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Summary record of the 1786th meeting

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

Extract from the Yearbook of the International Law Commission:-
1983, vol. I

decision not to take account of questions pertaining to the law of armed conflict, which had been dealt with in draft article 13 as proposed by the previous Special Rapporteur (A/CN.4/348, para. 415). Moreover, provisions on use preferences might not be acceptable in the case of long rivers, such as the Nile, in connection with which the agreements concluded by Egypt and the Sudan, for example, related mainly to agricultural uses.

48. Lastly, if draft article 1, paragraph 2, was worded positively, draft article 6 could be reduced to a single sentence, reading; "An international watercourse system is a shared natural resource."

49. Mr. REUTER said it was probably the first time in the Commission's history that a Special Rapporteur had, in his first report (A/CN.4/367), outlined the essentials of his thinking and submitted a complete set of draft articles. The report under examination bore witness to the author's constructive attitude, his clarity und his caution. Indeed, the Special Rapporteur was displaying caution firstly because it was a natural quality that had earned him a justified reputation at major and lengthy international conferences; secondly, because the largest possible measure of agreement should be achieved on a particularly difficult and delicate subject; and lastly, because it was preferable that members of the Commission should acquaint the Special Rapporteur with their points of view on the principal difficulties before he adopted a position. The result was that several of the proposed texts sidestepped difficulties rather than resolved them. He (Mr. Reuter) proposed to state his views on what he regarded as an accessory issue, that of the relationship between the law on international watercourses and the law on armed conflicts, and then to make a general comment from which other observations would derive.

50. The Special Rapporteur was right to have refrained from going into the question of the law of armed conflicts. The problems that might result from armed conflicts in the matter under consideration were all too easy to imagine, but the Commission did not have to concern itself with all the possible uses of the waters of international watercourses for destructive military ends. In that connection, he recalled that towards the end of the Second World War certain belligerents had striven to destroy some very important hydraulic installations in order to cause a major catastrophe. Fortunately, the two 1977 Protocols to the 1949 Geneva Conventions[24] had now been ratified by some 25 States.

51. The general comment from which other observations would derive concerned the balance in the draft between law and what might be termed "non-law". For a long time, Governments had on occasions inserted in treaties certain wishes or affirmations which involved no obligation and had no legal character. The Hague Conventions of 1899 and 1907 and the 1982 Convention on the Law of the Sea were cases in point. As an expert not representing a Government, he had no sympathy for draft provisions that involved no obligation. He was in favour of excluding not only recommendations, but also the use of the conditional. The reason why the Convention on the Law of the Sea contained wishes expressed in the conditional was that the Governments that had adopted the Convention had thought it good enough for those States that had been completely passed over in the apportionment of the advantages under that instrument. Personally, he would be against any article drafted in the conditional. Similarly, he would be opposed to any phrase such as "as far as possible" or "if Governments so desire", which would transform an article into a purely potestative clause. He had nothing against an international conference expressing certain wishes, or the Commission suggesting in a report that a conference might do so; but when drafting articles the Commission should state the actual rules it believed it was in a position to state. Admittedly, some rules might seem rather vague, but even the very general rule that States should co-operate with one another implied an obligation, one which, however vague, forbade complete refusal to co-operate. A distinction should therefore be drawn between formulations which were very general but contained a small element of obligation and those which contained none at all. Draft articles which included formulations of the latter kind should be rewritten. In the case of obligations expressed in very vague terms and bordering on non-law, the Commission should consider whether it could not go a little further and spell out their precise meaning.

52. The more general the obligations laid down by the Commission in the draft, the greater would be the need for a third party to intervene in resolving disputes. It did not seem possible to impose a general obligation requiring compulsory settlement for each and every dispute; otherwise the Commission's work would be paralysed by disagreements from the start. It would be better to proceed in the same way as for the law of the sea and try to identify some straightforward or fundamental cases for which an attempt might be made to provide for the compulsory settlement of disputes.

