

Document:-  
**A/CN.4/SR.1793**

**Summary record of the 1793rd meeting**

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

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

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51. So far as the procedural provisions of the draft were concerned, it was absolutely vital to distinguish fact-finding from negotiation, and negotiation from dispute settlement. While he favoured the inclusion in the draft of provisions for dispute settlement, they should not be such as to invite States in difficulty to submit themselves to what was in effect a lottery, in which elements of fact and law were so interwoven that any sovereign State would be reluctant to submit itself to the judgment of others. He would therefore urge the Commission to reconsider the immediacy with which the provisions of chapter III, relating to machinery, led on from the articulation of the principle of avoiding harm in article 9. It was highly desirable that, in each particular situation, neighbouring States should be able to agree on what constituted appreciable harm, since a simple overall definition was quite impossible. The degree of harm depended on whether the boundaries were in urban or rural areas, on the prevailing winds, and on all kinds of other natural phenomena; its determination required careful thought, good faith and patience. Those factors could produce the kind of system agreement that would pave the way for an orderly settlement of differences, in most cases long before they developed into a dispute.

52. In regard to the comparison between the rules of State responsibility and the rules to be articulated for his own topic, article 9 had much to commend it. If there was one area in which it was becoming clear that trans-boundary harm was wrongful, it was that of pollution, particularly when water-borne, because it was within the capabilities of modern science and technology to avoid such pollution. Article 9 did not relate liability solely to the occurrence of consequences, but referred to uses or activities "that may cause appreciable harm to the rights or interests of other system States". To that extent it applied an objective test of what might cause harm and it could be contrasted with the International Law Association's Montreal Rules, adopted in 1982<sup>25</sup> which related the wrongfulness of pollution to its actual occurrence and not to a course of conduct that permitted it to occur. He doubted, however, whether it would be helpful in arriving at a settlement to provide, in effect, that any disagreement between neighbouring riparian States as to whether the action of one of them was likely to cause harm would be tantamount to an accusation of a breach of international law. In his view, it was extremely important to keep the phases of fact-finding separate, for it was by compromise that a solution to the problem would be found, not by applying Draconian rules. There was never any justification for using procedure as a means of concealing uncertainty about substance. In cases where a rule could not be formulated in clear terms, the parties should not be expected to settle their differences through litigation.

*The meeting rose at 1 p.m.*

<sup>24</sup> See ILA, *Report of the Sixtieth Conference, Montreal, 1982* (London, 1983), pp. 158 *et seq.*

## 1793rd MEETING

*Thursday, 30 June 1983, at 10 a.m.*

*Chairman:* Mr. Laurel B. FRANCIS

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

**The law of the non-navigational uses of international watercourses (continued) (A/CN.4/348,<sup>1</sup> A/CN.4/367,<sup>2</sup> 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<sup>3</sup> (continued)

1. Mr. MAHIOU congratulated the Special Rapporteur on submitting a consistent and well-structured set of draft articles to the Commission. For the time being, he would make only preliminary observations because it would be impossible to deal with every aspect of the subject. His comments would, moreover, relate only to the Special Rapporteur's first report (A/CN.4/367), since the summary record of the 1785th meeting at which the Special Rapporteur had given his oral introduction was still not available.
2. The uses of watercourses gave rise to problems commensurate with the role rivers had always played. Not only had rivers been of great importance in the economic life of countries, they had also had a major impact on human life and had even given birth to civilizations, as in the case of the Nile in Pharaonic Egypt, which some historians did not hesitate to describe as a "water society". Literary works had also described the influence of rivers such as the Don and the Mississippi.
3. Referring to the example of the temporary watercourses in his country, which were known as "wadis" and had been mentioned by Mr. Schwebel and Mr. Evensen, he said that Algeria had an enormous ground-water horizon which covered several States and was a "shared natural resource" which had to be used with the greatest care because it took thousands of years to recharge. The scarcity of water in the Sahara had, moreover, been a decisive factor in attempts to formulate a system of customary rules for the distribution of water. The difficulties experienced by Algerian jurists in codifying

<sup>1</sup> Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

<sup>3</sup> 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.*

such rules made it clear that the task ahead of the Commission, which was dealing with international water problems, would not be an easy one.

4. The overall structure of the draft articles was clear, logical and acceptable. The Special Rapporteur had been right to explain the basic concepts first and then to formulate principles and rules of co-operation, management and protection and to provide for machinery for any disputes that might arise. That outline would serve as a solid foundation for the Commission's work.

