Document:-
A/CN.4/SR.1859

Summary record of the 1859th meeting

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

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

30. Referring to Sir Ian Sinclair's comments, he noted that, in the case concerning *United States Diplomatic and Consular Staff in Tehran*, Iran had sought to justify the taking of hostages by claiming prior interference in its internal affairs. It was also possible to envisage a case in which a State suddenly decided substantially to curtail the privileges and immunities of a foreign embassy by suspending certain relations between that embassy and the sending State, but without going so far as to endanger the freedom and lives of members of the embassy. Could the sending State then react by taking similar measures? The ICJ had not had to deal with that question in the case in point, but the rules relating to privileges and immunities could certainly not be regarded as absolute peremptory norms. The Court had perhaps been unwise to refer, in that connection, to a "self-contained régime", [11] an expression which had been interpreted by some as meaning that, in response to the violation by a State of rules concerning privileges and immunities, the injured State could only break off diplomatic relations or declare certain persons *non grata*. He was of the view that, in so far as more general obligations such as humanitarian obligations were not involved, the injured State could respond in kind to a manifest violation of the rules on privileges and immunities. For instance, in the event of the violation of a unanimously accepted rule concerning the diplomatic bag, the injured State should be entitled to act in the same way as the State responsible for the violation. In such circumstances, the régime of privileges and immunities did not seem to be particularly self-contained.

31. He also wondered where was the borderline between the concepts of reciprocity and reprisal to which the Special Rapporteur referred. There might exist a grey area between those two concepts if the principle of *exceptio non adimpleti contractus* had been adopted by the Special Rapporteur; however, that principle had been eliminated, and rightly so, if only because of its highly conventional connotations. The Commission had decided that the rules to be drawn up would not be attached to the source of responsibility. With regard to the distinction between reciprocity and reprisals, it seemed that, in general, any reaction to the breach of a rule should, in the interests of international relations, deviate from that rule as little as possible. When a State failed to apply a particular rule to another State, the latter could simply refrain from applying the rule to the former. However, such strict reciprocity was not possible when the positions of the two States were not symmetrical, such as when a bilateral treaty on customs tariffs concerning unilateral imports of particular products was violated. A State could also react to the breach of an obligation by violating rules affiliated to the rule violated. That could be a natural affiliation which depended on the subject of those rules, or a legal affiliation. Some writers considered that reciprocity could apply only within the framework of an individual treaty or a number of treaties relating to the same subject. A reaction which related to obligations in another field constituted a reprisal.

32. Mr. RIPHAGEN (Special Rapporteur) said that, if he had understood correctly, Mr. Reuter had raised the question whether a limitation of immunity by way of reciprocity would be admissible. While it was possible that, on the basis of reciprocity, the content of immunities might in certain cases be less than absolute, he did not think that that would apply under draft article 12, subparagraph (*a*), since the immunities to be accorded to diplomatic and consular missions and staff were the absolute minimum and a State could refuse to grant them only by breaking off diplomatic relations or by declaring somebody *persona non grata*.

33. With regard to the more difficult problem of the borderline between reciprocity and reprisals, what he had tried to reflect in draft article 8 was that reciprocity existed when the obligation involved was the same as, or a counterpart of, the obligation breached. There were many treaties, particularly bilateral ones, where performance by one party was very different from performance by the other but where both obligations were counterparts.

34. As for *exceptio non adimpleti contractus*, legally there was a difference between suspension of a treaty and non-performance of a treaty: in his view, State responsibility and the law of treaties could be distinguished by a reciprocal saving clause of the type incorporated in the Vienna Convention on the Law of Treaties and as proposed in draft article 16, subparagraph (*a*).

The meeting rose at 11.45 a.m.

1859th MEETING

Wednesday, 11 July 1984, at 10 a.m.

Chairman: Mr. Alexander YANKOV

later: Mr. Julio BARBOZA

Present: Chief Akinjide, Mr. Balanda, Mr. Calero Rodrigues, 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]

[11] *Ibid.*, p. 40, para. 86.

* Resumed from the 1857th meeting.

[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. SUCHARITKUL expressed appreciation of the Special Rapporteur's endeavours to find a formula that would be acceptable to all riparian States. His first report (A/CN.4/367), which had embodied such fundamental concepts as shared natural resources and the drainage basin, had been well received by the Commission and the Sixth Committee of the General Assembly and it would be a great pity not to proceed on the basis of those concepts—all the more so since unanimity would not be achieved by disregarding the will of the majority.

