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Summary record of the 1794th meeting

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

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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. Lacleta 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,[1] A/CN.4/367,[2] 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[3] (*concluded*)

1. Mr. MALEK endorsed the observation made by the previous Special Rapporteur in his first report[4] 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 head-waters 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,

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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 . . . 1989*, vol. II (Part Two), pp. 110 *et seq*.

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

in so far as possible, any entanglement in the larger questions of the law of war; he had expressed the view that the extreme gravity of the damage and losses that might result from the destruction of modern hydraulic installations and the ensuing lethal contamination of drinking-water supplies warranted codification efforts. It was for that reason that he had proposed draft article 13 on that question. The current Special Rapporteur, however, doubted the advisability of such a provision. Some members of the Commission appeared to share his view, while others, including himself, favoured an article along the lines proposed by the previous Special Rapporteur. In any event, the Commission should not simply refuse to deal with the question, but should rather consider the extent to which it could do so in the light of existing relevant instruments.

4. The report before the Commission (A/CN.4/367) had been extremely well prepared and drafted. Although it might admittedly have been conceived somewhat differently, the Special Rapporteur could hardly be criticized for submitting too many draft articles, when two Special Rapporteurs concerned with other topics had recently been criticized for precisely the opposite reason. He also emphasized the high quality of the three reports presented by the previous Special Rapporteur, particularly the third report (A/CN.4/348), which would continue to guide the Commission in its work.

5. Although, at the outset, it had been decided that the debate should be confined to general questions and to draft articles 1 and 6, it had actually ranged over the whole of the draft and nothing had been done to channel it in the desired direction. In addition to his general observations, he would therefore comment mainly on draft articles 1 and 6.

6. Firstly, he noted that the longer the debate continued, the greater the ground still to be covered tended to become. The concepts, ideas and principles which had initially been clear had become obscured by the alternative concepts, ideas and principles proposed. No general agreement had been reached on any important aspect of the topic. The differences of opinion on the very concept from which it derived appeared increasingly irreconcilable. In the past, the term "international rivers" had been used and everyone had understood what was meant.

7. When work on the codification of the topic had begun in the United Nations, the term initially used had been "international watercourses", which was equally clear. However, in the course of the codification exercise, it had been felt that, in order to ensure harmony between the physical laws governing water and the legal rules governing the use of fresh water, the drainage basin must be taken as the unit for the formulation of such rules. It had been at that point that differences had arisen. The use of the international drainage basin concept had met with considerable opposition, so that it had had to be abandoned. It had then been replaced by the international watercourse system concept, which now seemed to be seriously opposed by several members of the Commission, despite the fact that the Commission had accepted it provisionally in 1980. In introducing the term "international watercourse system", the previous Special Rapporteur had maintained in his third report (*ibid.*, para. 512) that it was a recognized concept used in State practice and by specialists in and commentators on the topic. The concept had seemed preferable to that of the basin, or drainage basin, in that it focused on the waters and their uses and interdependencies. The current Special Rapporteur had endorsed those conclusions. The meaning and scope of the international watercourse system concept had been defined by several members of the Commission, who had distinguished it from the basin or drainage basin concept. It had been argued that, once the concept had been provisionally adopted by the Commission, any attempt to modify it could jeopardize the future of the draft itself. As no final decision on article 1 was required for the time being, he would reserve his position on that article.

8. He would also reserve his position on article 6, the future of which seemed somewhat uncertain, since it contained the term "shared natural resource". Referring to paragraph 2 of that draft article, he said that he did not see why an international watercourse system and its waters, which constituted a shared natural resource, should be used only "in accordance with the articles of the present Convention and other agreements or arrangements entered into in accordance with articles 4 and 5". Could it really be claimed that the convention and the agreements entered into, or to be entered into, in accordance with articles 4 and 5 encompassed all the existing rules of international law pertaining to the subject? If such were the case, the limitation would not be necessary. Perhaps the words "and other rules of international law" should be added at the end of paragraph 2 as a safeguard clause.

9. Although draft article 4 was not under discussion, its importance was such that he wished to comment briefly on it. Contrary to what was stated in the commentary to draft article 4 (A/CN.4/367, para. 78), its inclusion in the introduction to the draft articles did not emphasize its importance. The same was true of draft article 5. Draft article 4 made it an obligation of system States to negotiate, while draft article 5 established the right of system States to participate in negotiations. In his view, both of those draft articles should be placed in chapter II, which was concerned with the rights and duties of system States. Moreover, paragraph 3 of draft article 4 should be placed at the beginning of the article, since it set out the basic rule whereby system States must conclude one or more agreements on the apportionment of the use of water. Paragraph 1 could either become paragraph 2 or be placed in the special article to be devoted to the definition of terms. Moreover, the obligation to negotiate, as stated in paragraph 3, was not sufficiently clear.

10. The commentary to article 4 as provisionally adopted by the Commission[5] provided little clarification in that regard, since it implied that there would be no

[5] *Yearbook . . . 1980*, vol. II (Part Two), pp. 118–120.

obligation to negotiate where an international watercourse was little used, if the degree of use was limited in relation to the resources available and thus did not call for an agreement between the system States, or if the use made of the watercourse by one or more system States was bound to have so little effect on the uses made of it by other system States that no agreement was needed. Terms such as "little used", "degree of use" and "so little effect" were so vague that they could make it even more difficult to determine the limits of the obligation. Instead of establishing the obligation of system States to negotiate in good faith with other system States for the purpose of concluding one or more agreements on the particulars of use, which could be easily contested or difficult to verify, it might be better quite simply to stipulate that the obligation existed not "in so far as the uses of an international watercourse system may require", but if one of the system States called for negotiations. The rule should be conceived in such a way that it could be applied without difficulty whenever it was deemed necessary by one of the system States. Given its importance, the rule should not contain conditions which rendered it ineffectual. Even if it did not constitute a rule of customary international law, it was certainly a rule of ethics. Consequently, it should be incorporated in the draft articles if only by way of progressive development of international law.

11. In conclusion, he expressed the hope that the Commission would accept Sir Ian Sinclair's proposal (1791st meeting) concerning the articles which should be considered at the next session.

12. Mr. YANKOV congratulated the Special Rapporteur on his admirable first report (A/CN.4/367). He also expressed his appreciation for the very informative and thought-provoking memorandum submitted by Mr. Stavropoulos (A/CN.4/L.353), which contained not only much valuable information, but also the 15 very interesting UNEP draft principles, some of which called for further scrutiny in order to ensure a proper balance between the divergent interests of States.

13. Referring to draft article 1 submitted by the Special Rapporteur, he said that the term "international watercourse system" needed further clarification. While the concept might be comprehensive and flexible, as noted in the commentary to that article (A/CN.4/367, paras. 71–72), he could not agree with the view expressed by the previous Special Rapporteur that it constituted "a recognized concept employed in State practice and by specialists in and commentaries upon the topic". His own feeling was that, even if the Commission, at its following session, went on to examine draft articles 7–20, the concept of the "international watercourse system", like that of a "shared natural resource", would continue to present difficulties.

14. Turning to draft article 2, he voiced doubts as to whether the concepts of "administration" and "management" should be introduced into paragraph 1, in addition to the concept of "conservation". If the provisions of article 2 as proposed by the Special Rapporteur were taken together with those of articles 11 and 12 concerning notifications and time-limits for reply, the impression might be created that other system States were precluded from taking any measures in their own territory until the whole notification process had taken its course. That was not to say that consultation elements should not be taken into consideration; but their proper place was in bilateral, multilateral or system agreements. They should not take the form of mandatory rules, as appeared to be the case in the draft articles.

15. The concept of a shared natural resource constituted one of the basic tenets of the draft and, for his part, he doubted whether the concept was sufficiently mature for that purpose. For the Commission's draft articles to be viable and acceptable to the international community, they had to take into account all the factors involved. The fact that the interests of States diverged in the matter could not be concealed. Every one of the various statements made during the Commission's discussion of the topic had revealed quite clearly that the speaker had been thinking of the interests of either an upper riparian or a lower riparian State.

16. He had similar reservations with regard to the contents of chapter III. Draft article 11 on notification, in particular, was much too rigid. As to the institutional arrangements dealt with in draft article 15, they should be left to regional or system agreements. Arrangements of that type did, of course, exist in State practice wherever the States concerned felt them necessary and practical. The matter was, however, one to be dealt with by specific agreements, rather than in general rules.

17. Referring to chapter IV of the draft, he said that, while he was not opposed in principle to consideration being given to the environmental aspects of the topic under consideration, it should be noted that environmental rules in different spheres constituted one of the most important issues of the day. The problems involved had received consideration in a variety of forums, both within and outside the United Nations. It was necessary, therefore, to exercise caution and to avoid establishing rules that might lead to unnecessary constraints and complications in river use.

18. In conclusion, he said that a sound basis for the Commission's work on the topic would be to adopt, as the dominant theme of the draft articles, the concept of uses based on international co-operation.

19. The CHAIRMAN recalled that, despite the fact that some members had commented on articles 2 and 3, there was general agreement that those articles should not be referred again to the Drafting Committee.