5. With regard to definitions, he noted that the Special Rapporteur had been very cautious in his analysis of the term "international watercourse system". Since it was clear from the Commission's past experience that the definition of terms often led to lengthy debates, the term "international watercourse system" should be approached with the greatest caution, as had been pointed out in paragraphs 6-7 of the Special Rapporteur's report and, in particular, in the last sentence of paragraph 12. In paragraphs 14 and 71, the Special Rapporteur had stated that he had decided not to propose a definition of international watercourses based on a doctrinal approach, while, in paragraphs 15 and 73, he had explained that it might nevertheless be useful to formulate a definition for the purpose of the draft convention. Paragraphs 14 and 16 were of considerable interest because they described an approach that should enable the Commission to make progress in its work. In trying to understand the term "international watercourse system", he would review the analysis made by the Special Rapporteur, but from a slightly different point of view.

6. It first had to be determined whether the Commission was dealing with a conceptual term or a functional one. In international law, many basic terms were of a conceptual nature and made it possible to know exactly which rights and obligations were established for States. However, the Special Rapporteur had noted in paragraph 14 of his report that such an approach would defy the purpose of drafting principles of general applicability which were sufficiently flexible. According to the Special Rapporteur, draft article 1 was purely descriptive and no legal rule or principle could be deduced from it; only at a later stage would the Commission establish the applicable legal rules. He himself would be receptive to that view if the Special Rapporteur had actually formulated a purely descriptive definition; but the definition contained in draft article 1 referred to the interdependence of the States of an "international watercourse system" and that gave that term a functional aspect. Moreover, paragraph 72, which stated that the concept of a "watercourse system" was recognized and employed in State practice, involved the risk of a reversion to a normative idea and perhaps to the doctrinal definition that the Special Rapporteur had initially tried to avoid. Clarifications would therefore be needed in order to dispel any doubts and prevent controversy.

7. A unified definition of the term "international watercourse system" had to be adopted in order to prevent its meaning from changing in the various pro-

visions of the draft convention. Once the definition had been delimited so that it would not vary, however, it would serve as a useful starting-point. The reference to "international watercourse systems" and to "system States" was likely to give rise to reservations on the part of members of the Commission and of States if it became an equation with more than one unknown. In functional terms, the main purpose of the international watercourse system was to reflect the interdependence of the States concerned and encourage them to co-operate; but it also had other related purposes which would be listed in the draft articles and which, once they were more clearly defined, should be able to be supported by members of the Commission.

8. The idea of interdependence in a watercourse system must be understood in relative, not absolute, terms because it derived from the various uses to which water could be put. As Mr. Riphagen had said (1790th meeting), a watercourse system was composed of several subsystems (fishing, irrigation, pollution, etc.), which could either be separate from one another or interdependent. In the light of those considerations, he was of the opinion that the Commission should follow the cautious approach which it had adopted in the past and that, at the present stage, a definition of the term "international watercourse system" was not needed. That term might even lose its usefulness in future.

9. Referring to the term "shared natural resource", he said that, notwithstanding the doubts expressed by some members of the Commission, that idea must not be discarded; an attempt must be made to understand everything it encompassed. Comparisons between international watercourses and the oceans or outer space could be useful if they were cautious, but it would be more dangerous to compare the concept of a "shared natural resource" with that of the common heritage of mankind. No State claimed sovereignty over any part of the common heritage of mankind, whereas States did exercise their sovereignty over rivers. The idea of the "exclusive economic zone" was perhaps a closer comparison; but riparian States did not have unlimited sovereign rights over that zone, whereas they did exercise full sovereignty over watercourses. Although a State could enter an exclusive economic zone to exploit fishery resources, it did not have similar access to a watercourse over which a neighbouring State exercised sovereignty. The term "shared" might also prompt the mistaken conclusion that sharing must be equal. Yet, as the Special Rapporteur was aware, that was not possible because a watercourse was not equally divided among the States through which it flowed. It was therefore necessary to define exactly what type of sharing was involved and to distinguish between commutative justice and distributive justice. Commutative justice implying equal sharing was out of the question. In the draft articles under consideration, only distributive justice could be involved and it meant that States equitably shared their rights and obligations according to their location. Another basic principle was that of equity or, in other words, proportionality.