2. The Commission's purpose was to find the right criteria for sharing the waters of watercourses. The signposts were there, but it had reached a crossroads and now had to decide which path to take. Buddha had taught that there were four basic elements essential to humanity: earth, fire, air and water. Water was an indispensable part of, and inseparable from, the human body. Without water there could be no life and no human civilization. Thailand's own early history provided an example of the vital importance of water. Its capital in the twelfth century, which had been sited on a river, had flourished for two centuries until that river had run dry. Then the capital had suffered pestilence and plague and had ultimately been destroyed.

3. The water with which the Commission was concerned was the fresh water that supported so many living things. When a river flowed through more than one country, it was only natural that its waters should be shared. Even the law of the jungle permitted animals to drink water without falling prey to one another; but human beings, who regarded themselves as superior to animals, had been unable to devise rules by which to share water. Consequently, water was not what it ought to have been—a shared natural resource.

4. The Commission was faced with a choice between the "drainage basin" concept and the "watercourse system" concept. He was prepared to accept either, or indeed simply the "watercourse", if that term were understood to cover either of the first two concepts.

5. The definition of the term "international watercourse" in draft article 1 was satisfactory, since it referred to watercourses "situated in two or more States" and thus covered boundary rivers. Such rivers, of which Thailand had a number, could not be excluded, since in addition to serving as political boundaries they had several other uses. The floating of timber could be regarded as either a navigational or a non-navigational use; teak wood, for example, being very heavy, had to be floated on a bamboo raft that was sometimes navigated by man. The most important non-navigational use of watercourses, however, was fishing, and he thought that should be brought out in draft articles 1 and 2. The definition should exclude such international waterways as the Panama and Suez canals, which were not international watercourses for the purpose of the draft.

6. The general principles of the law on the topic would require further elaboration. He noted that whereas the principle of good faith was a general principle of law, that of good-neighbourly relations was part of what had been termed "soft" law. The General Assembly was studying the possibility of progressively developing that concept, which had been reinforced in the 1955 Bandung Declaration.

7. There seemed to be a tendency to view the upper riparian State as having the upper hand, although the opposite was true in many cases. For instance, many species of fish travelled upstream to spawn, and where there were dams some means of passage had to be provided, otherwise the upper riparian would have no fish. To think that the lower riparian was always at the mercy of the upper riparian was also to overlook tides and the ebb and flow of the waters.

8. In regard to draft article 10, on co-operation and management, it might well be asked which was the most fundamental need: sovereignty and territorial integrity, referred to in paragraph 1, or water, without which there could be no life. It was in answer to that question that the members of the Mekong Committee, which represented different ideologies, had recognized that co-operation, not only among riparian States, but among the whole international community, was the only way to proceed. Recent co-operative projects included the building of a bridge financed by Thailand and Japan, and of a dam to be financed by Japan, Democratic Kampuchea and other countries.

9. He hoped that the Commission would be able to formulate principles and criteria for sharing water, not just among upper and lower riparian States, but among all mankind.

Mr. Barboza, Second Vice-Chairman, took the Chair.

10. Mr. MALEK welcomed Mr. Kalinkin, who had succeeded Mr. Romanov as Director of the Codification Division and Secretary to the Commission.

11. In order to speed up the Commission's work, he would not object to draft articles 1 to 9 being referred to the Drafting Committee at the end of the discussion. Given authority to settle problems of substance, the Drafting Committee, assisted by the Special Rapporteur, could take account of the views which had emerged. It was very doubtful that the Sixth Committee of the General Assembly either wished to, or could, impose on the Commission the solutions it considered appropriate. Besides, to leave those draft articles in abeyance until the next session would be a waste of the Commission's time. A great many texts prepared by the Commission for generally accepted codification conventions had been adopted by vote at a time when the Commission had comprised only 15 members; in order to avoid postponing certain problems from one year to another, the Commission should not hesitate to take decisions by vote when necessary.

12. Although the problems before the Commission

[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.*

were not particularly complicated, if not carefully studied and solved they could create dangerous situations all over the world. Mr. Boutros Ghali (1856th meeting) had been frank and courageous enough to draw the Commission's attention to the imminent danger of widespread armed conflict in Africa provoked by the threatening drought, in the absence of agreements ensuring rational sharing of the waters of that continent. At the Commission's previous session, he (Mr. Malek) had observed that the Middle East was under threat.[4] He then quoted from an article in the *International Herald Tribune* of 1 June 1984, entitled "Water: ancient source of tension", the following passage:

> ... Indeed, long after oil runs out, water is likely to cause wars ... and make and break empires and alliances in the region, as it has for thousands of years.
>
> The constant struggle for the waters of the Jordan, Litani, Orontes, Yarmuk and other life-giving Middle East rivers, little understood outside the region, was a principal cause of the 1967 Arab-Israeli war and could help spark a new all-out conflict.