The meeting rose at 6.05 p.m.

1786th MEETING

Tuesday, 21 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Flitan, Mr. Jagota, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Pirzada, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

[24] See footnote 14 above.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/348,[1] A/CN.4/367,[2] A/CN.4/L.352, sect. F.1, A/CN.4/L.353, ILC(XXXV)/Conf.Room Doc.8)

[Agenda item 5]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR[3] (*continued*)

1. Mr. REUTER, continuing the statement he had begun at the previous meeting, said that in regard to the central concept of an international watercourse system, the Special Rapporteur had not departed from the course set by the Commission and by his predecessors. The question arose, however, whether the replacement of the concept of a drainage basin by that of a watercourse system was a matter of substance or of form. There were two concepts of an international watercourse system, one corresponding exactly to that of a drainage basin and the other entirely different from it. Paragraph 1 of draft article 1 defined the former concept and paragraph 2 the latter, which was a functional concept. The system defined in paragraph 1 was one "ordinarily consisting of fresh water components, situated in two or more system States". It might perhaps be advisable to add that those components were in communication with one another, which was self-evident.

2. In a definition which had become famous, Gidel had defined the sea as the system of salt waters in free and natural communication.[4] In the case of an international watercourse, the components could be in either natural or artificial communication. If the Rhine and the Danube, each of which constituted an international watercourse within the meaning of the terminology adopted in the report, were joined by a canal, they would together form an international watercourse system. That first concept of a watercourse system was thus not very different from that of a drainage basin; it had physical character, both geographic and hydrological. But it was with the second concept, that of a system whose components were interdependent with respect to a certain problem, that the Special Rapporteur was chiefly concerned. As he had said in his oral introduction (1785th meeting), an international watercourse could be broken down into several systems.

3. At the very general level of pollution, it could be considered that a system as defined in article 1, paragraph 1, also formed a system within the meaning of paragraph 2. For example, pollution by the Federal Republic of Germany of the canal joining the Danube to the Rhine would have repercussions extending from the North Sea to the Black Sea. A functional system would be affected. Moreover, a river crossing the territory of three States could be considered, from the point of view of paragraph 2, as constituting a system of components situated in the territory of each of those States, or a system consisting only of components situated in the territory of two of those States, In the event of generalized pollution caused by one State, it was the system extending over the territory of all three States which should be considered. On the other hand, if the intermediate State used the water of the watercourse for irrigation purposes and only the interests of the downstream State were affected, the system to be considered was that extending over the territory of those two States only.

4. The Special Rapporteur had drafted paragraph 1 of article 1 bearing in mind the concept of the drainage basin, which he had discarded in paragraph 2. The reason why the term "system" was used in both cases was that the mechanisms he proposed raised difficult problems. For it could not be asserted that the true concept of a watercourse system was the functional concept which included only the States concerned, without saying who was to determine which those States were. In the system of notifications which a State had to submit to other States before undertaking certain projects (art. 11), it was that State itself that determined which States were concerned. It was no doubt because he was aware of the difficulty that the Special Rapporteur prudently referred in article 11 to "the relevant system States" without specifying whether the word "system" should be understood as in paragraph 1 or as in paragraph 2 of article 1. His own impression was that the concept in paragraph 2 should be adopted, since the Commission seemed reluctant to employ too broad a geographic concept which could involve too many States, thus reducing the chances of agreement.

5. However that might be, a preliminary question arose, which called for an obligatory decision procedure: that of the circle of interested States. It was a question of fact which should not raise insurmountable difficulties. In preparing the draft articles on the law of treaties, the Commission had met with a similar problem when considering whether there was a right to participate in the negotiation of general multilateral treaties; but it had been able to leave that problem aside, without solving it. In the present case, however, the right to participate in the negotiation of an agreement, and subsequently in the agreement itself, was an aspiration of most of the international community, and particularly of the developing countries. Indeed, those countries could not agree to questions affecting the general interests of mankind being settled without their participation.