10. In dealing with the protection or safety of a watercourse system, the Special Rapporteur had arrived at somewhat different conclusions from those of his predecessor. In the previous Special Rapporteur's view, it would be necessary to revise or at least amend the 1949 Geneva Conventions and the 1977 Additional Protocols thereto.<sup>4</sup> The present Special Rapporteur had rightly refused to embark on such an ambitious course, which would not be the correct one. That problem could not be overlooked, but might be approached from a different angle. Instead of referring to armed conflict, why not refer to the peaceful uses of international watercourses? That idea was explicitly referred to in the draft articles and, in particular, in article 7 relating to good-neighbourliness. In that connection, he cited relevant instruments relating to areas that had been demilitarized or denuclearized; in the present case, reference might be made to the Geneva Protocols, with emphasis on the peaceful nature of the uses of international watercourses.

11. It would be necessary to devise a solution to the question of the settlement of disputes, since the aim was to encourage States to co-operate as much as possible and since principles such as equity, reasonable use and appreciable harm might give rise to differing interpretations. In many cases, the fact of establishing machinery for the settlement of disputes encouraged States to solve their problems through negotiation, since a provision establishing the obligation to submit disputes to the ICJ was comparable to a sword of Damocles for States. Like Mr. Razafindralambo (1790th meeting) and Mr. Riphagen (1791st meeting), he would be in favour of compulsory conciliation.

12. The question of the scope of the draft articles had been raised in paragraphs 59–60 of the report. He did not think that it was really necessary to choose between codification and progressive development. A number of factors argued in favour of a code of conduct for States in respect of the use of international watercourses, since some uses might, in certain circumstances, not lend themselves to rigid codification. Account must also be taken of the existence of a large number of agreements which related to most of the major rivers and appeared to work satisfactorily. However, other factors argued in favour of specific rules governing the rights and obligations of States. For example, the interdependence of interests would have to be spelled out in the rules as more than a mere guideline.

13. The Commission must therefore try to establish both a minimum basis for codification and a basis which would serve to promote progressive development and, thus, the harmonious and equitable use of international watercourses. The draft articles should contain clear and specific provisions and indicate plainly the rights and obligations of every State so that the activities of some would not have harmful consequences for others. They should also encourage States to set out their rights and obligations in detail in specific agreements. The two

options of codification and progressive development were to be found in the articles which had already been provisionally adopted and which would have to be taken into account, though perhaps reconsidered on second reading.

14. Mr. LACLETA MUÑOZ said that the Special Rapporteur was to be commended for submitting a full set of draft articles, even though an outline would initially have been enough. Although the structure of the draft articles was acceptable to him, he thought that a chapter on environmental protection might be added. The chapter on the settlement of disputes was essential and the Special Rapporteur had been right to present it merely as a set of guidelines on which members of the Commission would have to express their views. He also supported the final provisions.

15. With regard to chapter I, he noted that draft article 1 expanded on the note adopted earlier by the Commission<sup>5</sup> and contained a provisional definition of watercourses. One of the basic elements of chapter I was that States were entitled to use the waters of international watercourses. In that connection, he said it was to be regretted that the proposed wording gave the impression of something static, whereas in fact a watercourse was dynamic, and that should be taken into account in the definition of terms. He shared Mr. Reuter's view (1786th meeting) that there were two different ideas embodied in the definition of an "international watercourse system". Draft article 1, paragraph 1, referred to a drainage basin in the broad sense of the term, while paragraph 2 was much closer to the notion of a watercourse system. He also wished to draw attention to some drafting problems that arose in the Spanish text. The word *sistema* was perhaps not entirely appropriate. In English, the words "system State" could simply be juxtaposed, but in Spanish a preposition had to be used in the term *Estado del sistema*, thus introducing ideas that were lacking in the English wording. Moreover, if it were not for the fact that the word *Estado* was capitalized, the term *Estado del sistema* could be taken to refer to the condition of the system.

16. Chapter II reflected the very important idea of a State's right to participate in the use of a watercourse system, while taking account of the need not to cause harm to other States. Those were rules which already existed in contemporary positive law. The idea of "appreciable harm" should be expressed in positive terms in draft articles 6 and 7. However, those two articles contained elements which complicated matters, since draft article 6 referred to the sharing of natural resources and draft article 7 dealt with the optimum utilization of water. He shared the doubts expressed by Mr. Mahiou concerning the idea of sharing. The use of systems involved more the idea of proper distribution than that of sharing. He noted that the draft articles were designed both to codify existing positive law and to encourage international co-operation for the optimum use of watercourses, but those two aspects should not be confused.

<sup>4</sup> See 1785th meeting, footnote 14.

<sup>5</sup> *Yearbook* . . . 1980, vol. II (Part Two), p. 108, para. 90.

