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Summary record of the 1853rd meeting

Topic:
<**multiple topics**>

Extract from the Yearbook of the International Law Commission:-
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the expression “adverse effects”. It would be well to recall Aesop’s fable of the stork and the fox, the moral of which was that one State’s beneficial effects were not necessarily another’s. It was a matter of cardinal importance, and one that had been clearly stated by the arbitral tribunal in the *Lake Lanoux* case (A/CN.4/383 and Add.1, para. 22), that States were judges of their own situation. They were not required to accept somebody else’s account of the situation. That was why he would suggest that the word “adverse” had no place in the scope clause and in the definition of transboundary effects. If, however, there was a discussion at an early stage in relation to a proposed activity, it was to be hoped that the parties would agree on what was and what was not beneficial.

49. With regard to scope, and specifically to the decision to confine the topic to cases in which there was a physical consequence, that was a rigorous limitation and one that permitted of no exception. Much had been sacrificed to it; for instance, questions such as misuse of drugs, problems of refugees and even product liability all fell outside the scope of the draft articles because of the requirement of a physical consequence. However, once that limitation had been accepted, as it had been by the majority, it was necessary to follow it through. That did not, however, preclude an assessment of the effects of an activity with due regard to economic, social and other relevant factors.

50. The sole purpose of the definition of “territory or control” was to relate the scope of the articles to existing law, and even to developing law, as it pertained to control over territory, ships, expeditions on the high seas and objects in outer space. The only possible policy element in the definition was the treatment of ships in passage or aircraft in authorized overflight as being in a transboundary situation *vis-à-vis* the State through whose territory they were travelling. All else was a matter of drafting.

51. So far as narrowing the scope of the draft articles was concerned, international law did not expect States to be omnipresent and to control every aspect of what happened in their territory. The draft articles certainly could not impose standards that States were not willing to apply in their own domestic affairs. It would, however, eventually be necessary to consider the point at which municipal law met international law.

52. With regard to articles 3 and 4, he agreed that, had there been a clear idea of the content of the subsequent articles, a radically different view could have been taken; but he considered that, at the present stage in the development of the draft, those two articles were essential. As to article 5, the role of international organizations under treaties was sufficiently evident to leave no doubt about the need to include some provision on that point.

53. Lastly, he suggested that, rather than referring the draft articles to the Drafting Committee, a small committee might be appointed to examine them and report back to the Commission.

The meeting rose at 6.10 p.m.

1853rd MEETING

Tuesday, 3 July 1984, at 10.05 a.m.

Chairman: Mr. Sompong SUCHARITKUL

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Balanda, Mr. Barboza, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov.

International liability for injurious consequences arising out of acts not prohibited by international law (concluded) (A/CN.4/373, ¹ A/CN.4/378, ² A/CN.4/383 and Add.1, ³ A/CN.4/L.369, sect. H, ILC (XXXVI)/Conf. Room Doc.6, ST/LEG/15)

[Agenda item 7]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR (concluded)

ARTICLE 1 (Scope of the present articles)

ARTICLE 2 (Use of terms)

ARTICLE 3 (Relationship between the present articles and other international agreements)

ARTICLE 4 (Absence of effect upon other rules of international law) *and*

ARTICLE 5 (Cases not within the scope of the present articles) ⁴ (concluded)

1. Mr. QUENTIN-BAXTER (Special Rapporteur) said that, in suggesting at the end of the previous meeting that a small committee should be appointed to consider draft articles 1 to 5, he had not intended that those provisions should be discussed further at the current session. He simply believed that draft articles which had not been fully considered by the Commission itself should not be referred to the General Assembly. His suggestion had, moreover, been purely tentative.

2. The CHAIRMAN suggested that the Commission should take note of the fact that draft articles 1 to 5 would not be referred to the Drafting Committee at the current session and that it should invite the Special Rapporteur to prepare further draft articles, which could be considered together with draft articles 1 to 5.

It was so agreed.

¹ Reproduced in *Yearbook ... 1983*, vol. II (Part One).

² Reproduced in *Yearbook ... 1984*, vol. II (Part One).

³ *Idem.*

⁴ For the texts, see 1848th meeting, para. 3.

The law of the non-navigational uses of international watercourses (continued)* (A/CN.4/367,⁵ A/CN.4/381,⁶ A/CN.4/L.369, sect. F, ILC (XXXVI)/Conf. Room Doc.4

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR⁷ (continued)

3. Mr. EVENSEN (Special Rapporteur) recalled that he had introduced his second report on the topic (A/CN.4/381) at the 1831st meeting to enable three members of the Commission to make their statements before they left Geneva.