6. With regard to article 6, he entirely agreed with the views expressed by Mr. El Rasheed Mohamed Ahmed. The drafting of the article was completely tautological. If no principles or rules of international law on shared resources existed at present, the concept of shared natural resources should not be employed. If such principles and rules did exist, it would be preferable to adopt the simple formulation suggested by Mr. El Rasheed Mohamed Ahmed (1785th meeting, para. 48) and say that the international watercourse system was governed by the

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

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

[3] For the texts, see 1785th meeting, para. 5. The texts of articles 1 to 5 and X and the commentaries thereto, adopted provisionally by the Commission at its thirty-second session, appear in *Yearbook . . . 1980*, vol. II (Part Two), pp. 110 *et seq.*

[4] G. Gidel, *Le droit international public de la mer*, vol. I, *Introduction – La haute mer* (Chateauroux, Mellottée, 1932), p. 40.

principles and rules common to the shared natural resources. The note presented by Mr. Stavropoulos (A/CN.4/L.353) showed that there was a trend favourable to principles and rules on shared natural resources, although the draft principles of conduct prepared by UNEP concerning shared natural resources had been received without much enthusiasm. He thought the Commission should avoid questions such as that of the existence of principles and rules common to shared natural resources such as international watercourses, atmospheric space, the ozone layer and the regions of space occupied by geostationary satellites. The wording proposed by Mr. El Rasheed Mohamed Ahmed seemed to be sufficiently close to the wishes of the developing countries, although it should be made clear in the commentary to article 6 that the law was developing and that the Commission considered it preferable not to go further into the question.

7. Although they were not formally under consideration, he wished to make some comments on articles 7 and 8, which concerned equity. He wondered whether the factors relevant to equity, a non-exhaustive list of which was given in article 8, should not be supplemented by the general principle to which they were subordinated. It was desirable that the provision should permit of an arbitration procedure. Referring to the concept of optimum utilization which the Special Rapporteur had introduced on several occasions in the draft articles, he observed that with regard to the uses of hydroelectric energy, the Economic Commission for Europe had advised States to examine their problems as though frontiers did not exist.[5] At a second stage they would have to consider compensation, which might or might not be linked to the international watercourse system in question. For instance, if it was thought best to build only one hydroelectric power plant on an international watercourse, the compensation granted to co-riparian States other than the State in whose territory the plant was built could either take the form of electric power supplies or be of an extraneous nature. The introduction of such a directive into article 8 might facilitate the procedure for settlement by a third party which was favoured by some people.

8. The draft articles under consideration sometimes raised problems of injury and responsibility which needed elucidation. For instance, in article 23 the Special Rapporteur seemed to introduce the notion of serious harm and to draw certain conclusions from it. If the gravity of the harm was ultimately to be taken into consideration, the draft articles as a whole should be re-examined from that point of view. Also, should a distinction not be made between damage caused to present utilization and damage to potential utilization? Furthermore, the concept "appreciable harm" could be considered from either the physical or the functional point of view. If the temperature of the water of a river rose by one degree after it had been used as a coolant, the resulting physical change was appreciable; but could it be said that harm had been done to a use of the water? It was also necessary to distinguish harm caused to uses, which the Special Rapporteur appeared to include among injuries to interests, from harm caused to the territory of States, which could lead to real disasters. Was it not conceivable that certain works, although lawful, could entail an exceptional risk and that, in the event of damage, compensation would be required? But that question pertained to two other topics which the Commission was studying.

9. On the question of settlement of disputes, the Special Rapporteur had been reluctantly obliged to adopt an attitude of extreme reserve. He described the possible solutions, but suggested none. He did, however, propose a mechanism of notification and protest, to which he attached effects, in particular by instituting an obligation to negotiate, which was not accompanied by any obligation to contract. Although mitigated by the notion of urgency, that system, which favoured downstream States, would be unacceptable to upstream States. The downstream State could not indefinitely oppose projects planned by the upstream State, although it was understood that the latter did not enjoy complete freedom in that respect. The least that could be required was to go a little further than mere negotiation.