17. Referring to chapter III of the draft, he said that he did not share Mr. Díaz González's view (1788th meeting) that the Spanish term *ordenación* gave rise to difficulties. As to the previous Special Rapporteur's third report (A/CN.4/348), he noted that, although it was quite normal to qualify the term "harm", the word "substantial" would be better than the word "appreciable". It might also be advisable to combine draft articles 6 and 9.

18. He noted that draft article 10 enunciated general principles which did not belong in chapter II because they related specifically to co-operation and management. That provision also referred to the idea of the optimum utilization of an international watercourse system. Draft articles 11–14 established a notification procedure based on the idea of "appreciable harm". As other members of the Commission had pointed out, that procedure could be effective only if it was accompanied by a system for the settlement of disputes. Since the purpose of draft articles 11–14 was to prevent appreciable harm from occurring, it might be better for them to be included in chapter II. On the other hand, draft articles 15 and 16, which both referred to the idea of optimum utilization, did in fact follow on from draft article 10. Moreover, since draft article 7 was also based on that idea, all those articles formed a separate unit. It would, however, be a mistake to draw the conclusion that draft articles 11–14 could not also apply in the case of a dispute between States wishing to establish the kind of co-operation defined in draft articles 10, 15 and 16. It was to be noted that, in chapter IV, draft articles 27 and 29 also referred to optimum utilization. The Special Rapporteur had therefore been right only to indicate the course to be followed, instead of establishing a general legal obligation to co-operate with a view to the optimum utilization of a watercourse system.

19. Although chapter IV of the draft, relating to environmental protection, was undoubtedly necessary, the draft articles of that chapter which established obligations that would apply in all circumstances should perhaps be moved to chapter II. At any rate, a distinction should be made between the provisions of chapter IV dealing expressly with environmental protection and those relating to the safety of international watercourse systems. He was also of the opinion that the Commission should at most refer to the 1949 Geneva Conventions and the Additional Protocols thereto<sup>6</sup>, but should not include any of the provisions of those instruments in the draft. Draft article 29 might, moreover, be included in chapter II. In his view, that provision went too far in stating that no specific use or uses should enjoy automatic preference over other uses, because there were in fact circumstances in which one use might well have priority over others. Earlier conventions on watercourses had, for example, given priority to navigation and had regarded as secondary any uses which caused too great a drop in the water level.

20. The Special Rapporteur had been right to formulate a number of draft articles constituting chapter V on the

question of the settlement of disputes. Those articles were, however, unsatisfactory and they might almost be replaced by a simple reference to Article 33 of the Charter of the United Nations. In any event, provision should be made for some kind of machinery for the settlement of disputes. He personally would be in favour of a range of procedures which would, in case of failure, culminate in a compulsory ruling by a third party in the form of an arbitral award or a judicial decision. He was, however, not unaware of the difficulties to which such a system would give rise for the many States which did not have the political will to agree to the compulsory settlement of disputes. As a minimum, conciliation should be compulsory, but that point was not made in draft article 34. Draft article 37 as it now stood was practically self-defeating. It was both permissive and restrictive in that it provided simply that States might submit a dispute for adjudication if they had not been able to arrive at an agreed solution by means of draft articles 31–36. In conclusion, he said that the establishment of boards of inquiry might go a long way towards enabling States to settle disputes relating to the uses of international watercourses directly between themselves.

21. Mr. BARBOZA said that, since the proposed draft articles would subsequently be considered individually, he would confine his statement to the general principles which formed the basis of the draft, including the obligation to negotiate, the need to apply system agreements and the characterization of the water of an international watercourse system as a shared natural resource. The Special Rapporteur had used those general principles to formulate standards that applied to the management of international watercourse systems and had referred, in that connection, to the concepts of equitable and reasonable participation, good faith, good-neighbourliness, optimum utilization and appreciable harm. He had also referred to the principle of co-operation.

22. Personally, he would have some difficulty in regarding as a principle the characterization of the water of an international watercourse system as a shared natural resource. It was rather from the legal nature of the waters of a watercourse, as defined in draft article 6, that principles could be derived. The sovereignty of a State was exercised according to the object to which it applied. For example, a State could in principle exercise full sovereignty over its territorial sea, but not in the same way as over its territory, since the sea could not be permanently occupied and population settlements could not be established there. Sovereignty over airspace was different again. The sovereignty of a State over shared natural resources was exercised within the limits set by sharing, but that was not the case of a State's own resources. It was thus in the nature of things to share sovereignty over shared natural resources and it would be inconceivable for positive law not to take account of the nature of things.