4. Mr. AL-QAYSI said that, in view of the complex and highly technical nature of the topic and of the vital State interests involved, the Commission's aim should be to reconcile those interests and arrive at legal provisions that would command broad acceptance. A variety of considerations were involved. Given the relevance of the physical facts to the legal rules to be formulated, the possible need for scientific and technical advice should be borne in mind. In view of the differences in the physical characteristics of international watercourses, a delicate balance also had to be struck between generality and specificity; the general rules should not be so general that they would not serve as guidelines for the practice of States and the Commission should always be prepared to supplement them where necessary with detailed rules. Furthermore, the physical features of international watercourses invariably gave upper riparian States a dominant position. There was thus a real possibility that the balance of interests which the Commission was seeking to achieve might be determined by such States, since lower riparian States were at the end of the receiving line. Such a result would be contrary not only to the fundamental duties of cooperation, solidarity and good-neighbourliness among States—duties that afforded the only viable basis for a solution to the development, population and environmental problems inherent in the use of water—but also to the physical interdependence of States in the matter of the non-navigational uses of international watercourses.

5. The acceptability of the legal norms to be drawn up would depend to a large extent on the Commission's response to the rights of the riparian States concerned. Those norms should strike a harmonious balance between the underlying interests involved and that balance-of-interests approach should in turn be based on State practice and be flexible enough to ensure the most equitable enjoyment of those rights. Existing laws should be codified and progressively developed to provide States with an indication of the direction they might wish to take in their enjoyment of international watercourses.

* Resumed from the 1832nd meeting.

⁵ Reproduced in *Yearbook ... 1983*, vol. II (Part One).

⁶ Reproduced in *Yearbook ... 1984*, vol. II (Part One).

⁷ For the texts, see 1831st meeting, para. 1. 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.*

6. Commending the Special Rapporteur on his second report (A/CN.4/381), he expressed his broad agreement with its general approach, which, as the Special Rapporteur had pointed out,

... seemed necessary in order to strike the right balance in those matters between the interdependence of riparian States and their sovereignty, independence and right to benefit from the natural resources within their borders. ... (*Ibid.*, para. 3).

7. The proposed draft articles, which had been given the form of a framework convention, dealt in an appropriate manner with the rights and obligations of States, the basic concept being that each State had a sovereign right to a reasonable and equitable share in the uses of water, subject to a duty not to affect to any appreciable extent the rights of other States in respect of that water.

8. In draft article 1, the Special Rapporteur had abandoned the "international watercourse system" and "system State" concepts in favour of the concepts "international watercourse" and "watercourse State". One reason for the change was that the system concept had attracted the same criticism as the drainage basin concept. The Special Rapporteur, who had noted that the topic was fraught with political as well as legal aspects, had concluded that the use of the system concept approach might "be a serious hurdle in the search for a generally acceptable instrument" (*ibid.*, para. 18). It had to be recognized that the system concept, with its possible connotation of jurisdiction over land areas, was not altogether free from ambiguity, and approval of it had in any event been tentative and contingent upon the final shape which the draft articles would take. The arguments in favour of the conceptual change were, moreover, quite convincing and the emphasis placed on surface water was not excessive, since such water constituted the bulk of the resource. The Special Rapporteur had, however, accepted the fact that "international watercourses have a wide variety of 'source components'" (*ibid.*, para. 24) and had given expression to that acceptance by referring in draft article 1, paragraph 1, to "the relevant parts or components" of the watercourse. He endorsed the Special Rapporteur's flexible approach, whereby the body of draft article 1 referred broadly to the components and parts of an international watercourse and further reference to the various types of components was made in the commentary. On that basis, he was prepared to give his tentative approval to draft article 1.

9. In his second report (*ibid.*, para. 33), the Special Rapporteur had suggested that it might be possible to delete draft article 3, which defined a watercourse State, since the system concept had been abandoned. His own view was that it would help to eliminate controversy if that provision was retained. One important question that must, however, be answered was whether, in the light of draft article 4 and, in particular, paragraph 3 thereof, draft article 3 meant that a watercourse State which contributed only ground water should be placed on an equal footing with a watercourse State which had hundreds of miles of the watercourse within its territory.

10. Draft article 4 was well conceived and the first sentence of the new paragraph 1 should alleviate some of

the misgivings referred to in the commentary to that article (*ibid.*, para. 38, first sentence). In the case of agreements concluded between States parties to the framework convention subsequent to its entry into force, as provided for in the second sentence of the new paragraph 1, however, it would seem correct to assume that the States concerned would be obliged to comply with the standards laid down in the framework convention.

11. With regard to draft article 5, paragraph 2, he wished to know whether, in the light of draft article 9, the term “affected to an appreciable extent” meant “harmed to an appreciable extent”. He also noted that, in that same paragraph, the Special Rapporteur had deleted the cross-reference to article 4 in order to make it clear, as stated in his commentary (*ibid.*, para. 42), that the watercourse State concerned was entitled only “to participate in the negotiations in order to make its concerns known to the negotiating States”. In his own view, a better solution would be to include a cross-reference to article 4, paragraph 2, immediately after the words “programme or use” in article 5, paragraph 2, thereby making it easier to determine the extent to which the use of a watercourse was affected. Also with regard to article 5, paragraph 2, what would the legal position be in respect of the problem of non-recognition?

12. Another point concerning draft article 5 related to the standard of “appreciable extent” which had been introduced in connection with the right of the watercourse State to participate in the negotiation of a proposed watercourse agreement. In that connection, he noted that, in paragraph (9) of the commentary to article 4 as provisionally adopted by the Commission at its thirty-second session, in 1980, the Commission had rightly inquired

... whether the rule should include qualification of the degree to which State interests must be affected in order to support a right to negotiate and become party to a system agreement.⁸

The Commission had taken the view that, while it would be far more useful to quantify any such effect, such quantification was not practical in the absence of technical advice. Owing to the importance of the standard under discussion and bearing in mind the criticism levelled against it, such technical advice should, in his own view, be sought in order to incorporate the necessary quantitative elements in the text and eliminate any ambiguity about the standard itself. In 1980, the Commission had considered that the standard of “appreciable extent” could be established by objective evidence and that there had to be a real impairment of use.⁹ His question was therefore at what point the criterion of impairment to an appreciable extent would start to operate. Could it be substantiated on the basis of objective scientific data at the stage when a given project was being planned or executed, or only definitively after its operation? If at the latter stage only, was it realistic to assume that the project could be amended or abandoned?

⁸ *Yearbook ... 1980*, vol. II (Part Two), p. 119.

⁹ *Ibid.*, para. (10) of the commentary.

13. Chapter II, which contained articles 6 to 9 on the rights and duties of watercourse States, was the core of the draft articles. He agreed with the Special Rapporteur (*ibid.*, para. 46) that articles 11 to 14, dealing more with issues of management and co-operation, should not be placed in that chapter, but kept in chapter III. The significant change made in draft article 6 with the elimination of the concept of an international watercourse as a “shared natural resource” had been introduced in response to the opposition which had been voiced in the Commission and in the Sixth Committee of the General Assembly and which had led the Special Rapporteur, in his commentary (*ibid.*, para. 48), to express doubts as to the advisability of retaining the concept as originally expressed. The basic starting-point, namely that each watercourse State was entitled within its territory to a reasonable and equitable share of the uses of the waters of an international watercourse, had, however, been retained.

14. In drafting general principles on the topic, it was necessary to bear in mind the applicable rules of customary international law. It must also be remembered that the subject involved limitations on the territorial sovereignty of States: upstream riparian States had a right to use the waters in their territory, but must not do so in such a way as to deny the rights of lower riparian States also to use the waters in their territory. The uses of the waters of an international watercourse therefore had to be regulated in a reasonable and equitable manner with a view to eliminating injustice and conflict; that, in turn, involved reciprocal rights and obligations. The legal consequences that flowed from draft article 6 should not, however, give rise to any concern that States with different shares would have the right to equal benefits from the use of the watercourse as a whole: it was evident that the right of a watercourse State to enjoy equal benefits from the watercourse applied exclusively to its share. On the basis of those considerations, draft article 6 merited support.

15. The basis for the general principles set forth in draft article 6, namely good faith and good-neighbourly relations, was to be found in draft article 7. The two articles were thus closely linked in substance, but draft article 7 introduced the concept of the development of the waters of an international watercourse on the basis of equitable sharing. Whereas the reasonable and equitable share envisaged in draft article 6 related to the uses of the waters of an international watercourse, the principle of reasonableness and equity envisaged in draft article 7 related to the development, use and sharing of the waters. That point needed clarification. The notion of protection and control also required more precision. Otherwise, article 7 was acceptable to him.

16. Draft article 8, which listed factors for determining reasonable and equitable use, was not only a “useful corollary to the legal standard set forth in article 7”, as the Special Rapporteur stated in his commentary (*ibid.*, para. 54), but was also essential. Of particular importance was paragraph 2, which was in keeping with article 7 and also with chapter V of the draft.

