A/CN.4/320, para. 86.

watercourses. With that in mind—in other words, blending the approach of the Helsinki Rules and the principles formulated by the Institut de droit international with that of the 1923 Geneva Convention, without prejudice to whether the question at issue was rivers, river systems or drainage basins—he had proposed draft articles 2, 3 and 4 as a solution to the major problem of the diversity of watercourses.

25. In article 2, the words "State which contributes to" meant a State from which water of an international watercourse derived; the question whether it derived from surface waters alone or from groundwater as well was not answered, nor was the question which surface waters were dealt with, in other words, whether tributaries were involved. The phrase "a State which... makes use of water of an international watercourse" also referred to the inhabitants, both individuals and legal entities, of that State. The expression "user State" had been adopted because it was neutral in terms of the scope of the draft articles, although in his view a better term would be "system State", indicating that States concerned in an international watercourse were involved in an interconnected system. Still better might be the expression "basin State", which would connote basin-wide regulation of international watercourses. He hoped the Commission would see its way to using one of those two latter terms.

26. Article 3 laid down a straightforward proposition which, if need be, could be elaborated in subsequent draft articles.

27. Article 4, which did not purport to be exhaustive, gave three fundamental definitions. A State could become a party to the articles provided it was a user State, as defined in article 2, but that would exclude States which did not both contribute to and make use of an international watercourse. Possibly, therefore, article 2 should be redrafted to read:

> "For the purposes of these articles, a State which contributes to or makes use of, or which contributes to and makes use of water of, an international watercourse shall be termed a user State."

But even if that broader formulation were used, States which neither contributed to nor made use of the water of any watercourse could not become parties to the articles, and it might be desirable to have as many members of the international community as possible lend their support to an instrument of codification. It would be seen from article 4 that a "contracting State" was free to adhere to the general and residual principles and procedures of the articles without entering into the more specific obligations entailed under a user agreement.

28. With regard to the term "co-operating State", it could normally be assumed that, if a user State were prepared to become party to a user agreement, as defined in the draft articles, it would also be prepared to be a party to the articles, since an agreement could be considered a user agreement under the articles only if it were linked with them, as provided in draft article 5. If, however, a user State preferred to act only in the context of a specific international watercourse, there should be no objection to allowing it to become a party to a user agreement, subject to two qualifications; first, there must be one or more other user States parties both to the articles and to the user agreement to ensure that the user agreement was entered into within the framework of the articles; secondly, the user agreement should reinforce the basic, if residual, principles of the articles by stipulating that they were applicable to the relations of the parties to the user agreement in regard to matters not regulated under the user agreement. Draft articles 5 and 6 had been prepared in the light of those considerations, which were explained more fully in paragraphs 92–101 of the report. Perhaps the words "and shall so provide" should be added at the end of article 6, paragraph 1, *ex abundanti cautela*.

29. Paragraph 2 of article 6, in keeping with the Commission's intention that the draft articles should be residual in scope, afforded the parties to a user agreement the possibility of varying the obligations contained in the articles for their particular purposes. A different approach would be to require the parties to a user agreement concluded within the framework of the articles to apply the principles and procedures set out in the articles, regardless of the provisions of the user agreement. Although that might strengthen the effect of the articles, it might also dissuade user States from entering into user agreements within the framework of the articles, and it would have the effect of imposing on States not parties to the articles obligations to which they had not agreed contractually. It might even be desirable for the States on a particular international watercourse to contract in terms that did not conform to those of the articles. The Commission would realize that the draft did not deprive such States of the possibility of concluding among themselves user agreements not related to the articles. All article 5 signified was that a user agreement would not be such for the purposes of the articles unless at least one party to the agreement was also a party to the articles. Under article 6, such a user agreement would be entered into within the framework of the articles, which would then apply residually to the user States not parties to the articles. Naturally, the articles would not apply to user agreements concluded completely outside their ambit.