10. When preparing the draft articles on the law of treaties, the Commission had not gone beyond the provisions of article 65, on the procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty; but that article did contain two valuable elements, namely a period of delay and a statement of reasons. In his opinion, a delay period should also be provided in the case under consideration, so that the projected work could not be carried out for a certain time following a protest. Moreover, in the event of failure of the negotiations, States should indicate the reasons therefor. International conventions on nuclear tests and nuclear weapons were moving towards a solution of that kind, since the most recent of them provided that States parties to the instrument could not withdraw from it without stating the reasons for their decision. Personally, he would be prepared to accept an arbitration procedure for all the articles of the draft, including article 8, but he was aware that many members would oppose it. The solution might therefore be to provide for negotiations of a rather less simple kind, for example negotiations conducted with the assistance of an international organization. It was thanks to the intervention of the World Bank that, despite the difficulties involved, the negotiations between India and Pakistan had been crowned with success.[6] Hence he favoured a system of negotiation "mediated" or "assisted" by an international body. The Commission should also consider whether it ought not to adopt an intermediate solution permitting a State which complied with the recommenda-

[5] See, for example, the recommendations of the ECE concerning the hydroelectric development of international rivers, in *Yearbook . . . 1974*, vol. II (Part Two), pp. 330–331, document A/CN.4/274, paras. 337–343.

[6] See the Indus Waters Treaty 1960 between India, Pakistan and IBRD, signed at Karachi on 19 September 1960 (United Nations, *Treaty Series*, vol. 419, p. 125).

tion of an impartial body to carry out its project without settlement of the dispute.

11. The CHAIRMAN suggested that, for the time being, the Commission should discuss the broad issues raised in the report under consideration (A/CN.4/367). At the end of the discussion, it could either consider the changes made by the present Special Rapporteur in draft articles 1–3 as submitted by the previous Special Rapporteur and provisionally adopted, or request the Drafting Committee to do so.

12. Mr. KOROMA said that, when the Commission had first been requested to consider the non-navigational uses of international watercourses, his reaction had been that the law of that topic, like the law of the sea, should already have been codified. After further reflection and research, however, he had come to the conclusion that, in the light of technical developments and the increasing uses to which international watercourses were being put, it was no accident that the Commission should have been requested to formulate new law on the subject.

13. It was a well-known fact that the economic and social development of mankind had been closely linked with river systems. Some of the world's greatest civilizations had taken shape and flourished on the banks of great rivers, which had provided water for domestic uses and navigation and had also come to be used for trade and the establishment of contacts with other civilizations. It had even been asserted that the first real application of international law in Africa had been the elaboration of fluvial law and the establishment of the régimes for the Congo and Niger Rivers.

14. At present, international watercourses were used for a wide variety of activities, including the production of hydroelectric, mechanical and nuclear power, irrigation, fishing, waste disposal and navigation, and their role in the economic development of the developing countries was assuming increasing importance. For example, at the Summit Meeting of Heads of State and Government of the member States of the Niger River Commission in January 1979, it had been stressed that "the economic development of the member States of the Commission depends to a crucial extent on the development of their river basins". With a view to promoting economic development, efforts had been made to integrate various river basins in Africa and to establish riparian associations, for example for the Mano, Niger and Senegal Rivers and for Lake Chad.

15. The increasing uses of international watercourses had, however, entailed serious consequences and, in some cases, had given rise to disputes between riparian states relating to pollution, water shortages or flooding. In essence, the problem was that of reconciling and harmonizing the various interests involved in the use of a particular watercourse by two or more system States and ensuring that the resource it represented was used without causing appreciable harm. It was thus with a view to avoiding or settling problems before they could worsen into disputes that the Commission had been requested to elaborate general principles applicable to the non-navigational uses of international watercourses.