23. Three principles could therefore be deduced: sharing must be equitable and reasonable; it must be in keeping with the rule *sic utere tuo ut alienum non laedas*;

<sup>6</sup> See 1785th meeting, footnote 14.

and it required co-operation. The obligation to negotiate established in article 3 as provisionally adopted was only a corollary of the obligation to use a watercourse system equitably and reasonably without causing appreciable harm. That obligation arose only if there was a danger of appreciable harm.

24. Referring to the draft articles that related to those principles, he said that, although he approved of draft article 7, which dealt with the equitable sharing of the uses of a watercourse system, he was not sure that it was essential to refer to the concept of good faith. That was a universal concept which governed the conduct of all States. He also noted that sharing counted more than good-neighbourly relations. For example, if State A was the neighbour of States B, C and D but shared a watercourse only with State B, its relations with States C and D would be governed only by the rules of good-neighbourliness, whereas its rights and obligations in respect of the watercourse would arise as a result of the sharing of that natural resource.

25. The general idea expressed in draft article 8 was undoubtedly necessary since an international watercourse system could be used for a variety of purposes. Draft article 9, which was essential, placed a restriction on reasonable and equitable use, which must not cause any appreciable harm. In his view, those two principles were mutually restrictive and, together, they constituted a legal standard which left no room for an abuse of rights. Reasonable and equitable use must not cause any appreciable harm, but if harm was actually caused, what was involved was not an abuse of rights, but rather a breach of an international obligation. As Mr. Laclata Muñoz had pointed out, the Spanish term *perjuicio apreciable* was not entirely satisfactory because it involved the idea of a judgment. It should, however, be noted that that term and other similar ones had been used in agreements and that State practice was beginning to shed some light on what they meant. It might nevertheless be better to use the Spanish term *perjuicio sensible*, which was also to be found in treaties. In any event, he was of the opinion that harm must be taken into consideration once it amounted to more than an injury that had to be tolerated. In positive law, there were, moreover, similar concepts, such as that of the conduct of the administrator of a trust and that of the conduct of a depositary, who had to take as much care of something entrusted to him as of something belonging to him.

26. Chapter III of the draft dealt with the obligation to co-operate. Draft article 10 embodied the principle of co-operation with a view to optimum utilization. The idea of optimum utilization nevertheless involved an element of subjective judgment and it might lead to a communal conception of the use of international watercourses which would require action by an authority; that would not be very realistic in the present state of international law. In his view, the purpose of the obligation to co-operate should be to give effect to the principles enunciated in the draft and to ensure the enjoyment by the States concerned of the equitable and reasonable use of a watercourse. It would be necessary to establish a general

obligation of co-operation which would be binding on all States, as well as specific obligations such as those enunciated in draft articles 16–18.

27. With regard to the notification procedure provided for in chapter III, he said he agreed with Mr. Laclata Muñoz that draft articles 11–14 did not follow from the obligation to co-operate. Those articles established a procedure that would be applicable if a project or programme caused appreciable harm. They should therefore be moved closer to draft article 9, which provided that a system State must refrain from uses that might cause appreciable harm to other system States. It was from that obligation that the articles relating to the notification procedure were derived.

28. The procedure provided for in the draft should be supplemented in three ways. A State which ran the risk of being harmed should not be able to veto the execution of a project or programme by another State; delays which might be prejudicial to the State making the notification had to be avoided; and the assessment of harm should not be left to the discretion of the State receiving the notification. The interests of the States concerned should be reconciled and there should be a compulsory and speedy procedure for the settlement of disputes. In addition, the machinery for international responsibility should be brought into play so that States would be compelled to fulfil the obligations established in the draft. If provision was not to be made only for compensation for the irreparable damage which States could do to an international watercourse system, all the other penalties authorized by international law would have to be applied. He could, moreover, agree to the establishment of joint watercourse commissions.

29. The draft articles contained in chapter IV, which dealt with environmental protection, might bring the Commission back to the concept of a drainage basin. From the point of view of international watercourses, environmental protection involved factors other than the uses of water. If the Commission dealt, for example, with the impact of deforestation on water quality, it might have to abandon the system concept and revert to the drainage basin concept.

30. Although the principles embodied in draft articles 22–25 were not really different from those enunciated in other parts of the draft, they formed a unit and might have to be applied more strictly. He agreed with the definition of pollution contained in draft article 22 and shared the Special Rapporteur's view that, once the threshold of appreciable harm had been crossed, it made no difference whether the source of pollution was old or new.