13. At the previous session, he had also stressed the political and legal importance of the topic under consideration for all countries, and had urged, in particular, the need to ensure that the draft articles would include provisions calculated to assist in the regulation of certain *de facto* situations which contributed to the insecurity of several regions that were short of water. He had said that the diversion of the waters or part of the waters of a watercourse should be declared unlawful.[5] He recognized that the wrongfulness of diversion could easily be deduced from the obligations stated in draft articles 6 to 9, namely the obligation to share and use the waters of a watercourse equitably and the obligation to refrain from any use which might cause appreciable harm to the rights or interests of other watercourse States. Nevertheless, he still believed that, in view of the importance of the law on the uses of international watercourses in relations between States, it was essential to mention that point expressly in the draft articles. The previous Special Rapporteur, in his third report, had suggested the possibility of devoting an article to the legality of diversion of water outside the international watercourses.[6]

14. The present Special Rapporteur had made a number of changes, both of substance and of form, to his first version of the draft articles, to take account of the views expressed in the Commission and in the Sixth Committee. As the discussion at the present session was nearing its end, he was sorry that the Commission did not appear to be in an encouraging position or at least to be better placed than at the end of the previous session. In 1983, the longer the discussion had continued, the more difficult it had been to overcome the obstacles faced; on all important points, the differences of opinion had seemed more and more irreconcilable. In 1980, before provisionally adopting the concept of an "international watercourse system", the Commission had successively considered the concepts of an international river, an international watercourse, a hydrographic basin and an international drainage basin. It had not been possible to reach general agreement on any of those concepts. The notion of an international watercourse system had itself been seriously criticized by several members of the Commission at the previous session, whereas others had argued that, since it had already been provisionally adopted, to abandon it might compromise the future of the draft articles. The Commission also had to face other problems which were quite as difficult, such as that raised by the controversial notion of a "shared natural resource". Thus nothing had changed since.

15. As the present topic was being considered immediately after that of international liability for injurious consequences arising out of acts not prohibited by international law, the question inevitably arose whether the Commission was really examining two different matters. The similarity of object was quite striking. In both cases, the Commission was called upon to define the international obligations of States in the exercise of their sovereignty in their respective territories. In one case it was trying to determine the rules of international law which governed or should govern States, or at least guide them, in the use of international watercourses; in the other, it had to perform an identical task concerning other activities liable to cause harm beyond national frontiers. In both cases, the Commission was up against the same difficulties of principle inherent in the traditional concept of territorial sovereignty.

16. At the present stage in the development of international law it was still argued that States, which were sovereign in their respective territories, must have sovereign authority over the watercourses passing through those territories. There was thus a refusal to accept any notion which would limit the sovereign right of a State to decide how it would use watercourses passing through its territory. He did not know to what extent such ideas were, at the present time, a decisive factor in the formation of rules of international law. But there was no doubt that a rule of law could only be established as a result of reciprocal concessions and sacrifices freely agreed to, on the basis of solidarity, by the different and sometimes antagonistic subjects whose conduct it was intended to govern. In any event, the law on the uses of international watercourses comprised a certain number of mandatory rules which were rules of customary international law, affirmed by numerous international agreements, both bilateral and multilateral.

17. Draft articles 6 and 7 affirmed the incontestable right of every watercourse State to use the waters of an international watercourse in its territory. Nevertheless, that right could only be exercised within the limits imposed by international law. Draft articles 6 and 7 ruled out any arbitrary use of international watercourses. The Special Rapporteur had abandoned the idea of a "shared natural resource" in draft article 6, but had retained its spirit. The new version of the article made paragraph 1 unnecessary. The right of the State to a reasonable and equitable share of the uses of the waters of a watercourse in its territory was sufficiently emphasized by draft article 7, which specified how an international watercourse

---

[4] *Yearbook ... 1983*, vol. I, p. 229, 1794th meeting, paras. 1-2.

[5] *Ibid.*

[6] *Yearbook ... 1982*, vol. II (Part One), p. 189, document A/CN.4/348, para. 513.

should be used, relying on concepts which were, for the most part, generally accepted in the practice of States, such as equity, good faith and good-neighbourly relations. The previous Special Rapporteur, in his third report, had dealt in detail with the concept of "equitable participation"; he had said that there might be no more widely accepted principle in the law of the non-navigational uses of international watercourses than that each system State was "entitled, within its territory, to a reasonable and equitable share of the beneficial uses of the waters". [7] The term "reasonable", however, had not been used in the draft articles prepared at that time.