16. To that end, the Special Rapporteur had presented an eminently readable and useful report (A/CN.4/367). The pragmatic approach he had adopted had enabled him to achieve a technical victory in combining a large number of complex principles into an integrated whole or "framework agreement" which could, when necessary, serve as a basis for specific regional agreements. As the Special Rapporteur had rightly pointed out (1785th meeting), the elaboration of a framework agreement was a delicate political task, in which account must be taken of the unique nature and legal circumstances of each international watercourse and of the interaction of the sovereignties of the States concerned. There were, however, features common to all international watercourses and it was to those features that the Special Rapporteur had applied general principles in devising a régime for the administration and management of international watercourses and for the peaceful settlement of any disputes that might arise concerning them.

17. The outline for a draft convention submitted by the Special Rapporteur (A/CN.4/367, para. 65) was both comprehensive and symmetrical and would provide an excellent basis for the Commission's discussions. As expected, the Special Rapporteur had attempted not only to codify the law of the topic entrusted to him, but also to develop it on the basis of the general principles of international law embodied in the Charter of the United Nations. He had accordingly proposed that an international watercourse system should be regarded as a shared natural resource whose reasonable and equitable use was to be regulated by negotiation and consultation, and that activities connected with a watercourse system which might cause appreciable harm to any of the system States should be prohibited.

18. The Special Rapporteur had been right not to try to define an international watercourse, for such a definition would be controversial. The terms "international watercourse system" and "system States" were comprehensive enough to cover all the elements involved in any given case and neutral enough for riparian States not to think that their interests were being neglected in framework agreements. Those terms would serve as a solid foundation on which future proposals could be built.

19. He fully agreed with the rationale offered by the Special Rapporteur (*ibid.*, paras. 87–92) for the formulation of draft article 7 and for the use of the expressions "shared", "reasonable and equitable manner" and "optimum utilization". He presumed that the words "good faith" were used in draft article 7 in the sense of *pacta sunt servanda*. The Special Rapporteur had been right to identify and emphasize the duty of system States to refrain from uses or activities that might cause appreciable harm to the rights or interests of other system States. That duty was central to the topic because of the impact of technology on international watercourses, in whose utilization, administration and management the interests of all system States must be taken into account, so that they would not suffer appreciable harm or injury in respect of either the quantity or the quality of the water they were entitled to use.

20. Chapter III of the draft struck the right note, since international watercourses constituted a unity or continuum and it was essential for system States to co-operate in their efficient and optimum utilization, either bilaterally or multilaterally and, when necessary, with the assistance of the competent United Nations specialized agencies. The idea of such co-operation was not new and, indeed, it already existed throughout the world, but it needed to be properly institutionalized. It was in that regard that the principle of negotiation, consultation and regular exchange of data and information assumed particular importance. As the Special Rapporteur had pointed out (*ibid.*, para. 138), the collection, processing and dissemination of information and data were essential for the effective management and control of international watercourse systems.

21. Chapter IV of the draft contained articles relating to protection of the environment of a watercourse system from pollution. The definition proposed by the Special Rapporteur in draft article 22 not only covered all the essential components of modern pollution, but also referred to the dangerous consequences that such pollution could have for the physical environment.

22. Draft article 23 prohibited all system States from polluting the waters of an international watercourse and provided that a State in which pollution originated had a duty to take reasonable measures to abate or minimize such pollution. The Special Rapporteur did not, however, regard that duty as being *erga omnes*. Draft article 23 was therefore well balanced and dealt correctly with one of the main aspects of the topic, namely the duty to prevent the pollution of an international watercourse system and to take measures to abate such pollution when it occurred. The Special Rapporteur had reflected the expectations of the international community when he had stated (*ibid.*, para. 171): "To pollute an international watercourse system so as to cause appreciable harm to other system States cannot acquire 'the rank of a vested right'."