30. Article 7 was the last of the articles pertaining to the question of reconciling the need for general principles with the diversity of watercourses. At first sight, the small number of ratifications or accessions required might seem surprising, for quite rightly the conventions based on draft articles approved by the Commission had generally stipulated a substantial number of ratifications or accessions for their entry into force. Article 7, however, was designed to bring the articles into force for a particular international watercourse, and not in regard to all the parties to the articles. In dealing with international watercourses, the Commission was treating a novel situation: it was seeking to establish worldwide principles and procedures of a residual character which, if they were to be

effective, must operate within the confines of each individual watercourse. In such a situation, safety in numbers was not a workable principle; the articles, even with 35 or more accessions, but without a provision such as article 7, would have no practical impact if no two of the 35 acceding States were on the same watercourse. That had essentially been the fate of the 1923 Geneva Convention he had mentioned earlier. He had explained the position more fully in paragraphs 102–109 of the report. In particular, the thought that the contents of paragraphs 108 and 109 justified his taking such a low number of States as two for the purpose of bringing the articles into force for a particular watercourse. As noted in paragraph 110, the question whether the articles should contain a provision concerning their general entry into force might be deferred.

31. The Commission might by now consider that the scheme of the draft did through the back door what it avoided doing through the front, in other words, that in effect it adopted the drainage basin approach even though his report and his present introduction did not admit it. His plea to that charge would be that he was not necessarily guilty. First, the draft articles spoke not of basins but of international watercourses. Secondly, hydrologists, engineers and the consultants who had prepared studies for the United Nations Secretariat thought in terms of the drainage basin; thus references to their work could hardly avoid that concept. Thirdly, he did not believe that the articles as they stood required a commitment by the Commission to one approach or another.

32. That conclusion could be illustrated by an example of the use of an optional clause, a possibility he had mentioned earlier. Let it be assumed that there were three States lying on the waters of a drainage basin through which ran the Sinuous river. State A was traversed by a section of the river. State B was traversed by a section of the river and also by tributaries of it that were located exclusively within State B's territory. State C gave rise to groundwater that percolated into State B and then flowed, via tributaries, into the Sinuous river itself. State C was not a riparian State, but it was a basin State. If States A, B and C all adopted the drainage basin approach and all wished to be parties to the articles, or to a user agreement entered into within the framework of the articles, or both, all three could so opt. The articles would enter into force for the Sinuous river and be binding on States A, B and C. Alternatively, if State A, taking a riparian approach, wished to enter into relations under the articles and a user agreement with State B, it might specify, under the optional clause, that it regarded the articles and the user agreement as applicable only to riparians. Having so specified, its relations would be only with State B, provided that State B accepted State A's terms. In that event, there would be a treaty relationship between States A and B and, pursuant to article 7, the articles would enter into force between them in respect of the Sinuous river watercourse. However, State B might take the same approach as State A vis-à-vis State C, namely, the riparian approach. If it did so, State C could not become a party to the articles in respect of that watercourse. On the other hand, State B could say that it was willing to apply the articles, and for that matter another user agreement, to its relations with State C, the non-riparian basin neighbour, and to include tributaries and groundwater flowing into the Sinuous river. In that event, a treaty relationship would arise between States B and C.

33. In his opinion, such an approach was consonant with the Vienna Convention on the Law of Treaties,[23] but it might present considerable complexity and would require close examination. He did not necessarily recommend the use of an optional clause, and merely wished to point out that the draft did not prejudge the question what definitional approach should be adopted.

34. Chapter IV of the report was important for two reasons. First, the draft articles it proposed set out substantive obligations to be undertaken by contracting States and also provided that those States might assume further such obligations through user agreements. Moreover, room was left for co-operating States to assume data collection and exchange obligations. The obligations of that kind assumed by a co-operating State and a contracting State under a user agreement might be wider than the minimum data collection and exchange obligations undertaken by a contracting State under the articles. Secondly, the obligations in articles 8 to 10 were substantive; as stressed in paragraph 131 of the United Nations study already cited,[24] data collection and exchange were vital to the regulation of international watercourses, and thus to any meaningful international law on the subject.

35. A significant number of treaties contained provisions on the collection and exchange of water information as basic principles. Commissions formed to administer river régimes, such as the Danube Commission, the Central Commission for the Navigation of the Rhine and the International Joint Commission on Pollution of Lake Erie, Lake Ontario and the International Section of the St. Lawrence River, performed a vital data collection function. International declarations and resolutions also acknowledged the importance of data collection, among them the Charter of Economic Rights and Duties of States[25] (article 3), recommendation 51 adopted by the United Nations Conference on the Human Environment[26] and the draft principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared

[23] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287. The Convention is hereinafter referred to as the "Vienna Convention".

