Document:-
A/CN.4/SR.1857

Summary record of the 1857th meeting

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

Extract from the Yearbook of the International Law Commission:-
1984, vol. I

... considerable restraint should be demonstrated in regard to allegations that special watercourse agreements concluded in good faith subsequent to the entry into force of the framework convention would have to apply and adjust the provisions of the framework convention to a special watercourse agreement or arrangement if the States parties held a different opinion. ... (*Ibid.*, para. 39.)

He would like some clarification in that regard and trusted that the commentary would make the position a little clearer.

41. Like other speakers, he had some misgivings about the term "to an appreciable extent" used in draft article 4, paragraph 2. If the use of the waters of an international watercourse was adversely affected, such adverse effect must of necessity be "appreciable"; if it were not, he did not see how the use could be "adversely" affected. To his mind, the term "to an appreciable extent" could confuse the issue. He also noted that the term appeared at a number of other points in the draft and he had the impression that, in some places, it was used more for psychological reasons than out of legal necessity.

42. The comment he had made on the words "are not affected" in draft article 1 could also apply to draft article 4, paragraph 2, and to draft article 5, paragraph 2. With regard to the latter provision, he would like to know whether the intent was that any decision as to whether the use of the watercourse was "thereby affected" should rest with the State whose use of the water was, or was likely to be, affected, or whether the other watercourse State which proposed an agreement also had a right to take part in such a decision. Since the paragraph in question provided for an entitlement to participate in the negotiation, he thought it was proper to interpret it as conferring a sole right of decision upon the State whose use of the water was affected. That should, however, be made clear, if not in the body of the draft, then in the commentary.

43. Referring to draft article 6, he said that it was not clear whether any substantive difference from the original text of the article had been introduced by discarding the concept of a "shared natural resource". Since the concept of sharing had been retained, the content of the old and new versions of article 6 seemed to be the same; the deletion of the concept of a "shared natural resource" could thus be regarded as purely cosmetic. The Special Rapporteur might, however, have some substantive change in mind and some further clarification would therefore be appreciated. For his own part, he wondered whether the concept of a "shared natural resource" might not serve a useful purpose in certain cases. In that connection, he noted that there were two categories of special watercourse agreements: one relating to agreements for the management and administration of the watercourse, and the other to agreements for a particular development project. In the case of the latter category in particular, it might sometimes be useful to adopt the concept of a "shared natural resource" if the watercourse States concerned agreed to do so. Accordingly, without making any firm proposal, he would suggest that, rather than excluding the concept entirely, a provision along the following lines should be considered:

"Watercourse States parties to a special watercourse agreement may accept the concept of a shared natural resource for the purpose of that particular agreement to the extent that the proposed special watercourse agreement is applicable to a particular project or programme or to a particular use of that water resource."

He would appreciate having the Special Rapporteur's comments on that suggestion.

44. He noted that the Special Rapporteur had used the words "reasonable and equitable manner" in draft article 7, whereas, in his commentary (*ibid.*, para. 48), he had used the words "fair and equitable share". That could suggest that the word "reasonable" and the word "fair" had almost the same meaning. While he could accept either the words "reasonable and equitable" or the words "fair and equitable" some further clarification regarding any difference in legal meaning between the word "reasonable" and the word "fair" would provide a basis for the interpretation of subsequent articles.

45. Doubts had also been expressed with regard to the word "optimum" in draft article 7. The fact that that term had been used in a number of legal instruments and, in particular, in fisheries agreements which referred to the "optimum annual catch" of fish provided some precedent for the concept and he was therefore prepared to accept it. He was not, however, very sure about the legal content of the term "good-neighbourly relations" and was inclined to regard it more as a political concept than as a legal concept. In that connection, he noted that draft article 4, paragraph 3, referred only to "good faith". He would like to know whether there was any legal significance in the fact that different terms had been used in draft article 4, paragraph 3, and draft article 7.

The meeting rose at 1.10 p.m.

1857th MEETING

Monday, 9 July 1984, at 3 p.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Evensen, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Lacleta 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. Sucharitkul, Mr. Thiam, Mr. Ushakov.