23. Draft article 26, on the control and prevention of water-related hazards, would be most helpful. The Special Rapporteur's suggestion that States should co-operate with international bodies such as UNEP and UNDRO to combat drought and flooding deserved support and further consideration.

24. On the basis of Chapter VI of the Charter of the United Nations, the Special Rapporteur had proposed a number of draft articles on the peaceful settlement of disputes arising in connection with the non-navigational uses of international watercourses. Pride of place had been given to consulation and negotiation and that was, in his own view, the correct approach, especially as the purpose of the draft articles was to promote co-operation between States in the use of a shared natural resource. Careful consideration should, however, also be given to the draft provisions on compulsory conciliation, which had been borrowed and adapted from the new United Nations Convention on the Law of the Sea[7] and were thus untested. Compulsory conciliation offered the possibility of a friendly but lasting settlement, in which none of the parties would lose face or feel cheated, and that psychological factor should not be underestimated in the case of disputes relating to international watercourses, which were difficult to settle because they involved questions of territory and sovereignty. He agreed with the Special Rapporteur that situations involving armed conflict should not be covered in the draft articles.

25. Referring, lastly, to the position of notes in the report, he considered it desirable to revert to the former practice of placing them at the foot of the relevant page, rather than grouping them at the end of the report.

26. Mr. PIRZADA, congratulating the Special Rapporteur on his meticulous and balanced report (A/CN.4/367), said he had noted the reference (*ibid.*, para. 27) to the Indus watercourse system. The Indus Valley was well known for its civilization, which dated back to about 5000 B.C., and remnants from that era were well preserved at Mohenjo Daro and Harappa in Pakistan. Etymologically, the name of India could be traced back to the River Indus. The many problems to which the Indus Basin had given rise over the centuries—for instance, sharing the water for irrigation purposes and changing the course of the river and its tributaries—had been satisfactorily solved long before the decision of the PCIJ in the *River Oder* case in 1929.[8] Problems over the waters of the Indus Basin had even arisen under the British régime, and in or about 1918 a commission had been appointed. In 1938, the Indus Commission (Rau Commission) had enunciated principles of equitable sharing of waters which, *inter alia*, had provided the basis for the study by the International Law Association which had led to the Helsinki Rules.[9]

27. In 1947 India and Pakistan had become independent sovereign States and the Province of Punjab had been partitioned. That province had been given its name, which meant five rivers, because the River Indus and its five tributaries flowed through it. The partition of Punjab and the border demarcated by the Radcliffe Boundary Commission had cut across the Indus water system. Pakistan had become the downstream riparian State and the headworks of the two main irrigation canals had been awarded to India. The sharing of the use of the waters by the two States had then become a vital issue and, following a suggestion by David Lilienthal, former Chairman of the Tennessee Valley Authority, that Indian and Pakistani technicians should work out a comprehensive engineering plan with the assistance of the World Bank for the development of the waters of the system, the President of the Bank, Eugene Black, had used his good offices to further negotiations between India and Pakistan. The Indus Waters Treaty had eventually been signed in September 1960[10] and, at the same time, the

[7] See 1785th meeting, footnote 10.

[8] *Territorial Jurisdiction of the International Commission of the River Oder*, Judgment No. 16 of 10 September 1929, *P.C.I.J., Series A*, No. 23.

[9] See 1785th meeting, footnote 13.

[10] See footnote 6 above.

Indus Basin Development Fund Agreement[11] had been signed by representatives of Australia, Canada, the Federal Republic of Germany, New Zealand, Pakistan, the United Kingdom, the United States and the World Bank. Under the Indus Waters Treaty, India and Pakistan had declared their intention of co-operating to the fullest possible extent; meteorological and hydrological observation stations had been established; provision had been made for a full exchange of information; the Permanent Indus Commission had been appointed to settle differences and disputes; and a procedure had been established for recourse to a neutral expert for final decisions on technical questions and, in certain circumstances, to a court of arbitration. The Indus Waters Treaty 1960 must be regarded as a landmark in the law of international rivers.