17. If the purpose of draft article 9 was to prohibit cer-

tain activities relating to the uses which a watercourse State made of its share of the waters of a given watercourse, that should be made clear. If not, the relationship between the words "uses" and "activities" should be explained.

18. Referring to chapter III of the draft, he welcomed the addition to draft article 10 of a new paragraph 2 relating to assistance from the United Nations and other relevant international agencies.

19. As far as the notification procedure was concerned, he considered that time-limits had been dealt with in an appropriate manner, but he wondered whether, in draft article 12, paragraph 1, it would not be useful to add the requirement of sufficiency to that of reasonableness. It might also be useful to list certain criteria, possibly in the commentary, as examples of what was meant, in article 12, paragraph 2, by "justifiable requests" for additional information.

20. A significant change had been introduced in draft article 13, paragraph 3, in response to the criticism that the original text virtually gave the receiving State the right to veto the plans of the notifying State. He fully agreed that it was neither realistic nor in keeping with the underlying principles of the draft articles to envisage such a right. Since the standard of appreciable harm had been adopted under draft article 9, however, it seemed important to refer to that standard in draft article 13, rather than to substantial effects. With a view to strengthening the possibility of recourse to the procedures for peaceful settlement of disputes provided for in chapter V of the draft, it was also essential to replace the words "must be settled", in draft article 13, paragraph 4, by the words "shall be settled". Similarly, the word "should" in draft article 18 should be replaced by the word "shall".

21. As to chapter IV of the draft, he considered that the purpose of draft article 23, paragraph 1, would be clearer if the last part of the paragraph were amended to read: "in regard to their equitable use of such waters free from other harmful effects within their territories." In that connection, he also noted that the Special Rapporteur had not given any reasons for the substantive changes made in draft articles 23 to 25. Some of the terms used, such as "prevent", "abate", "mitigate" and "neutralize", should be examined more closely with a view to achieving greater precision.

22. He agreed with the view expressed by the Special Rapporteur in his commentary (*ibid.*, paras. 91-92) regarding the position of article 27 in the draft. He could also accept the new draft article 28 *bis* and the view expressed in the commentary thereto (*ibid.*, para. 97).

23. With regard to draft article 29 (now draft article 15 *ter*), paragraph 2, he considered that the words "and benefits" should be added after the words "equitable distribution". He also wondered whether paragraph 4 as it now stood was sufficient to resolve any conflicts that might arise in connection with use preferences and whether a cross-reference to the provisions on peaceful settlement of disputes of chapter V might not be appropriate.

24. Chapter V of the draft was crucial as a balancing factor in the interplay of the rights and interests involved. Although the Commission usually left the elaboration of procedures for peaceful settlement to the conference or body that adopted a draft convention, that balancing factor had to be kept constantly in focus during the formulation of the substantive provisions. The final shape that those provisions would take would, of course, have an influence on the modalities of the procedures for peaceful settlement of disputes.

25. Mr. STAVROPOULOS said that the Special Rapporteur's second report (A/CN.4/381), which contained a full set of revised draft articles, represented an attempt to reconcile competing interests and was a step towards the achievement of solutions that would be acceptable to all. The useful amendments to the draft articles could not but enhance the balance of the draft and might well lead to agreement in due course.

26. The most significant amendment was that the word "system" had completely disappeared and the draft articles no longer referred to "system States", "watercourse systems" or "system agreements." Instead, the revised draft dealt with "international watercourses", "watercourse States" and "watercourse agreements". He welcomed that new presentation, which no longer brought to mind the "drainage basin" concept.

27. He agreed with the Special Rapporteur (*ibid.*, para. 8) that the term "uses", which included all uses except, of course, navigational uses, should be taken not in the narrow sense, but should relate to such issues as environmental protection, pollution, and prevention and control of water-related hazards.

28. Turning to the draft articles themselves, he said that he approved of article 1, including the additions and changes thereto, and of articles 2 and 3. He had no objection to articles 4 or 5.

29. As to chapter II of the draft, he endorsed the Special Rapporteur's view that, in draft article 6, it would not be conducive to the attainment of a generally acceptable convention to retain the concept of an international watercourse as a "shared natural resource" (*ibid.*, para. 48). There had been strong opposition to that concept both in the Commission and in the Sixth Committee of the General Assembly, on the grounds that the words "shared natural resource" could be taken to mean that natural resources had to be shared equally by downstream and upstream States. The Special Rapporteur had therefore amended the text of draft article 6, paragraph 1, to read:

1. A watercourse State is, within its territory, entitled to a reasonable and equitable share of the uses of the waters of an international watercourse.

He himself had had no objection to the earlier version of draft article 6 and could also agree to the new version because he had always believed that a watercourse State was, within its territory, entitled to a reasonable and equitable share of the uses of the waters of an international watercourse. The concept as now drafted had, moreover, been endorsed by other members of the Commission, including Mr. Njenga (1831st meeting) and Mr. Jagota (1832nd meeting).

30. He could accept draft article 7 on equitable sharing in the uses of the waters of an international watercourse, as well as draft article 8 on the determination of reasonable and equitable use, and draft article 9 on the prohibition of activities causing appreciable harm. In article 8, a new factor had been added in paragraph 1 (c) and he supported that addition.

31. Paragraph 2 of the revised draft article 10, which dealt with general principles of co-operation and management, provided that watercourse States should obtain the appropriate assistance from the United Nations and other relevant international agencies and supporting bodies. There was no doubt that the Economic and Social Council, the Secretary-General of the United Nations, the appropriate specialized agencies and even the General Assembly could provide assistance in many instances. That question had been raised in recommendation 85 of the 1977 Mar del Plata Action Plan (see A/CN.4/367, para. 34). It would therefore have been a serious omission if no provision on the subject had been included in the present draft articles.

32. Mr. BALANDA said that, as far as the African countries were concerned, the Special Rapporteur should be able to achieve the goal of preparing a generally acceptable legal instrument, since the basic principles embodied in the draft differed very little from those contained in the agreements in force between African watercourse States. The draft articles submitted in the second report (A/CN.4/381) were basically the same as those contained in the first report (A/CN.4/367), on which he had already commented. His remarks would therefore relate to only a few of the provisions proposed at the current session.

33. He was in favour of the Special Rapporteur's initiative of abandoning the concept of an international watercourse as "a shared natural resource", which was far too unclear (A/CN.4/381, para. 48). In so doing, the Special Rapporteur had dispelled some States' fears that they would have to share with other States resources that belonged to them alone. For the sake of consistency, any reference to the idea of sharing should therefore be avoided throughout the text of the draft.

34. Like Mr. Al-Qaysi, he was not sure about the nature of the legal instrument that was being elaborated. The idea of a framework convention seemed to be generally acceptable, but it was not clear whether the members of the Commission all agreed on the meaning of that idea and whether the purpose of that convention would be only to provide guidelines for States or whether States would have to undertake to abide by the envisaged procedure for the settlement of disputes. The Special Rapporteur should define the exact nature of the draft convention so that conclusions could be drawn about the type of procedure to be established. Could a compulsory arbitration procedure be established if the future convention was not binding on States?

35. He would have no objection if the Special Rapporteur dealt with environmental protection problems and, in particular, with the prevention of water-related hazards. As far as developing countries were concerned,

however, the duty to provide information, which lay at the heart of the topic, might give rise to financial problems. The implementation of the provisions of the 1964 Niamey Agreement¹⁰ relating to exchanges of information was, for example, being hampered by the Niger River riparian States' lack of resources. In that connection, draft article 10, paragraph 2, relating to assistance from international organizations, was essential.

36. In his view, the wording of the draft articles should be simplified. The Drafting Committee might, for example, shorten draft articles 6, 10-14, 20 and 23 and make them more readable. As a result of criticism voiced in the Commission and in the Sixth Committee of the General Assembly, the Special Rapporteur had, moreover, replaced the term "system State" (*Etat du système*) by the term "watercourse State" (*Etat du cours d'eau*), which was rather awkward in French, but satisfactory in other respects. The Drafting Committee might therefore examine that term more closely. Although the words "reasonable and equitable" had been used several times in the draft articles and it was important to stress the need for equity, he did not think that the word "reasonable" added much to the text, except in draft article 12, in which a specific time-limit would be difficult to set.

37. Referring to the substance of the draft articles, he commended the Special Rapporteur for having drawn a distinction in draft article 5 between the negotiation of an agreement applying to an international watercourse as a whole and the negotiation of an agreement applying only to part of a watercourse. That distinction took account of situations that could actually arise.

38. Draft article 12, paragraph 1, referred to the "decision" which the watercourse State or States would be allowed to communicate to the notifying watercourse State. In order to avoid any possibility of a veto, however, those States should rather be invited to communicate their "reply" or their "position" concerning the notification. That paragraph also provided that the six-month time-limit could be extended because of the complexity of the issues at stake, the magnitude of the work involved or other reasons. That time-limit could, however, not be extended indefinitely without harming the States concerned. That provision should therefore establish a means of dealing with such a situation. Draft article 12, paragraph 2, which also referred to the time-limit set forth in the notification, was likely to give rise to practical problems because it did not specify whether the time-limit would be interrupted when the receiving State requested additional information or whether a new time-limit would start when that State had received the additional information it had requested.

39. Draft article 15 provided for the establishment of "permanent" institutional machinery. The word "permanent" should, however, be deleted because it was for States to decide whether the system of consultations they established would operate on a permanent basis or only occasionally. The meaning of the words "regular meetings and consultations" was also difficult to define be-

¹⁰ United Nations, *Treaty Series*, vol. 587, p. 19.

cause regularity was an entirely relative concept. The only aim of draft article 15 was to encourage consultations among watercourse States. Since the establishment of permanent institutional machinery or of a system of regular meetings and consultations would, moreover, involve financial implications, draft article 15 should not go into so much detail and should simply enunciate general principles.

40. Although he had no objection to the fact that some information might be regarded as "restricted", he was not sure that draft article 19 would not hamper exchanges of information. A State which frequently classified the information in its possession as "restricted" might prevent consultations from being held with the other States concerned.

41. As to draft article 26, paragraph 2, which referred to "early warning systems", he was of the opinion that the word "early" was inappropriate because it implied the use of advanced technology that was not available to all countries. The aim of that provision was to encourage the States concerned to exchange information about potential water-related hazards.

42. The new draft article 28 *bis*, which related to the problem of "internal armed conflicts", seemed to imply that a group of individuals who did not agree with the established Government of their country and who damaged international watercourse installations or works would be held internationally responsible. It was, however, difficult to see how a legal instrument which was supposed to be effective could provide that individuals had an obligation to repair the damage they had caused.

43. Draft article 30, paragraph 2, would also give rise to practical problems because it implied that all watercourse States would be bound to co-operate in protecting a part of a watercourse which one watercourse State had declared a protected site. It must be borne in mind that the interests of one State were not necessarily the same as those of other States.

44. In his view, the draft articles did not place enough emphasis on the idea of compensation. The question of reparation arose in the case where one watercourse State built an installation that caused appreciable harm to the rights or interests of another watercourse State. Should the installation in question be destroyed or should the possibility of compensation be envisaged in such a case? In that connection, he referred to the example of a hydroelectric power station built during the colonial period on the Mpozo River, of which Zaire and Angola were riparian States. The construction of the dam had caused flooding in Angola and the Portuguese authorities at the time had requested compensation in the form of 15 per cent of the electric power produced.

45. Mr. BOUTROS GHALI said that the draft convention under consideration would serve as a basis for the formulation of international legislation relating to the non-navigational uses of international watercourses. Such legislation was of particular importance to third world countries in general and to African countries in particular. Until recently, there had been full freedom of

action in that field: there had been no customs to respect or situations to take into account. The African States had then drafted conventions and adopted resolutions which all urged them to co-operate actively in the area of river law, since international rivers were regarded as the basis for the regionalism or subregionalism which would enable Africa to overcome micronationalism and achieve macronationalism.

46. The importance which Africa attached to the topic under consideration was, for example, reflected in the African Convention on the Conservation of Nature and Natural Resources, which had been adopted at Algiers in 1968¹¹ and had entered into force in 1969. That Convention stated:

Article V. Water

1. The Contracting States shall establish policies for conservation, utilization and development of underground and surface water, and shall endeavour to guarantee for their populations a sufficient and continuous supply of suitable water, taking appropriate measures with due regard to:

- (1) The study of water cycles and the investigation of each catchment area;
- (2) The co-ordination and planning of water resources development projects;
- (3) The administration and control of all water utilization; and
- (4) Prevention and control of water pollution.

2. Where surface or underground water resources are shared by two or more of the Contracting States, the latter shall act in consultation, and if the need arises, set up Inter-State Commissions to study and resolve problems arising from the joint use of these resources, and for the joint development and conservation thereof.

47. Moreover, according to the Lagos Plan of Action for the Implementation of the Monrovia Strategy for the Economic Development of Africa, adopted in 1980,¹² the problems of the integration, development and management of water resources had to be dealt with at the sub-regional level by strengthening existing river commissions and, at the regional level, by establishing an intergovernmental committee on water for the African region, as decided by the ECA Conference of Ministers at its fifth meeting, held at Rabat in 1979.

48. Because of drought, many African States had been making increasing use of river water, rather than rain water, for soil cultivation and, in the near future, that would give rise to problems with regard to water distribution and the construction of dams. Serious armed conflicts, such as the border and tribal disputes now taking place in parts of Africa, could break out between States belonging to the same international river basin. The problem of the shortage of water did not, however, affect Africa alone, for, as the Special Rapporteur had stated in his second report (A/CN.4/381, para. 2), it was "a major scourge for more than one third of the population of the world". The elaboration of the law of the non-navigational uses of international watercourses would therefore contribute to the maintenance of international peace and security and promote the economic development of the third world countries.

¹¹ *Ibid.*, vol. 1001, p. 3.

¹² A/S-11/14, annex I.

49. The major problem dealt with in the Special Rapporteur's second report was that of striking a balance between the interdependence of riparian States, which might be regarded as the "co-owners" of the waters of a watercourse, and their sovereignty or, in other words, their right to use the waters which were located in or flowed through their territory. That problem arose particularly when a State decided to implement a watercourse project that might harm the interests of another riparian State. A solution to the problem of reconciling the interests of upstream and downstream States would help to determine the object and purpose of the draft convention and to establish guidelines for procedures for the settlement of disputes between States.

50. Referring to draft article 8 on the determination of reasonable and equitable use of the waters of an international watercourse by a watercourse State, he suggested that an additional relevant factor to be listed in that article was one that had already been mentioned in draft article 4, namely special watercourse agreements. Account should also be taken of the fact that, in the current computer age, there were various measurable criteria that might be important. Draft article 8, paragraph 1 (g), referred to co-operation among watercourse States in projects or programmes "taking into account cost-effectiveness and the costs of alternative projects"; but comparative project costs were another relevant factor to be considered. Account should also be taken of the population which depended on the waters of an international watercourse and of the feasibility of awarding compensation to one or more riparian States as a means of re-establishing a balance between the interests of those involved in a possible conflict and of ensuring the reasonable and equitable use of the waters of the watercourse. Such compensation would strengthen and institutionalize solidarity among riparian States. For example, if, after building a dam, State A increased its water consumption at the expense of State B's consumption, State B should be entitled to a larger share of the electric power produced.

51. Long-term demographic and hydrographic forecasts should also serve as criteria for determining reasonable and equitable use. Major international river projects took decades to complete and, during that time, the economic and social balance between the watercourse States concerned was liable to change. New scientific techniques could offer new solutions for reconciling the present and future interdependence of riparian States and their particular immediate interests. Moreover, account had not been taken of the criterion of navigation. The fact that the topic related to the non-navigational uses of international watercourses was no justification for that omission, because the implementation of a project could, in fact, hamper navigation on an international river.

52. It would, of course, be very difficult, if not impossible, to list all the relevant factors to be taken into account in accurately determining reasonable and equitable use and to classify them in order of priority, but the following three factors warranted particular attention: (a) existing special agreements; (b) measurable criteria such as pollution, silt loss and water quantity an-

alyses; (c) long-term forecasts of, for example, changes in the balance in relations between watercourse States.

53. Draft article 13 did not establish the right balance between a State which was executing a watercourse project and a State which was harmed by that project, since paragraph 3 provided that a "notifying State" which deemed that a project was extremely urgent could proceed with that project. The affected State's only satisfaction was that compensation should be based on good faith and a spirit of friendly relations. Since that imbalance weakened the principle of interdependence, it would be necessary to find a formula that would place the two States on an equal footing. The problem would, however, be even more complicated if the State which was executing the project was an upstream riparian State and the State which was harmed was a downstream riparian State.

54. The balance between the two should be dealt with in a more detailed study that would take account of different types of projects relating, for example, to the construction of canals and dams and the diversion of the waters of a watercourse; the different types of harm; the situation of upstream and downstream riparian States; different forms of compensation; and different types of co-operation in the execution of projects. Such a study would, of course, involve problems and risks, since such details should be worked out in the specific régimes to be established as part of special agreements, whereas the draft convention was to be only a framework agreement.

55. If the Commission merely enunciated general principles, however, it would, no matter what procedures it adopted, end up giving absolute power to the notifying State or a right of veto to the State receiving the notification. A general principle which would place upstream and downstream riparian States on an equal footing might, moreover, not establish the desired balance. In either case, the principle of interdependence would suffer, and the main objective of the draft convention was to strengthen the principles of co-operation and interdependence. The Commission should attempt either to classify types of project and harm or to formulate rules of law that would promote co-operation between watercourse States. Only genuine solidarity among such States would make it possible to reconcile conflicts of interest and enable the joint institutions referred to in the draft articles to function smoothly.

56. Draft article 10, paragraph 2, which related to co-operation with the United Nations and other relevant international agencies, was essential in order to promote solidarity among watercourse States. An international organization could not only play a catalytic role and resolve differences of opinion, but could also offer financial and technical assistance that would provide a strong foundation for solidarity among States. Conflicts of interest often arose because of a lack of information. In that connection, he referred to a hydrometeorological study of Lakes Victoria, Kioga and Albert which was being subsidized by UNDP in co-operation with WMO and which related to the water balance of the Upper Nile. That study had helped to strengthen contacts between riparian States of the Nile, despite their conflicts of interest.

57. The new draft article 28 *bis*, which was extremely important, might be supplemented by a paragraph based

on article 54, paragraph 2, of the first 1977 Additional Protocol to the Geneva Conventions,¹³ which read:

2. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as ... drinking-water installations and supplies and irrigation works ...

58. Mr. USHAKOV said that the position of principle he had adopted some 10 years previously had not changed. It was, moreover, becoming increasingly clear that, instead of elaborating a framework convention, the Commission should be drafting model articles which might or might not be taken into account by the States concerned. The draft conventions that the Commission elaborated were usually universal in scope, but the draft articles under consideration would be of no interest whatever to island countries or even to adjacent countries which did not share an international watercourse. It would, in any case, not be possible to apply rules adopted in Europe to other continents.

59. The concept of an international watercourse could be considered from different points of view. There was nothing to prevent States, if they so wished, from managing a watercourse as a hydrographic basin, as a watercourse system or simply as a river.

60. With regard to specific uses of the waters of a watercourse, it should be noted that, in some countries, drinking-water was of major importance to the population, whereas, in others, water was used mainly for agricultural or industrial purposes. In the light of the wide variety of situations that could arise, no generalizations could be made. Accordingly, the Commission could draft only model articles, that would serve as guidelines for the conclusion of agreements relating to particular situations. Otherwise, it would continue to be divided on the question whether its starting-point should be a basin, a system, a watercourse or even part of a watercourse. If it drafted model articles, States would then be able to use those articles to define the concepts to which the agreements they concluded would relate.

61. The draft articles contained more than one reference to "the present Convention". Usually, however, it was only after having drafted a set of articles that the Commission recommended that the General Assembly should adopt them in the form of a convention. In the present case, the Commission had to decide at the outset whether or not it intended to draft model articles, so that its work and the praiseworthy efforts made by the Special Rapporteur would not have been in vain.

62. Referring to draft article 1, paragraph 2, he stressed the need to take account of the geographical location of States, which might be upstream States or downstream States. In principle, the components of a watercourse located downstream did not affect the use of the waters of the watercourse by upstream States. Downstream States must, however, be included in agreements on the use of the waters of a watercourse concluded by upstream States, since the water that subsequently flowed into their territory might, for example, be polluted.

The meeting rose at 12.55 p.m.

¹³ See 1831st meeting, footnote 5.

1854th MEETING

Wednesday, 4 July 1984, at 10 a.m.

Chairman: Mr. Sompong SUCHARITKUL

later: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Al-Qaysi, Mr. Balanda, Mr. Boutros Ghali, Mr. Calero Rodrigues, Mr. Diaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Laclea Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Ni, Mr. Ogiso, Mr. Quentin-Baxter, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Sir Ian Sinclair, Mr. Stavropoulos, Mr. Thiam, Mr. Ushakov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/367,¹A/CN.4/381,² A/CN.4/L.369, sect. F, ILC (XXXVI)/Conf. Room Doc.4

[Agenda item 6]

DRAFT ARTICLES SUBMITTED BY THE
SPECIAL RAPPORTEUR³ (*continued*)

1. Mr. CALERO RODRIGUES said that, as a result of the welcome changes which the Special Rapporteur had made in the draft articles to take account of the views expressed in the Commission and in the Sixth Committee of the General Assembly, the Commission now had a generally acceptable basis for discussion. The Special Rapporteur had rightly maintained the structure of the draft, which had not attracted many objections and could, on the whole, be approved, although it still included too many elements in the form of recommendations. As a framework convention, the draft could be simpler and should be limited to strictly legal provisions.

2. With regard to chapter I of the draft, he welcomed the fact that the Special Rapporteur had decided, as stated in his second report (A/CN.4/381, para. 18), to abandon the "system" concept approach, which might be "a serious hurdle in the search for a generally acceptable instrument". As it now stood, draft article 1 explained the term "international watercourse", which was used in draft article 2 to define the scope of the draft articles.

3. The replacement of the term "international watercourse system" by the term "international watercourse" involved more a semantic than a conceptual change, since the "system" concept, which had replaced the "drainage basin" concept, had lost many of its objectionable features when the Commission had agreed in its 1980 provisional working hypothesis that

¹ Reproduced in *Yearbook ... 1983*, vol. II (Part One).

² Reproduced in *Yearbook ... 1984*, vol. II (Part One).

³ For the texts, see 1831st meeting, para. 1. 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.*