[24] See foot-note 11 above.

[25] General Assembly resolution 3281 (XXIX).

[26] *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. II, sect. B.

by two or more States, approved in 1978 by the UNEP Intergovernmental Working Group of Experts on natural resources shared by two or more States.[27] State practice and declarations by international organs supporting an obligation to collect and exchange data on international watercourses were so substantial that some observers had concluded that a rule of international law to that effect had already emerged. A pertinent statement in that regard had recently been made by Mr. Erik Suy, the Legal Counsel, in an article written in a private capacity.[28]

36. Articles 8 and 9 took account of the potential variation in the quantity of data required for a particular watercourse. Article 8, paragraph 1, required the collection of a minimum amount of information common to all watercourses. In view of his limited technical knowledge of the subject, however, he had not attempted precise delineation of the elements pertinent to data collection. The blanks in article 8, and also the blank in article 9, paragraph 1, illustrated the Commission's need for expert advice. Article 8, paragraph 2, contained no more than a "best efforts" obligation, because of the diversity in the pertinent methods and resources of States. Paragraph 3 related to the special problem posed by water quality and other data. The need for water quality information was undeniable, but the desirability of establishing uniform, universal requirements might be questioned. The collection of water quality data was a matter on which user agreements could be of particular value.

37. Article 9, paragraph 1, dealt with the sharing of data collected pursuant to paragraphs 1 and 2 of article 8. Contracting States ought perhaps to be obliged to share that minimum information not only with other contracting States and co-operating States but also with non-contracting States as well, or even with all States that wished to have it, but such a provision, among other drawbacks, would lessen the incentive for States to become parties to the articles and to user agreements entered into within the framework of the articles.

38. Paragraph 2 of article 9 called only for "best efforts" in relation to the supply of data other than the minimum data. The Commission would note that it imposed an obligation on co-operating States, even though by definition they were not parties to the articles. It obviously was desirable that a co-operating State should likewise be under a "best efforts" obligation to collect and provide the data covered by article 8, paragraph 1, as well. He envisaged that co-operating States would undertake both obligations through the medium of user agreements concluded within the framework of the articles. The articles concerning data collection, exchange and costs might need reworking in order to express that situation more clearly. Article 10, dealing with costs of data collection and exchange, was self-explanatory.

39. It was plain that the Commission could not yet deal with the draft articles, still less dispose of them. However, he hoped the Commission would indicate whether or not it believed that his basic approach made sense. He also hoped it would be possible to discuss the articles later in the session.

40. The CHAIRMAN congratulated the Special Rapporteur on his first report, which dealt with a complex subject requiring much reflection on the part of the Commission. He hoped that even at the present stage the Commission would be able to indicate its basic views on the subject and so assist the Special Rapporteur in his further work on the topic.

41. Mr. RIPHAGEN said it was abundantly clear from the Special Rapporteur's lucid and detailed report that, as a result of modern scientific knowledge and technology, the international system of dividing the whole human environment into separate so-called territories of separate so-called sovereign States was in many respects outdated. That was particularly true in the case of water, whether sea or fresh water, for it was in constant movement. It could rightly be said to be characteristic of the territories of States that they were not watertight compartments. Even human movements across international boundaries, although States could prevent them physically or legislate against them through the exercise of sovereign powers, were considered under international law to be the object of rules that limited such restrictions. Those rules resulted from *jus communicationis,* which, although some writers claimed that it did not exist, none the less underpinned many rules of positive international law. The system of division of the world among States must therefore be complemented by a system of co-operation among States in respect of the natural paths of communication considered to form part of their separate territories.

42. A set of rules of international law concerning the non-navigational uses of international watercourses was a necessity, and such rules implied limitations on the sovereignty of States over their territories. Many pertinent international rules already existed, although they were mostly conventional rules relating in the main to specific uses of particular watercourses, and more particularly to navigational uses of the watercourses that were termed international rivers. However, the conventions in question included rules on other uses of territory, such as the building of bridges wholly within the territory of one State across the river in question, or the construction of other installations that were outside the actual river but nevertheless affected its navigational uses. International rules also dealt with the impact of the navigational uses of rivers on other matters; for instance, to prevent pollution, there were rules relating to the construction and design of vessels carrying dangerous goods. Hence the subject called for a broad approach, not only to the scope of the uses of water and watercourses but also to natural phenomena such as floods, erosion, sedimentation and salt-water

[27] UNEP/GC.6/17.

[28] E. Suy, "Innovations in international law-making processes", *The International Law and Policy of Human Welfare,* eds. R. St. John MacDonald, D. M. Johnston and G. L. Morris (Alphen aan den Rijn, Sijthoff and Noordhoff, 1978), p. 187.

intrusion. Nevertheless, any wide set of rules of general international law that the Commission might devise could serve only as a framework for more specific conventional rules to be established between the States most directly concerned.

43. The task of formulating such a framework was formidable; it had to include a careful analysis of the many existing conventional rules in order to deduce their common legal elements and distinguish the latter from purely organizational and regulatory matters.

44. The approach adopted by the Special Rapporteur in his draft articles was generally most acceptable, although a few questions obviously arose. The first concerned the relationship between the draft articles and the existing rules of general customary international law. Naturally, the draft was intended to form a convention, as was clear from the use of terms such as "State party to these articles", in article 4. Accordingly, the Commission should at some stage make it clear that the articles were without prejudice to the rules of general customary law relating to the uses of the water of international watercourses, since it was generally recognized that, under modern international law, a State did not enjoy complete freedom in determining the use of such water within its territory.

45. A similar question arose regarding the relationship between the draft articles and existing and future user agreements between States. In that context, the definitions of "user agreement" and "user State" for the purposes of the draft articles were particularly relevant. It was to be inferred from article 5 that the draft articles would apply only to user agreements to which at least one party was also a party to the articles, and only to future user agreements. It was therefore necessary to determine at some point the relationship between the draft articles and existing conventional rules of international law.

46. Article 6, paragraph 2, suggested that the draft articles would apply also to States that were not parties to the articles, provided they were parties to a user agreement. Those States would be third States in respect of the articles, and it had therefore to be determined whether or not that paragraph would be subject to the rules in articles 34 to 38 of the Vienna Convention. In his view, the situation regarding the uses of international watercourses was somewhat different from the situations envisaged in those articles. Nevertheless, if a user State entering into a user agreement with another user State in the knowledge that the latter was a party to the articles could be said to accept the application of the articles to itself in respect of matters not regulated by the agreement, the articles might be interpreted as codifying existing customary international law—a situation to which article 38 of the Vienna Convention applied. Such an interpretation could certainly be justified by the necessity for rules of international law to regulate the use of a shared natural resource such as an international watercourse, but the matter called for a less consensual approach than that of the Vienna Convention. Also, the contracting and co-operating States concerned would have to be user States in respect of one and the same international watercourse; if, by entering into a user agreement, they recognized that they shared a particular resource, it seemed right that the articles should apply to all of them, even if they were not all parties to the articles.

47. With regard to the definition of a user State in article 2, a State that made use of the water of an international watercourse was clearly a user State in relation to that watercourse, but it was legitimate to ask whether a State that used electricity generated in another State from the water of an international watercourse thus became a user State in respect of that international watercourse. A similar question was whether a State that used the water of an international watercourse solely for navigation could be regarded as a user State in respect of that watercourse. In some cases it obviously could, since it must bear the same obligations—for example, to refrain from pollution—as other States using the watercourse for navigational purposes. Yet in other cases it was clearly not a user State. Suitable wording would therefore have to be found to define the term "user State". A further point was that article 2 specified that a user State was one that contributed to and made use of water of an international watercourse, but he felt sure that the requirement that the State should contribute to the water of a watercourse was not intended to exclude downstream States from the category of user States. Nor did the definition in article 2 seem designed to exclude *a priori* a State in whose territory a watercourse originated but that did not actually use the water of that watercourse.

48. It would be most useful to hear the view of the Special Rapporteur on those matters.

49. Mr. SUCHARITKUL said that for the moment he would make a few preliminary remarks and not discuss in detail the articles presented in the illuminating report of the Special Rapporteur, to whom he was grateful for emphasizing the scientific and technical aspects of the problem.

50. The Commission's approach to the subject must obviously take account of the contributions of science. He therefore welcomed chapter IV of the report, on regulation of data collection and exchange, a matter that had created serious problems in the Committee for the co-ordination of investigations of the Lower Mekong basin. Another problem was that some rivers crossed the territories or formed the boundaries of many States, and in some instances downstream riparian States appeared to be at the mercy of upstream riparian States. It was therefore important to determine the status of countries in relation to a user agreement.

51. The non-navigational uses of international watercourses involved not only numerous technical problems relating to the harnessing of river resources but also many legal problems. As long ago as 1968, the United Nations had sponsored a Panel of Experts on the legal and institutional aspects of international water resources development. In South-East Asia, a num-

ber of river projects had given rise to user agreements, for example for the use of electric power, but dam projects on main rivers had led to serious legal, economic, social and other problems. Legal difficulties could of course be overcome if States displayed the necessary political will. The draft articles could well serve as a model for States wishing to enter into user agreements. The world was entering a new era in international law, in which a balanced approach had to be maintained in all cases.

The meeting rose at 6 p.m.

1555th MEETING

Tuesday, 19 June 1979, at 10.10 a.m.

Chairman: Mr. Milan ŠAHOVIĆ

Members present: Mr. Dadzie, Mr. Díaz González, Mr. Evensen, Mr. Francis, Mr. Jagota, Mr. Njenga, Mr. Quentin-Baxter, Mr. Riphagen, Mr. Schwebel, Mr. Sucharitkul, Mr. Tabibi, Mr. Tsuruoka, Mr. Ushakov, Sir Francis Vallat, Mr. Verosta.

Tribute to the memory of Professor D. P. O'Connell

1. The CHAIRMAN informed the Commission of the sad news of the recent death of Professor D. P. O'Connell, a scholar who had been well known to the Commission and had made a great contribution in particular to the study of the topic of State succession. He suggested that the Commission send a message of condolence to Professor O'Connell's family.

It was so decided.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/320 and Corr.1)

[Item 5 of the agenda]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

2. Mr. FRANCIS said that the Special Rapporteur's preliminary but none the less masterly report would doubtless prove of great interest to jurists throughout the world. He had in mind, for instance, the interest shown in the topic at the nineteenth session (1978) of the Asian-African Legal Consultative Committee, which he had attended as an observer for the Commission. For the first time in its history, the Commission was embarking on a task of codification on the basis not of abstract legal theories but of scientific and technical data. Moreover, it was dealing with the international regulation of one of the most important aspects of national development, namely, resource management.

3. It was apparent from the replies of States to the Commission's questionnaire [1] that no decision could be taken immediately as to whether the geographical concept of an international drainage basin should be adopted as the basis for studying the legal aspects of the non-navigational uses of international watercourses. In addition, it was evident that any draft articles adopted by the Commission must be residual in character and widely acceptable to States, and also take account of the relationship between non-navigational and navigational uses of international watercourses and of such matters as flood control and soil erosion.

4. Certain fundamental issues would have to be tackled from the outset. To give an example, let it be assumed that a major watercourse, used *inter alia* for navigation, traversed several States and had an important tributary which lay entirely in another State, whose territory abutted the major watercourse solely at the confluence of the latter and the tributary. What should be the international obligations of the latter State in respect of navigation and other uses of the dominant watercourse towards the riparian States downstream from the confluence? Again, where a watercourse abutted more than one State and, because of rainfall in an upstream State, caused floods in a downstream State, what should be the international obligations of the former State towards the latter? Those were some of his reflections on the Special Rapporteur's report. He had little hesitation in endorsing the Special Rapporteur's general approach.

5. Mr. TABIBI said that the topic had important economic, social and political implications and should be examined with the utmost care. The Commission was fortunate to have a Special Rapporteur from a country that not only had great technical and scientific experience but that was also fully alive to the problems involved, being an upper riparian State in relation to Mexico and a lower riparian State in relation to Canada.

6. In view of the increase in world population and advances in science and technology, the Commission's consideration of the non-navigational uses of international watercourses was a matter of very great importance. In recent years, bodies in the United Nations system and private institutions such as the International Law Association and the Institut de droit international had been seeking ways to regulate and improve the use of water, but they seemed to have approached the matter in differing terms, on a regional and geographical basis, as a result of which there were no clear and universal principles of international law on the subject. One writer had stated that it was doubtful whether international law recognized any ser-

[1] See 1554th meeting, foot-note 6.