20. Mr. EVENSEN (Special Rapporteur), summing up the discussion on the topic, said that he had felt it appropriate to submit to the Commission, at the current stage, a fairly complete set of suggestions in the form of draft articles. The reasons for adopting that course were many. First, the previous Special Rapporteur's third report (A/CN.4/348) had provided a good starting-point for the Commission's work on the topic. Secondly, he had felt that an extensive exchange of views was necessary and that such an exchange should be of a very concrete rather than of a general nature, so as to enable him to do useful work. Thirdly, there had been a strong demand from the

international community—not least in the General Assembly and in its Sixth Committee—for concrete guidance because of the increasing need to find peaceful solutions in matters of watercourse management in various parts of the world. Fourthly, the task of drafting a convention on the topic was perhaps somewhat unusual in that it was of a highly political nature, while at the same time involving formidable legal challenges.

21. He had felt that the only possible approach to the task entrusted to the Commission by the General Assembly was to draft a complete framework agreement, because each watercourse system had its own distinctive characteristics and its unique set of problems arising from its geography, hydrology, climate and environment. Equally important was the fact that those various factors often gave rise to explosive political issues—both domestic and international—and frequently led to problems in the much wider context of a whole region or continent.

22. The exchange of views that had taken place over the past two weeks would prove very valuable to him in his work. He was particularly gratified to note that all members present had contributed to the discussion, and he expressed his gratitude for the assistance thus rendered to him in the form of invaluable advice and a host of ideas, recommendations and guidelines which had shed light on the various political and legal issues involved. He was also very grateful for the courteous and friendly manner in which the necessary criticisms and proposals for changes had been submitted.

23. The majority of speakers had stressed the importance of the topic, especially for the developing countries. Many had emphasized the added importance due to ever-increasing uses and to technological developments. Mr. Jagota (1790th meeting) had also emphasized the peace-keeping aspects of the topic. Mr. Mahiou (1793rd meeting) had dwelt on a particular aspect of great interest to his country, namely the importance of ground-water reserves under the Sahara desert, which amounted almost to international ground-water lakes.

24. In his second statement (1791st meeting), Mr. Ushakov had appeared to detract from the importance of the Commission's task by pointing out that the future convention might well not be ratified by all riparian States, adding that it would serve little purpose if two countries, such as the USSR and Senegal, were to ratify the convention when they had no common international watercourse. He, for one, did not share those sentiments. Observations of that kind could be made with respect to a great many multilateral treaties and reflected a risk inherent in treaty-drafting activities. That risk, however, in no way detracted from the importance of the task before the Commission. The codification part of its efforts would crystallize, in treaty form, the relevant governing principles of international law and thus influence the international relations of States in fluvial matters, regardless of ratification or non-ratification by particular States. The progressive development aspect would be equally important. One of the essential bases of discussion was the conclusion of system agreements that would take into account all the special elements and peculiarities of a geographical problem area. The formulation of such agreements would be greatly facilitated by a framework agreement embodying relevant proposals and principles.

25. Other speakers had appeared to entertain doubts as to the usefulness of elaborating a comprehensive framework agreement, thus apparently suggesting that the task before the Commission might boil down to the elaboration of three main elements: the sovereignty concept, responsibility for substantial damage caused to others, and certain specific aspects of pollution. He felt that those comments constituted reactions to his rather unsuccessful attempts to strike a balance between the various rights and interests involved. Certain upper-riparian States, in particular, had found that his draft did not place sufficient emphasis on State sovereignty. He would bear those remarks very much in mind and was grateful to those members, especially Mr. Calero Rodrigues (1787th meeting) and Mr. Njenga (1788th meeting), who had drawn his attention to a number of sensitive issues.

26. Another question which had been discussed from various angles was that of the form which should be given to the draft. There appeared to be broad agreement that the Commission should aim at drafting a framework agreement. That being said, the question arose of the meaning of "framework agreement" in the current context. From the discussion, five elements had emerged as necessary or desirable in that regard. First, the framework agreement should be a comprehensive one, covering most of the important issues that could arise. Secondly, the principles embodied in it must be framed as general principles, partly in the form of legal standards. Thirdly, system agreements for special watercourses, special uses, specific installations or specific parts of watercourses should be encouraged. Perhaps there should be system agreements of a regional nature, taking into account the distinctive features and peculiarities of a special region. Fourthly, the framework agreement should involve both codification and progressive development of international law. Fifthly, a number of the articles in the framework agreement should be formulated as binding provisions, mainly perhaps those which represented the codification of existing State practice, of rulings taken from decisions of international or national courts, or of established norms extracted from the teachings of legal scholars. Other articles would contain non-mandatory norms which would be subject, among other things, to qualifications applicable in each concrete case.

27. In that connection, Mr. Reuter (1785th meeting) had expressed the view that any provision included in the agreement must entail some element of legal obligation. There had also been a suggestion that a distinction could be made between legally binding provisions and non-legally binding recommendations. It was difficult, however, to know where to draw the line in that respect. Possibly, members' views were divided according to whether they had had practical experience of drawing up a draft convention or had a purer concept of law and, in particular, of treaty law. In his opinion, the Commission

should be guided by practical considerations, and therefore the framework agreement should not only set forth unconditional obligations, but also contain provisions whose legally binding content was less clear. Such provisions could pertain, for example, to what was practical or necessary in a given case; they could prove indispensable in shaping practice regarding river administration and co-operation, as well as in formulating progressive rules of law, and could also provide States with the legal and political impetus to draw up modern system agreements. The bases for discussion set forth in his report (A/CN.4/367) seemed to command general support in that respect, but he would take due account of the comments made when preparing his second report.

28. In his introductory statement (1785th meeting), he had asked for the Commission's reaction to the outline for a draft convention set out in his report (A/CN.4/367, para. 65). It seemed that the outline was basically acceptable, although Mr. Jagota and Mr. Lacleta Muñoz (1793rd meeting) had suggested that the articles might be rearranged, and Mr. Flitan (1791st meeting) had underlined the importance of retaining chapter V on the settlement of disputes. In his future work on the topic, he would take account of the views that had been expressed in order to improve the outline in the manner suggested.

29. As to whether he had struck a reasonable balance between the various interests involved, he did not think that he had been entirely successful on that score, and Mr. Jagota, for example, had suggested that certain formulations might be misinterpreted. Again, in his future work, he would bear such points of concern in mind.

30. Also in connection with the outline for a draft convention, he had suggested that it might be inadvisable to include provisions on the law of war. While several members had supported this view, others had suggested that some provisions could be included on use and management for peaceful purposes or on use for peaceful purposes in time of peace and in time of war. He would reconsider the matter with a view to arriving at an accommodation in that regard.

31. The general feeling in regard to chapter V, relating to settlement of disputes, was that it was useful, and even necessary, to include it in a framework agreement. A number of members had supported his oral proposal that consideration should be given to including provisions on compulsory conciliation procedures. In that connection, he noted that Mr. Lacleta Muñoz and Mr. Quentin-Baxter (1792nd meeting) had advocated the establishment of a fact-finding technical commission, or fact-finding technical bodies, while Mr. Reuter (1786th meeting) had suggested that such negotiations could perhaps be assisted by international organizations or mediators appointed specifically to ascertain the facts. Mr. Ushakov (1788th meeting), on the other hand, had questioned the need for chapter V since, in his view, if the purpose of a framework agreement was to create the climate in which individual system agreements could be concluded, such issues should be solved by negotiation between the parties of those system agreements.

32. With regard to the interesting exchange of views which the Commission had had on the concept of an "international watercourse system", he believed that there was a fundamental difference between that concept and the "drainage basin" concept. In addition to the two features of a watercourse system which Mr. McCaffrey (1792nd meeting) had indicated, namely flexibility and relativity, it should perhaps be borne in mind that the drainage basin concept had been defined in article II of the Helsinki Rules on the Uses of the Waters of International Rivers[6] and, consequently, was burdened with that definition. Notwithstanding some hesitation on the part of some members of the Commission, his own view was that the concept of the watercourse system was a convenient descriptive tool, especially if it were not regarded as a superstructure from which to distil legal principles.

33. When considering draft article 6, he would take account of the statements made regarding the "shared natural resource" concept. The many valuable observations made pertaining to other concepts would likewise assist him when he came to reconsider his first report.

34. As to his future programme of work, he hoped to revise his proposals in the light of the proceedings in the Commission and in the Sixth Committee of the General Assembly, in whose deliberations he planned to take part. He trusted that he would be able to submit his second report in good time for the Commission's thirty-sixth session. In the circumstances, it did not seem appropriate at the current stage to refer any draft articles to the Drafting Committee. He had not summed up the comments on individual draft articles, since he felt that it was not the right time to do so and he also wished to be able to consult the summary records. Lastly, he thanked members again for their comments and valuable advice.

35. The CHAIRMAN, thanking Mr. Evensen for his work as Special Rapporteur, said that the Commission looked forward to receiving his second report in 1984.

The meeting rose at 12.30 p.m.

[6] See 1785th meeting, footnote 13.

1795th MEETING

Monday, 4 July 1983, at 12.05 p.m.

Chairman: Mr. Laurel B. FRANCIS

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