18. Although the notions of good faith and good-neighbourly relations did not correspond to precise legal concepts, they had been sufficiently used in treaties, case-law and doctrine, and were alluded to in the United Nations Charter and in several General Assembly resolutions. Nevertheless, he doubted whether draft article 7 should expressly mention such vague notions, which might affect its meaning and the limitations it imposed. He thought there would be no objection to omitting the criterion of reasonableness, which was already covered by the notion of equity. The Commission could also omit from the provision the concepts of good faith and good-neighbourly relations, which were developed in draft article 8, on the determination of reasonable and equitable use. Even if more simply formulated, draft article 7 would retain its significance. He proposed, for example, the following wording:

> "The waters of an international watercourse shall be developed, used and shared by watercourse States in an equitable manner, in accordance with article 8, with a view to attaining ..."

19. Draft article 8, which explained article 7, had given rise to some useful suggestions, which should be drawn to the attention of the Drafting Committee.

20. Draft article 9 affirmed another fundamental rule of international law, which was that no watercourse State had the right to cause appreciable harm to the rights or interests of other watercourse States. In his third report, the previous Special Rapporteur had made a detailed study of that rule, [8] which should be taken into account in preparing the commentary to draft article 9, the terminology of which needed clarification.

21. In his view, draft article 9 was comparable to section 5 of the schematic outline prepared by Mr. Quentin-Baxter (A/CN.4/373, annex), which required a State liable to cause transboundary harm to take measures of prevention and, if that were impossible, measures of reparation, thus recognizing the lawful character of all transboundary harm, whatever its extent, provided that the acting State had done everything possible to avoid it. It was very difficult to see how the Commission could approve that proposition when, in dealing with the present topic, it was rightly called upon to affirm or confirm the wrongfulness of all "appreciable" harm of that kind. In view of the similarity of the topics entrusted to Mr. Quentin-Baxter and Mr. Evensen, it would be surprising to see similar *de facto* situations governed by different rules. The Commission should not hesitate to adopt identical rules of law, having recourse if necessary to progressive development of international law. Since draft article 9 did not require absolutely strict application of the rule it stated, why not proceed in the same way with regard to international liability, on the understanding that the parties concerned would freely negotiate and conclude agreements regarding possible harm?

22. He noted that draft articles 1 and 4 had been the subject of very constructive suggestions, and in his opinion the Drafting Committee was in the best position to revise the texts of the articles in the light of the views expressed during the discussion. He reserved his position on any text on which he had not commented, in particular draft articles 13 and 28 *bis*.

23. Mr. LACLETA MUÑOZ said that on the whole he approved of the general structure of the draft submitted in the Special Rapporteur's second report (A/CN.4/381). He found it necessary, however, to comment on certain aspects of that structure with which he was not satisfied, in particular chapter III which, following chapter I containing the definitions, and chapter II on the rights and duties of States, constituted the outline of the framework agreement intended to facilitate co-operation between States. He wished to point out in that regard that co-operation and, ultimately, optimum utilization, which was more difficult to achieve, were one thing, and rights and duties were quite another; he would revert to that point later.

24. In his opinion, draft articles 11 to 14 would be better placed in chapter II than in chapter III, since their purpose was to establish an obligatory mechanism for determining possible derelictions of the duty of a watercourse State not to cause harm—a duty associated with certain uses of the watercourse. Moreover, the essential part of chapter II was based on the well-known principle of customary international law, *sic utere tuo*. That principle should be fully developed in chapter II.

25. He observed that the Spanish text of the draft articles raised problems of terminology, which sometimes reflected problems of substance, and appeared to be too closely modelled on the English version. For instance, the expression *acuerdo de curso de agua* was quite unacceptable, for it meant nothing. Besides the drafting problems which distorted the language, there were problems of definition due to the absence of a distinction between the use of water and the use of a watercourse. Even before defining an international watercourse, the Commission should try to clarify the idea of a watercourse as such. Did it consist only of the waters, or of the place they occupied as well as the waters? In any event, it was quite possible to distinguish between the use of a watercourse and the use of its waters. Navigation, for example, used the watercourse only, although it needed a certain depth of water, whereas timber-floating used the current. For navigation purposes, the watercourse was something static, the current being of no importance. That was an aspect of the draft which the Commission should study, in order to establish the difference between

[7] *Ibid.*, p. 75, para. 42.

[8] *Ibid.*, pp. 91 *et seq.*, paras. 111-156.

water-consuming uses and non-consuming uses. After that, the Commission could establish an order of priority for the different uses.