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

[Agenda item 6]

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

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

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

1. Mr. OGISO, concluding the statement he had begun at the previous meeting, said that paragraph 1 (*c*) of draft article 8 laid down an extremely important criterion. Some years earlier, Japan had provided Laos with assistance in connection with the construction of a dam on the upper part of a tributary of the Mekong river which flowed through Laos. The construction of the dam had made it possible to furnish Thailand with electricity for which Thailand had paid the Lao Government. That payment had provided Laos with an important benefit in terms of its foreign exchange earnings, while Thailand had received a benefit in the form of electricity from Laos. That was an excellent example of the factor referred to in paragraph 1 (*c*).

2. Since some members had difficulty in agreeing to include a list of various relevant factors in the body of the article itself, he would have no objection to including such a list in the commentary. All the factors listed were, however, extremely useful and relevant for the elaboration of future watercourse agreements.

3. With regard to draft article 9, he wondered why the word "harm" was used, rather than "adverse effect", which appeared elsewhere in the draft. Specifically, he was concerned that, if the word "harm" was used, the downstream State might interpret it to mean that, in the event of harm resulting from the use of the water by the upper riparian State, the lower riparian State would have the right to request that the harm be stopped, notwithstanding any benefit it might derive from the use or activity in question. As that was presumably not the intention of the Special Rapporteur, the term "adverse effect" might be more appropriate.

4. Commenting on articles on which he had not previously had an opportunity to express his views, he wondered whether draft article 10, paragraph 2, should refer only to international organizations, and not also to third States. The possibility of a third State making a technological as well as a financial contribution to a particular use of the resources of an international river, if requested by the watercourse States concerned, was not precluded. Japan, for example, was supplying financial and technical assistance to the Mekong Committee in the form of technological expertise and equipment to measure water levels. As currently worded, paragraph 2 of draft article 10 could discourage such co-operation. He therefore suggested that a reference to assistance from third countries should be added to article 10.

5. With regard to draft articles 11 to 15, consultation and exchange of information were the most important aspects of the management and development of an international river. In his view, while a general provision concerning the obligation to notify should be included in the draft convention, the details of the procedure for notification should be dealt with under an optional protocol or in optional clauses within the framework of the dispute-settlement procedure. Furthermore, even if the procedure envisaged under articles 11 to 15 were adopted, it would be advisable to embark on consultations immediately notification was made, to allow more time for consultation and exchange of views.

6. Lastly, with regard to article 28 *bis*, he wondered whether the reference to internal conflicts was appropriate in the context, and also whether the proper place for the article was not perhaps in the context of some other legal system, such as humanitarian law.

7. Chief AKINJIDE said it had rightly been observed that the Commission was dealing with a matter that was not only vital to life, but was life itself. That was particularly true in the developing countries, where a bucket of water could mean survival for one family for a whole week. The developed countries referred to water in millions of cubic tonnes, but in many parts of the developing world there was sometimes no rain for months on end, or even for a year. That was the background against which the problems involved had to be considered.

8. Although flowing water obeyed only physical laws, the uses to which it was put were determined by political, economic and social needs. The composition of, for example, the Danube Commission and the Mekong Committee was not based on any political ideology, the nations concerned having decided that their national interests were best served by co-operation.

9. While he endorsed the proposed draft articles in principle, he was concerned that they might conflict with the various agreements entered into by groups of countries. He appreciated that draft article 4 preserved existing agreements but, given the terms of draft articles 5 to 15, the possibility of such conflict was very real. There were currently 27 commissions in existence all over the world: 7 in Africa; 9 in South America; 2 in North America; 5 in Europe; and 4 in Asia. They had entered into approximately 100 agreements, some of which dated back as far as a century. In some instances, the rivers, lakes and waters with which they dealt were so numerous that they were simply referred to broadly as "boundary waters". All the agreements contained very comprehensive provisions; no two were the same. His fear, therefore, was that, if certain provisions in the draft proved to be inconsistent with those of agreements which had been in force for decades, or even centuries, the parties to those agreements might not sign the draft convention or, if they did, might not ratify it. Consequently, the Commission should endeavour to safeguard and protect agreements already entered into, leaving it to the parties concerned to enter into any further agreement needed in the light of their special needs and circumstances, and should avoid laying down detailed provisions governing procedure of the type contained in articles 8 and 10 to 15.

10. Mr. Ushakov (1853rd meeting) had raised the point that States which did not have rivers or estuaries might not be able to become parties to the future convention. In that connection, he drew attention to the fact that the

[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.*

membership of the Central Commission for the Navigation of the Rhine included Belgium and the United Kingdom, neither of which of course were riparian States. That example would perhaps to some extent answer the point raised by Mr. Ushakov.

11. Furthermore, the European Economic Community was party to the International Commission for the Protection of the River Rhine against Pollution, and the United Kingdom, being a member of EEC, was likewise a member of that Commission, vicariously. It seemed, therefore, that not only non-riparian States, but also international organizations, should be able to become parties to the future convention.

12. He noted that the draft convention would deal with three elements: the watercourse itself, the water in the watercourse and, to take the point added by Mr. McCaffrey (1855th meeting), the benefits of the watercourse. There were, however, a number of areas in the world, such as the Sahel, where rivers were sometimes dry for a year or more at a time. Some were boundary rivers, and artesian wells, or boreholes, had been built along the river basin to provide water for grazing, drinking, or even for small factories. What, therefore, would be the position if a riparian State which had not contributed to the cost of an artesian well wished to make use of the water which it provided by, for instance, fishing in it or extracting the water? That might not be a problem in parts of the world such as Europe or North America, but it was a matter of vital importance in areas such as Africa.

13. Referring to draft article 9, he said that a number of agreements provided for reparation in the event of appreciable harm, in the form of, for example, a free share in electric power generated or financial compensation. Article 9 might thus conflict with such agreements by virtue of the maxim *volenti non fit injuria*.

14. Lastly, he said that his remarks were not to be construed as a criticism of the Special Rapporteur, whose work would provide the basis for an excellent convention. He suggested that the draft articles should be referred to the Drafting Committee.

15. Mr. THIAM said that a number of concepts, including that of the drainage basin, had been excluded from the draft articles rather quickly. For example, in draft article 1, the Special Rapporteur had retained only the "water" element to define the international watercourse, excluding any reference to the geographical area, which was, nevertheless, another highly important element. Water must be placed in the geographical and economic context of the river from which it came. The human element also played an important role. The Special Rapporteur appeared to have placed too much emphasis on questions of sovereignty and the international character of the watercourse, at the expense of regionality considerations. If he had concerned himself more with the latter aspect, he would have realized the importance of the integrated basin concept. A number of agreements or conventions concerning the Niger, Nile or Senegal rivers placed less emphasis on conflicting interests and questions of sovereignty than on the pooling of resources in the interests of regional development. While some large countries might not feel such a need for economic integration, the African countries had to capitalize on the possibilities of union afforded by rivers. It would thus be worth while stressing that point. In the region to which Senegal belonged, the parties to the 1972 Senegal River Agreement had gone beyond the provisions of the draft articles by setting up, among other things, an organization of a political, as well as an economic, character. The same had been true in the case of the Gambia river. Why, then, be satisfied with codifying international law when the prospect of progressive development presented itself? In preparing his draft articles, particularly articles 6 and 7, the Special Rapporteur had been more concerned with questions of sharing than with the idea of pooling.

16. The respect shown in the draft for a number of traditional principles of international law might, in practice, have dangerous consequences for the interests of the developing countries. Draft article 10, for example, stated in paragraph 1 that "co-operation shall be exercised on the basis of the equality... of all the watercourse States concerned". Was it not idealistic to assert the equality of States in an inegalitarian context? A river could pass through States which differed in size and in economic importance, and it was illusory to think of such States as of equal importance. It would be preferable to devise specific provisions for the protection of small States.

17. Reference was also made to the even more dangerous principle of freedom. Was a weak State free from the influence of a powerful neighbour? With regard to the notification procedure, for example, it was easy for a State having considerable financial resources and an advanced technology to confront a weaker State with a *de facto* situation. Moreover, the reparation envisaged, the provisions governing which were in fact not mandatory, would not always satisfy the injured State. In cases where the damage might be irreparable, the injured State should be able to initiate a suspension procedure. The existing provision gave the stronger State what amounted to an advantage, since an international watercourse State could quite easily be without the technical means necessary to evaluate a project communicated to it by another watercourse State, even if the stipulated time-limit were extended.

18. In conclusion, he expressed concern that too little account was taken of the developing countries, so that there was a danger that the balance sought might be achieved at their expense. Consequently, the approach to the draft should be reconsidered on the basis of more realistic criteria.

19. Sir Ian SINCLAIR, speaking on draft articles 1 to 9, said that he shared to some extent the reservations expressed by Mr. Reuter (1855th meeting). If there was to be a framework agreement, the principles and procedures which it laid down should be formulated with precision and should be capable of being applied effectively. He had the general impression that the draft suffered from the use of vague and imprecise terminology. It might well be that certain provisions should savour

more of "soft" than of "hard" law, but the Commission should at least ensure that what it was doing was entirely consistent and was not so vague as to amount to no more than a collection of pious *voeux*. He regretted to say that, from that point of view, the revised draft presented in the Special Rapporteur's second report (A/CN.4/381) seemed to constitute a regression from the original draft.

20. He expressed some regret at the abandonment of the "system" approach in draft article 1. It had some value in indicating that, within the same watercourse system, there might be differing régimes governing distinct uses. He would not, however, stand in the way of the abandonment of the "system" approach if it would help to reconcile differing viewpoints.

21. He shared the misgivings voiced by other members at the disappearance from the draft of an indication of the types of hydrographic components that constituted an international watercourse. It was not sufficient simply to refer to "relevant" parts or components, despite the explanation given by the Special Rapporteur in his second report (*ibid.*, para. 25) and in his oral presentation (1831st meeting). Flexibility might be a valuable tool in seeking to overcome particular problems, but clarity was essential in what was supposed to be a basic article indicating what was meant by the expression "international watercourse". The combined effect of paragraphs 1 and 2 of article 1, as formulated, only added to the confusion: for while paragraph 1 made it necessary to determine what were "relevant" parts or components, paragraph 2 provided that those components or parts, presumably whether "relevant" or not, which were not affected by, or did not affect, uses of the watercourse in another State should not be treated as being included in the watercourse. Also, he agreed with Mr. Quentin-Baxter (1856th meeting) that the abandonment of the system approach called for a more radical restructuring of draft articles 4 and 5.

22. His remarks on draft article 1 applied *mutatis mutandis* to draft article 3. He wondered whether draft article 4, paragraph 1, should not be deleted entirely, or at least replaced by something completely different. As drafted, it seemed in part to duplicate draft article 39 and in part to give some undefined higher status to the draft articles over agreements already concluded. The idea that the validity of special watercourse agreements might be open to challenge if the conditions specified for such agreements in paragraph 1 were not met had a mild savour of *jus cogens*. He did not think that anyone would seriously wish to assert that the proposed draft articles should be regarded as *jus cogens* from which watercourse States could not derogate by treaty. The most that article 4, paragraph 1, should perhaps do was to encourage watercourse States to enter into special watercourse agreements taking into account the principles and procedures set out in the draft articles and the special characteristics of the international watercourse concerned.

23. With regard to draft article 5, he said that, if the term "watercourse State" was relative, as it would appear to be from draft article 3 and paragraph 2 of draft article 1, then paragraph 1 was rendered more or less meaningless. Like other speakers, he also had reservations about the phrase "to an appreciable extent" in paragraph 2, given the content of article 1, paragraph 2. As drafted, article 5, paragraph 2, would seem to leave out of account the position of watercourse States whose use of the waters of the watercourse might be affected, but not "to an appreciable extent".

24. He had great difficulty with draft article 6 as reformulated. He did not blame the Special Rapporteur for having dropped the idea of a shared natural resource. However, the redraft was, in his view, open to serious misinterpretation. Again, it was necessary to bear in mind the definition of a watercourse State. If it was a State having parts or components which were affected by, or which themselves affected, uses of the watercourse in another State, what was the distinction between paragraphs 1 and 2? Was paragraph 1 intended to be more general? If so, it should not contain the expression "watercourse State". Even if that interpretation were correct, however, there was a difference between "a reasonable and equitable share of the uses of the waters", referred to in paragraph 1, and the obligation to "share in the use of the waters of the watercourse in a reasonable and equitable manner", referred to in paragraph 2. The concept of sharing "in a reasonable and equitable manner" was more flexible than the concept of "a reasonable and equitable share". Consequently, he doubted the need for paragraph 1, provided that paragraph 2 was retained. In any event, it was necessary to consider not only uses, but also benefits, in the article. Again, he agreed by and large that a reasonable and equitable result might be achieved by sharing benefits as well as particular uses. Reference should therefore be made to both "uses and benefits".

25. He doubted whether draft article 7 said anything significant and considered that "optimum utilization" might not be a desirable objective if it was achieved at the expense of the conservation of the resource as a whole.

26. With regard to draft article 8, he could see some value in a non-exhaustive list of factors. It had rightly been said that, in the absence of rules capable of objective application—and the concept of acting "in a reasonable and equitable manner" was self-evidently a principle that lent itself to an infinite variety of interpretations, depending on the view of the State concerned—one was almost inevitably forced to a non-exhaustive indication of factors to be taken into account in the determination of reasonable and equitable use. While he did not object to the addition of the further factors suggested by Mr. Boutros Ghali (1856th meeting), he agreed with Mr. Quentin-Baxter (*ibid.*) that the list of factors could perhaps be relegated to an annex.

27. Referring to draft article 9, he could see that a simple rule prohibiting activities which might cause appreciable harm could inhibit the imaginative development of watercourses in the interests of all watercourse States. Any major project, such as the construction of a dam to produce electricity, was likely to have the potential to cause appreciable harm to downstream riparians. But the benefits of the project, if shared between the watercourse States concerned, could outweigh the

resultant harm to other uses of the waters. If the rule was to be retained, it should be made clear that the obligation to refrain from an activity that might cause appreciable harm was not applicable where a watercourse agreement or arrangement provided for the equitable apportionment of benefits resulting from that activity.

28. Lastly, he considered that it might make for speedier progress in the longer term if, rather than referring draft articles 1 to 9 to the Drafting Committee, the Special Rapporteur were asked to recast them in the light of the debate in the Commission.

29. Mr. DÍAZ GONZÁLEZ said that a topic as important as the one under consideration should not be debated hurriedly. Members of the Commission should have time to reflect on it and the opportunity to engage in a genuine exchange of views. The Commission could not embark on verbal marathons and take premature decisions which it would later have to reconsider. With the enlargement of the membership of the Commission, it naturally took longer for all members to express their views without undue haste. If the Commission wished to maintain its high reputation, it must sooner or later consider the question of the time to be allotted to consideration of the reports of special rapporteurs.

30. In his statement (1856th meeting), Mr. Quentin-Baxter had traced the history of the Commission's deliberations on the topic and, in doing so, had gone to the heart of the matter, namely the uncertainty and lack of coherence in the Commission's decisions on the content and wording of the draft. That situation was attributable not only to the difficulties inherent in the topic, but also to the fact that it had been dealt with by a succession of special rapporteurs. The reports which they had submitted to the Commission had reflected the individual experience and conceptions of each rapporteur. On the basis of the excellent work done by Mr. Schwebel, the previous Special Rapporteur, and following lengthy discussions and difficult negotiations, the Commission had arrived at a consensus on the elaboration of an initial set of draft articles,[4] to enable it to advance in its consideration of the topic on the basis of certain generally accepted guidelines.

31. After considering the first report of the current Special Rapporteur (A/CN.4/367), the Commission had been of the view that work on the topic should take a more concrete form. The reasons given by the Special Rapporteur in support of the amendments made by him in his second report (A/CN.4/381) demonstrated clearly the difficulties involved in the undertaking. Any attempt to please everyone deprived the draft of its legal content. From the points of view of drafting and the concepts which it contained, the draft resembled a General Assembly resolution rather than a legal instrument. In introducing his second report (1831st meeting), the Special Rapporteur had pointed out that the task entrusted to him was not of a purely legal character, but had political and economic connotations as well, so that any draft convention must take account of the political and economic factors. That conclusion was indisputable, since any legal rule simply reflected the society in which it originated and which it was designed to regulate. However, it was important for legal rules to be expressed in legal terms and to indicate the basis of the rights and obligations which they set forth. It should be noted that the Commission, while it could not remain completely aloof from political and economic realities, had as its primary function the elaboration of legal rules, so that political and economic questions should be left to the General Assembly.

32. In his oral introduction of his second report, the Special Rapporteur had also stressed the need to strike the right balance in the draft articles between the interdependence of riparian States and their sovereign right to benefit from the natural resources within their territories. Accordingly, the Special Rapporteur had quite simply abandoned the concept of a shared natural resource, replacing it with legal formulations or legal standards such as the concepts of good-neighbourly relations, good faith, reasonable and equitable use, and appreciable harm. However, those were not legal concepts; they belonged rather in resolutions, declarations of principles or codes of conduct. Moreover, the Special Rapporteur had stated that the discussions in the Sixth Committee of the General Assembly had broadly confirmed the approach chosen by the Commission regarding the scope of the topic, which would call for the elaboration of a draft convention. He was under the impression that the Commission had not decided to prepare a draft convention, which would, in fact, not be in keeping with its practice. The approach chosen by the Commission, and confirmed by the Sixth Committee, had involved the elaboration of a draft framework agreement to facilitate the negotiation and conclusion of subsequent specific agreements.

33. While he agreed with Mr. Mahiou's observation (1854th meeting) that concepts which did not enable the work of the Commission to advance should be abandoned, such a step should not result in a total vacuum, as had happened in the case of the abandonment of the "shared natural resource" concept. Natural resources were situated within one territory rather than another because nature had put them there, and not as the result of a treaty or declaration. As a result of man-made territorial divisions, such as frontiers, natural resources were sometimes subject to the control of a number of sovereign States. However, the benefits of an international watercourse certainly did not stop at the frontiers which it crossed. The use of a watercourse and its waters was of the utmost importance for the development of the populations living within the area which it irrigated. Consequently, those populations should have the right to use it as a natural resource and the obligation to conserve it, particularly since their harmonious development, and sometimes even their survival, depended on it. That was the origin of the ideas of proportionality and priority of use.

34. A distinction should also be drawn between uses of water which entailed its total disappearance and those which did not. In any event, it could not be asserted, as the Special Rapporteur had done, that the shared natural

[4] See footnote 3 above.

resource concept, when applied to water, was without sufficient foundation. That concept was embodied in the Mar del Plata Action Plan (see A/CN.4/367, para. 34), and the PCIJ had alluded to it, without naming it specifically, in its judgment in 1929 in the *River Oder* case, which had been referred to by the Special Rapporteur (*ibid.*, para. 37). Furthermore, the 1972 United Nations Declaration on the Human Environment (Stockholm Declaration),[5] the 1982 Nairobi Declaration,[6] numerous United Nations resolutions and the Charter of Economic Rights and Duties of States[7] all contained references to shared natural resources. It was not possible, therefore, to set that concept aside and replace it by others, such as those which emphasized what was equitable, reasonable or fair.

35. On the initiative of the Special Rapporteur and contrary to the Commission's practice, it had been decided to regard as non-existent the first articles adopted by the Commission in first reading.[8] In addition, consideration was being given to removing from a number of articles the concepts which had been agreed after lengthy debate in the Commission, in the Drafting Committee and even in the General Assembly. In his first report, the current Special Rapporteur had submitted 39 draft articles which many members had regarded as forming a sound basis for a future draft convention. There was room for doubt, however, whether the Commission should or could prejudge the final form which its draft articles would take. Moreover, in his second report, the Special Rapporteur proposed substantive amendments to the draft articles. The 39 draft articles originally submitted were based on the reports of the previous Special Rapporteur which, in turn, were based on a philosophy and on concepts of which some had been accepted tacitly and others explicitly by the Commission. The Commission would therefore have to review that philosophy and those basic concepts. In any event, it would have to decide whether it wished to begin on a new basis, disregarding the achievements of 10 years of effort, and decide precisely what the General Assembly expected of it.

36. The Special Rapporteur also proposed abandoning the "international watercourse system" concept. That concept had been adopted provisionally by the Commission as a compromise solution which might be supplemented by a definition. It could not be claimed, as the Special Rapporteur had done, that it had met with considerable opposition. That view did not reflect the actual situation. He reserved the right to revert to the matter when the Commission came to discuss it. Under the circumstances, the draft articles should not be referred to the Drafting Committee until the Commission had reviewed its approach to the topic.

37. Turning to the draft articles under consideration, he said that the first difficulty to which they gave rise had to do with their telegraphic style. In draft article 1, at the beginning of paragraph 2, the words "of the watercourse" should perhaps be replaced by "of a watercourse". Paragraph 3 of the article should begin with the words "International watercourses or their components which are apt to appear...". The draft article also failed to specify the nature of those components. In his commentary (A/CN.4/381, para. 30), the Special Rapporteur stated that ground water did not form part of an international watercourse, but was of a transboundary nature. However, ground water did indeed appear to form part of international watercourses, as evidenced by the existence of numerous major agreements on ground water, such as the Agreement concluded in 1973 between the United States of America and Mexico, which had implications for Mexican agriculture (see A/CN.4/373, footnote 57). Article 1, paragraph 4, merely gave a number of examples of watercourse components such as deltas, river mouths and other similar formations. Such components obviously differed from one watercourse to another. With regard to ground-water resources, the Special Rapporteur had stated that, in elaborating a watercourse convention, no attempt should be made

> ... to include such special resources under its general domain, nor should special provisions be included in such an instrument to regulate such specific resources. (A/CN.4/381, para. 30.)

Nevertheless, it would appear that the flow of an international river depended on the flow of ground-water deposits in the subsoil of a riparian State, in which case such ground water actually constituted a component of the river.

38. In Spanish, the title of draft article 3 should perhaps be amended to read: *Estados de un curso de agua*. In his commentary (*ibid.*, para. 33), the Special Rapporteur stated that he wished to make an amendment "in order to make it clear that no legal rules or principles could be deduced from this article". Why, then, include in a legal text a provision from which no legal rules or principles could be deduced? Moreover, at some point, it should be made clear what was meant in general by "components" or "parts" of an international watercourse.

39. Referring to draft article 4, he said that most international watercourses were already the subject of agreements, which must obviously be taken into account in preparing a draft framework agreement. However, paragraph 1 of article 4 appeared to suggest that the provisions of that article would apply to all watercourse agreements, whether concluded before or after the entry into force of the future convention. Some of those agreements were entirely satisfactory, so that it was difficult to see why the States which had concluded them should renounce them and accept the much more general provisions of the draft. In the first sentence of the Spanish version of paragraph 2, the word *especial* should be placed after *acuerdo* rather than after the word *agua*. In the second sentence, the word "riparian" should be inserted before the word "States". In general, there seemed to be a contradiction between the intention to draft a set of model rules and the wording of draft article 4.

40. As other members of the Commission had pointed

[5] See *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), chap. I.

[6] See *Official Records of the General Assembly, Thirty-seventh Session, Supplement No.25* (A/37/35), part one, annex II.

[7] General Assembly resolution 3281 (XXIX) of 12 December 1974.

[8] See footnote 3 above.

out, draft article 6 concerned the use of the waters of an international watercourse, rather than the use of the international watercourse itself. Paragraph 1 of that article should begin with the words "An international watercourse riparian State" and not "A watercourse State". Furthermore, the word "reasonable" used in that same provision should be replaced by the word "fair".

41. With regard to the drainage basin concept, account must be taken of the modern concept of human solidarity and priority must be accorded to populations whose survival, rather than simply their economic development, depended on certain uses of the waters of international watercourses.

42. In draft article 7, which also referred to the concepts of what was reasonable and equitable, the word "riparian" should be inserted before the word "States". It also appeared obvious that, in order to be "developed", the waters of an international watercourse must be "used and shared". The mere fact that such waters lay within the territory of a riparian State indicated that they must be shared. Like several other draft articles, article 7 was couched in terms which were out of place in a legal instrument in that they expressed wishes or declarations of intent.

The meeting rose at 5.55 p.m.

1858th MEETING

Tuesday, 10 July 1984, at 10 a.m.

Chairman: Mr. Alexander YANKOV

Present: Chief Akinjide, Mr. Balanda, Mr. Barboza, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Francis, Mr. Jacovides, Mr. Koroma, Mr. Lacleta 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. Sucharitkul, Mr. Thiam, Mr. Ushakov.

State responsibility (A/CN.4/366 and Add.1,[1] A/CN.4/380,[2] A/CN.4/L.369, sect. D, ILC (XXXVI)/Conf. Room Doc.5)

[Agenda item 2]

Content, forms and degrees of international responsibility (part 2 of the draft articles)[3]

DRAFT ARTICLES SUBMITTED BY THE SPECIAL RAPPORTEUR

FIFTH REPORT OF THE SPECIAL RAPPORTEUR *and* ARTICLES 1 TO 16[4]

1. The CHAIRMAN invited the Special Rapporteur to introduce his fifth report on the content, forms and degrees of international responsibility (A/CN.4/380), as well as draft articles 1 to 16 contained therein, which read:

Article 1

The international responsibility of a State which, pursuant to the provisions of part 1, arises from an internationally wrongful act committed by that State entails legal consequences as set out in the present part.

Article 2

Without prejudice to the provisions of articles 4 and 12, the provisions of this part govern the legal consequences of any internationally wrongfnl act of a State, except where and to the extent that those legal consequences have been determined by other rules of international law relating specifically to the internationally wrongful act in question.

Article 3

Without prejudice to the provisions of articles 4 and 12, the rules of customary international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of the present part.

Article 4

The legal consequences of an internationally wrongful act of a State set out in the provisions of the present part are subject, as appropriate, to the provisions and procedures of the Charter of the United Nations relating to the maintenance of international peace and security.

Article 5

For the purposes of the present articles, "injured State" means:

(*a*) if the internationally wrongful act constitutes an infringement of a right appertaining to a State by virtue of a customary rule of international law or of a right arising from a treaty provision for a third State, the State whose right has been infringed;

(*b*) if the internationally wrongful act constitutes a breach of an obligation imposed by a judgment or other binding dispute-settlement decision of an international court or tribunal, the other State party or States parties to the dispute;

(*c*) if the internationally wrongful act constitutes a breach of an obligation imposed by a bilateral treaty, the other State party to the treaty;

(*d*) if the internationally wrongful act constitutes a breach of an obligation imposed by a multilateral treaty, a State party to that treaty, if it is established that:

(i) the obligation was stipulated in its favour; or

(ii) the breach of the obligation by one State party necessarily affects the exercise of the rights or the performance of the obligations of all other States parties; or

(iii) the obligation was stipulated for the protection of collective interests of the States parties; or

(iv) the obligation was stipulated for the protection of individual persons, irrespective of their nationality;

(*e*) if the internationally wrongful act constitutes an international crime, all other States.

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

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

[3] Part 1 of the draft articles (Origin of international responsibility), articles 1 to 35 of which were adopted in first reading, appears in *Yearbook ... 1980*, vol. II (Part Two), pp. 30 *et seq.*

[4] For the commentaries to articles 1, 2, 3 and 5 (article 5 now having become article 4), adopted provisionally by the Commission at its thirty-fifth session, see *Yearbook ... 1983*, vol. II (Part Two), pp. 42-43.