31. With regard to the question of the settlement of disputes dealt with in chapter V, he said that differences of opinion were bound to arise, particularly in trying to determine whether appreciable harm had been caused and what were preferred uses. In his view, conciliation would be an appropriate procedure that could be made compulsory in certain cases particularly in connection with the obligation to co-operate. In some cases, it might also be useful to request the assistance of technical experts or a board of inquiry. It would then be possible to

reconcile the positions of the parties to a dispute, as Argentina had done when it had been involved in a dispute with Brazil.

32. In conclusion, he said that, apart from the comments on methodology which he had made, he was of the opinion that the report under consideration (A/CN.4/367) would serve as an excellent basis for the Commission's future work on the topic.

*The meeting rose at 12.55 p.m.*

## 1794th MEETING

*Friday, 1 July 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. Koroma, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Njenga, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Sucharitkul, Mr. Thiam, Mr. Ushakov, Mr. Yankov.

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

[Agenda item 5]

DRAFT ARTICLES SUBMITTED BY THE  
SPECIAL RAPPORTEUR<sup>3</sup> (concluded)

1. Mr. MALEK endorsed the observation made by the previous Special Rapporteur in his first report<sup>4</sup> to the effect that the amount of fresh water in watercourse systems was unevenly distributed throughout the world, so that there had always been large deficiencies of water in some regions and large excesses in others. Some members of the Commission had stated that, in their own countries, water was, by virtue of its abundance, a crucial commodity. Despite that abundance, or perhaps even because of it, serious problems arose in those countries

owing to the lack of appropriate rules of law. In many other countries, the absence or insufficiency of water was a source of constant concern. Sometimes the shortage of water in a State even contributed to military insecurity, not only for the State itself, but for the whole of the region in which it was situated. That was so in the case of Lebanon.

2. In the absence of official information, he referred to reports published recently in the *International Herald Tribune* and in *Monday Morning*, a Beirut weekly, which stated that many specialists in the area were convinced that the watercourses and wells in the countries of the region—namely Israel, Lebanon, the Syrian Arab Republic and Jordan—were crucial not only to the chances of success of the United States-sponsored troop-withdrawal plan for Lebanon, but also to the prospects of another Middle East war. The reports mentioned, in particular, the Oronte River, which rose in the heart of Lebanon and flowed through the Syrian Arab Republic, irrigating a large proportion of that country. The reports emphasized the Syrian Arab Republic's intention to ask Lebanon to guarantee that the Oronte would not fall under Israeli control. They also stated that the headwaters of the Oronte appeared to be one of the main factors in the Syrian Arab Republic, which was heavily dependent on agriculture, being determined to keep its troops in Lebanon. It also appeared that Israel was keenly interested in the waters of a river flowing through southern Lebanon—the Litani—over which it had no claim, but a portion of which it had controlled since its troops had entered Lebanese territory in 1982. According to the reports in question, one of the first acts of the Israelis had been to seize all the hydrographic charts and technical data concerning the dam and the river, on the grounds that those documents came under the heading of military intelligence. It had also been acknowledged that seismic soundings and surveys had been carried out with a view to boring a diversion tunnel at the point on the Litani nearest the Israeli border. Given its lack of fresh water, Lebanon made maximum use of the waters of the Litani. Any diversion of a portion of those waters would be catastrophic for Lebanon. While, admittedly, not even the most developed rules of law could change such situations, it was important for the Commission to take them into account in preparing the draft articles. The diversion of all or part of the waters of a watercourse should be considered strictly prohibited and the draft should contain a provision to that effect. In his third report (A/CN.4/348, para. 513), the previous Special Rapporteur had referred to the diversion of water outside an international watercourse system as one of the questions which should be dealt with in a separate set of articles.

3. Another question on which the Commission should take a decision was the protection of hydraulic works and water resources in periods of armed conflict, whether that conflict was international or not. In his third report (*ibid.*, para. 399), the previous Special Rapporteur had stated that any provision on that question which the Commission decided to include in its draft should be designed to avoid,

<sup>1</sup> Reproduced in *Yearbook* . . . 1982, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* . . . 1983, vol. II (Part One).

<sup>3</sup> 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* . . . 1989, vol. II (Part Two), pp. 110 *et seq.*

<sup>4</sup> *Yearbook* . . . 1979, vol. II (Part One), p. 149, document A/CN.4/320, para. 24.