26. That research would make it possible to determine what should be understood by the expression "cause harm". The obligation not to cause harm was different from that of "optimum utilization", but in draft article 8, for example, the two notions were confused. It was already difficult enough to determine what was "appreciable harm", for in the strict sense, the obligation not to cause appreciable harm might mean that an international watercourse State could not change the watercourse in any way, at least so far as the quality and quantity of water was concerned. But that was not the meaning of the obligation; certain changes were justified and consequently permitted. The upstream State was naturally in a dominant position, although the Harmon doctrine of unlimited sovereignty, according to which a State had the unqualified right to utilize and dispose of the waters of an international river flowing through its territory, was now obsolete.[9] Without going to the other extreme of adopting the principle that the downstream State had an absolute right to the waters of the upstream State and that the latter must cause no harm, whether appreciable or not, the need of the upstream State to engage in certain activities must be accepted. But how was the legitimacy of any particular activity to be established? That was the essential problem to be solved in chapter II.

27. He was much concerned about the numerous references to such notions as "reasonable and equitable use"—what was reasonable being, in his view, equitable, and vice versa. Again, why emphasize the need to negotiate in good faith? Did that mean that States might negotiate in bad faith? Similarly, he feared that by speaking of "good-neighbourly relations", for instance—that was to say, by stating pious hopes in provisions of a legal character—the Commission might distort the law. In his opinion, the Commission's task was not to advise States, but to lay down rules and, if necessary, to specify the modalities for their application.

28. Reviewing draft articles 1 to 9, he observed first that the substitution in article 1 of the expression "international watercourse" for the expression "international watercourse system" had no consequence in practice. The definition proposed by the Special Rapporteur was flexible; it emphasized the essentials, namely changes in the quantity or quality of the waters of an international watercourse passing from the territory of one State into that of another. In practice, that definition would be awkward to apply, because the different uses of watercourses affected their various parts and components differently. Whereas some uses had lasting and far-reaching consequences which were felt beyond the frontier, even if it was very far from the point of use, others had purely local effects. In any case, the new expression proposed by the Special Rapporteur did not have the territorial connotations of the expressions "hydrographic basin" and "international watercourse system", which had been criticized by many States and members of the Commission, including himself. He therefore approved of the use of the expression "international watercourse", which improved article 1, although that article needed further improvement as to drafting, at least in Spanish.

29. Draft article 2 should be retained because of the reminders it contained, particularly in paragraph 2. It was inevitable that there should be interaction between the uses of the waters of an international watercourse for navigation and its uses for other purposes.

30. The titles of draft articles 3 and 4 were not satisfactory, at least in Spanish. Perhaps it should be specified that article 3 referred to the "riparian" States of the watercourse. Article 3 was intended to define States in whose territory the waters of an international watercourse flowed. In his second report (*ibid.*, para. 30), the Special Rapporteur opposed the inclusion of ground water within the scope of the instrument being prepared. The drafting of article 3 could be improved by introducing the term "riparian States"; the problem of ground water could be dealt with in a separate article.

31. Paragraph 1 of draft article 4 would be better placed at the end of the draft, in a provision covering relations between the future convention and special agreements. Paragraph 2 could serve to establish the existence of agreements between riparian States. However, if those agreements very clearly defined the waters to which they applied, the paragraph would be unnecessary. The content of paragraph 3 seemed to be a mere declaration of intent.

32. Draft article 5, or at least paragraph 2 of that article, in fact belonged in chapter II, on the rights and duties of States. Under the terms of that provision, if a watercourse State concluded an agreement on certain uses of the watercourse and the implementation of that agreement might affect the use of the watercourse by another State, that other State had the right to participate in the negotiation of the agreement.

33. Draft articles 6 and 7 expressed the same idea and could be combined. The Special Rapporteur had been right to remove the concept of a "shared natural resource" from article 6 and replace it by that of a "reasonable and equitable share of the uses of the waters." That change would overcome many difficulties, without weakening the protection afforded to States in respect of the use of water as a natural resource passing from the territory of one State into that of another. The notion of "optimum utilization", referred to in article 7, was not appropriate. In the modern world it was illusory to believe that a riparian State of an international watercourse could have the right to demand optimum utilization of the watercourse, as if there were no frontiers. Referring to the experience of his own country, he observed that a plan for optimum utilization necessarily involved conflicting local, provincial and regional interests. To claim that there was a right or an obligation, at the international level, to co-operate with a view to attaining optimum utilization of an international watercourse would be quite fanciful.

34. The essential problem was determination of the

[9] *Ibid.*, p. 77, footnote 98.

harm which it was forbidden to cause. The expression "appreciable harm" was not sufficient. It was no doubt a step forward to consider, as the relevant articles seemed to do, that harm implied disturbance of the balance in respect of the reasonable and equitable sharing of the uses of an international watercourse. The idea of appreciable harm was too strict; it prohibited the upstream State from using an international watercourse in ways which might cause changes in the quantity or quality of the waters flowing into the territory of the downstream State.

35. Draft article 8 was of great importance, because it set out the factors to be taken into account in determining what uses were permitted. Subparagraphs (*b*), (*d*), (*f*) and (*j*) of paragraph 1 were particularly important. Subparagraph (*c*) merely referred back to the reasonable and equitable balance between the rights and interests of the States concerned, and could not provide a criterion. Subparagraphs (*g*) and (*k*) were similar and tended to confuse the question of co-operation, which was voluntary, with that of rights and duties.

36. The Commission's task was not easy, and in some ways it resembled that of certain other bodies when they had had to find objective rules and criteria for the equitable delimitation of maritime space.

37. The CHAIRMAN, speaking as a member of the Commission, said that the doubts he had expressed at the previous session as to whether the concept of "optimum utilization" was appropriate [10] had not been dispelled. That idea seemed to imply the existence of a supranational authority which would decide what was optimum, having regard to what was reasonable and equitable. Not only did the observations of Mr. Lacleta Muñoz concerning the experience of his own country deserve consideration, but the example cited by Mr. McCaffrey (1855th meeting) suggested that a technically developed country could claim to play a greater role in the optimum utilization of an international watercourse.

38. Mr. EVENSEN (Special Rapporteur) said that the outline for a draft convention in the form of a framework agreement, together with the preliminary draft of 39 articles, submitted in his first report (A/CN.4/367, para. 65) had proved more or less acceptable to the Commission at its previous session and to the Sixth Committee of the General Assembly at its thirty-eighth session. The revised set of draft articles contained in the second report (A/CN.4/381) took account of the comments made during those discussions in the Commission and in the Sixth Committee in 1983. Before summing up the discussion on those revised draft articles, he wished to thank the Secretariat for its very useful working document (ILC (XXXVI)/Conf.Room Doc.4), and the members of the Commission for their concrete comments, which would be of great value in further work on the topic.

39. He would deal first with the general issues raised during the discussion, the first of which was the outline of the draft, to which he had made certain changes in his second report. Articles 27 and 29, originally in chapter IV, had been transferred to chapter III as the new articles 15 *bis* and 15 *ter*, while a new article 28 *bis*, on the status of international watercourses in armed conflicts, had been introduced into chapter IV. In chapter V, dealing with the peaceful settlement of disputes, a new article 31 *bis* had been introduced, and the concept of compulsory conciliation had been incorporated into article 34. Those changes and adjustments did not appear to have raised any objections during the discussion. Mr. Lacleta Muñoz had, however, proposed certain changes in the outline to which he would give careful consideration.

40. The second general issue was the Commission's decision at previous sessions to draft a "framework agreement". Mr. Ushakov (1853rd meeting), whose position had remained unchanged since the introduction of the topic in 1976, had opposed a framework agreement and recommended that the Commission should draw up model rules; but that would mean deviating from the mandate given to the Commission by the General Assembly. The scope and form of the Commission's task had been quite clear as early as 1979, when the previous Special Rapporteur, Mr. Schwebel, had stated in his first report that his task was to draw up a framework agreement. [11] He had stressed the uniqueness of every watercourse, adding:

> In view of this diversity, the question arises whether it is possible to draft rules to deal with the uses of watercourses that will not be either so general as to be uncertain guides or so specific that they will be applicable to some but not to the full range of issues that may arise in an individual watercourse or ... may deal inappropriately with the particular facts. ... [12]

Precisely in order to meet the difficulties arising from that situation, the previous Special Rapporteur had proposed the method of drawing up a "framework treaty" as "a means of achieving a marriage of general principles and specific rules" [13]. He had mentioned as an example the Convention relating to the Development of Hydraulic Power Affecting more than One State (Geneva, 1923), which combined the statement of legal principles with the formulation of guidelines and recommendations.

41. In both his second and his third reports, the previous Special Rapporteur had noted the broad support received in the Sixth Committee by the "framework instrument" approach, and he himself, since taking up his duties as Special Rapporteur, had been able to note the general support in the Sixth Committee. Consequently, it would be a serious mistake at the present stage—after six reports had been submitted on the topic—to attempt to switch from the concept of a framework agreement to that of model rules. At the present late stage in the Commission's work, he could not possibly recommend such a fundamental change in approach. Moreover, in the discussion at the present session, most members had supported a framework agreement, among them Mr. Al-Qaysi, Mr. Stravropoulos, Mr. Balanda, Mr. Ni, Mr. Mahiou and Mr. Ogiso.

[10] *Yearbook ... 1983*, vol. I, p. 228, 1793rd meeting, para. 26.

[11] *Yearbook ... 1979*, vol. II (Part One), pp. 165-166, document A/CN.4/320, paras. 86-91.

[12] *Ibid.*, p. 159, para. 65.

[13] *Ibid.*, p. 165, para. 86.

42. A more complicated question, which had been touched upon by a number of speakers, including Mr. Reuter, Mr. McCaffrey and Sir Ian Sinclair, was how to define the term "framework agreement". His own view was that there was no clear definition, and still less any binding definition of that term. Consequently, the Commission was free to approach its task in the way it considered most useful and most conducive to furthering the interests of the United Nations and of the world community as a whole. That would entail adopting certain basic principles, while at the same time encouraging the negotiation of specific agreements relating to particular watercourses or regions, to specific uses, to specific installations or to watercourse regulations. The general instrument drawn up should therefore also contain guidelines and recommendations capable of giving watercourse States inspiration and ideas on the content of such agreements. It was specially important to adopt principles, guidelines and recommendations on the necessary co-operation, on the joint management of international watercourses and on the peaceful settlement of disagreements and disputes. Moreover, it was essential to take the term "framework agreement" in a broad and flexible sense, at least in regard to the present topic.

43. That conception of the framework agreement had already been clearly reflected by the previous Special Rapporteur in his third report when he had stated that

> ... the product of the Commission's work should serve to provide ... the general principles and rules governing international watercourses in the absence of agreement among the States concerned and to provide guidelines for the negotiation of future specific agreements. ... [14]

As he himself saw it, that broad definition of a "framework agreement" commended itself particularly in regard to a multifaceted topic such as the present one.

44. The interesting comments made on specific articles had covered mainly those in chapters I and II of the draft, and there had been some reaction to the elimination of the concepts of a "watercourse system" and a "shared natural resource". He himself had considered those two concepts quite acceptable, but he had dropped them because, as he explained in his second report (A/CN.4/381, paras. 18 and 48), the discussions at the 1983 sessions of the Commission and of the Sixth Committee had shown that they might stand in the way of the search for a generally acceptable convention.

45. The debate at the present session had indicated that the deletion of those two concepts was generally acceptable, as had been shown by the comments of Mr. Al-Qaysi, Mr. Balanda, Mr. Calero Rodrigues, Mr. El Rasheed Mohamed Ahmed, Mr. Jagota, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Ni, Mr. Njenga and Mr. Stavropoulos; and Mr. McCaffrey had said that he had no objection in principle. Mr. Ogiso had asked for an explanation on the subject, and he referred him to the relevant paragraphs of his second report (*ibid.*, paras. 11-18). Mr. Ogiso (1856th meeting, para. 43) had also suggested a formulation along the following lines:

> "Watercourse States parties to a special watercourse agreement may accept the concept of a shared natural resource for the purpose of that agreement ...".

It would, of course, be open to watercourse States to include that concept in their special watercourse agreements without any provision on the subject being embodied in the draft convention. Moreover, the inclusion of such a provision in a general instrument would only lead to confusion.

46. As Mr. Calero Rodrigues had observed (1854th meeting), the purpose of article 6, paragraph 2, was to explain in more concrete language, without actually using the concept of a "shared natural resource", that the waters of an international watercourse constituted a resource which must be shared by the watercourse States concerned. He reminded members that the paragraph took its language directly from article 5, paragraph 1, as provisionally adopted by the Commission in 1980, [15] which read:

> 1. To the extent that the use of waters of an international watercourse system in the territory of one system State affects the use of waters of that system in the territory of another system State, the waters are, for the purposes of the present articles, a shared natural resource.

His own proposal would therefore be to retain article 6, paragraph 2, with drafting improvements. Consideration would be given to the suggestion by Mr. McCaffrey that the words "the use of the waters" should be replaced by the words "the utilization of the waters".

47. Several speakers had suggested that article 7 was redundant and should be deleted, and he was prepared to accept that suggestion; it would have the added advantage of eliminating the reference to "optimum utilization", which had met with some opposition. He could not, however, accept the suggestion that all references to "sharing" should be removed from article 6, and from article 7 if retained. The whole idea of drawing up a framework agreement was that there existed a unity of interests and an interdependence between watercourse States which, by their very nature, postulated sharing in the utilization and benefits of the waters.

48. With regard to article 1, there had been some opposition to his suggestion that an enumeration of the various parts and components of a watercourse should be included. Some members had even expressed the fear that consideration of such an enumeration might reopen discussion of the drainage basin concept and thereby detract from the acceptability of the framework agreement. There could be no doubt that international watercourses had a wide variety of source components. The nature and types of those components, as well as their relevance, varied from watercourse to watercourse, from region to region and from use to use. That was why he had referred to the "relevant" parts or components. He still believed that an enumeration of them in the commentary to the article might be useful, but, in deference to the objections raised, he would, of course, be willing to omit it from the body of the article.

[14] *Yearbook ... 1982*, vol. II (Part One), p. 67, document A/CN.4/348, para. 2.

[15] See footnote 3 above.

49. In his second report, he had discussed the question of ground-water resources unrelated to any surface watercourse (A/CN.4/381, paras. 26-30). The best known example was the enormous water resources—often described as an underground ocean—deep beneath the Sahara. Another example was the underground geological formation in the border region between the State of Arizona in the United States of America and the State of Sonora in Mexico. He thanked members who had made observations on that question and reiterated his view that the Commission should not attempt to deal with independent ground-water resources in the draft. Nevertheless, the principles and rules laid down in a framework convention on the present topic could have a bearing on, or be applicable by analogy to, independent ground-water resources. Some members, such as Mr. Mahiou (1854th meeting), had supported that approach, but others appeared to favour the inclusion in the draft of a provision dealing with independent ground- water resources. If the majority of the Commission favoured that course, he would have no objection.

The meeting rose at 1 p.m.

1860th MEETING

Thursday, 12 July 1984, at 10.10 a.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 (*concluded*) (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]

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

1. Mr. EVENSEN (Special Rapporteur), continuing his summing-up of the discussion on draft articles 1 to 9, said that draft article 2, dealing with the scope of the articles, appeared to be generally acceptable. Its language had been drawn from article 1 as provisionally adopted by the Commission in 1980. It had been pointed out by Mr. Reuter (1855th meeting), however, that the wording "uses of international watercourses and of their waters" in article 2 was not consistent with the terminology used in other articles—such as articles 5, 6 and 7—which referred to the "use of the waters of an international watercourse". Even article 2, paragraph 2, itself began with the words: "The use of the waters of international watercourses ...".

2. To some extent, those differences of wording were justified, and had in fact been inherited from the articles provisionally adopted in 1980. Paragraph 1 of article 1 as adopted in 1980, for example, referred to "uses of international watercourse systems and of their waters", while paragraph 2 of the same article spoke of "The use of the waters of international watercourse systems". Article 3, paragraph 3, spoke of "the uses of an international watercourse system", while article 5, paragraph 1, referred to "the use of waters of an international watercourse system". Those discrepancies could, of course, be eliminated by the Drafting Committee. In that connection, the proposal by Mr. McCaffrey to introduce the formula "the utilization of the waters of an international watercourse" was useful, since the term "utilization" could prove more viable than "use" in that context.

3. Draft article 3, on the definition of watercourse States, appeared to be broadly acceptable to most members. Its wording was based on that of article 2 (System States) as adopted in 1980. The current formulation depended, of course, upon agreement to abandon the "system" concept. The word "relevant" qualifying components or parts was intended as a reference to draft article 1, paragraph 2. If there was any objection to it, it could easily be deleted. Also, the words "the present Convention" could, if so desired, be replaced by "the present articles", until the nature of the instrument had been agreed upon.

4. Draft article 4 on watercourse agreements had given rise to serious reservations. Mr. Calero Rodrigues (1854th meeting) had proposed that paragraph 2 should become paragraph 1. A number of speakers had suggested the deletion of the qualifications contained in the first sentence of paragraph 1, a suggestion with which he concurred. It had also been suggested that draft article 4 should begin with a provision similar to that of article 3, paragraph 1, as provisionally adopted in 1980, which read:

> 1. A system agreement is an agreement between two or more system States which applies and adjusts the provisions of the present articles to the characteristics and uses of a particular international watercourse system or part thereof.

Some speakers had, however, expressed reservations as to that formulation, which they found too inflexible; they also felt that it gave too much importance to the provisions of the current draft articles concerning special watercourse agreements. He himself found those comments justified and suggested that draft article 4, paragraph 1, might be redrafted along the following lines:

---

[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.*