28. In Pakistan the Indus waters had given rise to some problems among the provinces. In 1976 a commission headed by a judge of the Supreme Court had submitted its report, the recommendations of which, though fair, had led to complications when it came to implementation. Subsequently, a high-level tribunal had been set up, headed by the Chief Justice of Pakistan and composed of the Chief Justices of the High Courts of all the provinces. The report of that tribunal had been submitted in May 1983 and was still under consideration, but it was likely to provide material that could help in formulating principles of law governing the uses of the watercourse.

29. As a member of the International Rivers Committee of the International Law Association, which had formulated the Helsinki Rules in 1966, he appreciated that those Rules were based on the concept of the drainage basin with a hydrological background, whereas the present draft had a geographical approach based on the concepts of "system States" and the "international watercourse system". He noted that draft article 1, paragraph 1, sought to discard the concept of the international drainage basin in favour of a geographical approach, although the Special Rapporteur had stated (*ibid.*, para. 73) that the definition in draft article 1 was purely descriptive and that no legal rule or principle could be deduced from it. The Special Rapporteur had also said that the definition was a first attempt. That being so, draft article 1, paragraph 1, could be taken as the starting-point and improvements could be introduced in the light of the views expressed by members. As to paragraph 2, in view of the comments made by Mr. El Rasheed Mohamed Ahmed (1785th meeting) and Mr. Reuter, he would reserve his position.

30. Draft article 6 had been received with mixed feelings. While he recognized that a watercourse system and its waters should be regarded as a shared natural resource in which each State was entitled to a reasonable and equitable share, he trusted that the Special Rapporteur would reconsider draft article 6 in the light of the constructive comments made by Mr. El Rasheed Mohamed Ahmed and elaborated upon by Mr. Reuter.

31. In draft article 9 the Special Rapporteur had used the term "appreciable harm" in reference to the prohibition of certain activities. Although traditionally such expressions as "serious damage", "serious injury", "substantial detriment" or "serious prejudice" were used, he had an open mind and would be prepared to consider the term "appreciable harm".

32. It had been pointed out that draft articles 22 and 23 made no distinction between existing pollution and new pollution, as did the Helsinki Rules, although the American branch of the International Law Association had had reservations on that matter. For his own part, he agreed with the Special Rapporteur (A/CN.4/367, para. 171) that, in view of more recent developments, such a distinction was not acceptable.

33. Conflicting opinions had been expressed regarding draft article 28, dealing with the safety of international watercourse systems. Mr. Reuter (1785th meeting) apparently took the view that provisions relating to armed conflict were outside the Commission's competence. The previous Special Rapporteur, however, had given cogent reasons in his third report (A/CN.4/348, paras. 416–420) for appropriate provisions along the lines of the two 1977 Geneva Protocols;[12] and the present Special Rapporteur had stated (A/CN.4/367, para. 186) that he was in favour of such provisions, but hesitated to include them in his first draft until he had obtained the guidance of the Commission and the Sixth Committee of the General Assembly. Given the fact that many developing countries were dependent on dams and the possibility that those dams would be destroyed in the event of war, he was in favour of the provisions proposed by the second Special Rapporteur being incorporated in the draft.

34. Lastly, he agreed with those who favoured compulsory conciliation, especially as the report provided for in draft article 35 was of a recommendatory nature. That would be in keeping with the principle of good faith. As to adjudication, provisions along the lines of those in the 1982 Convention on the Law of the Sea relating to settlement of disputes should be given objective consideration. If the aim was a purpose-oriented convention, as advocated by the Special Rapporteur, pragmatic but productive provisions were required.

The meeting rose at 12.25 p.m.

[11] United Nations, *Treaty Series*, vol. 444, p. 259.

[12] See 1785th meeting, footnote 14.

1787th MEETING

Wednesday, 22 June 1983, at 10 a.m.

Chairman: Mr. Laurel B. FRANCIS

Present: Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed