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Summary record of the 1979th meeting

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

Extract from the Yearbook of the International Law Commission:-
1986, vol. I

49. In that connection, he advocated caution regarding terminology: rather than speak of injury or harm, the Commission should consider using the word "change" for the time being. Uses of watercourses raised problems only at such times as they harmed nature or substantially changed the watercourse régime. He was therefore in favour of removing from the initial draft articles the idea of qualifying a change by reference to a rule of law, especially if the rule was not enunciated.

50. The legal act which must establish the status of the waters was, in his opinion, something which could be decided in the internal legal system by the legislator alone, and not by arbitrators or judges. The examples of arbitral awards which sprang to mind were all linked to a convention, and everyone knew what kind of use could be made of a convention! Such conventions, moreover, did not exist among the developing countries. Consequently, he seriously doubted whether solutions of that type could be envisaged.

51. However, he agreed with the idea that, through mediation, independent men of integrity could intervene discreetly in negotiations, for which reason draft article 8 was indispensable. Naturally, the terms of the article would have to be weighed very carefully. It was, of course, difficult to find new terminology which did not too quickly become loaded with inferences that would condemn it in the eyes of the Sixth Committee of the General Assembly. Apart from article 8, the Commission would be dealing with a text that was essentially one of procedure. If the rules of procedure were so precise that they might in some instances give rise to a problem of traditional responsibility in the event of their non-observance, it should always be remembered that the courts rarely held that there had been a breach of the obligation to negotiate. Normally, neither party incurred responsibility when negotiations failed. Hence it was necessary to go beyond information, consultation and negotiation. He noted the tendency in that respect to set "reasonable periods of time" in the negotiation procedures when the subject did not lend itself to the determination of specified periods. In the modern world, rivers were not suitable for impromptu projects and the building of dams or power stations was the result of lengthy work by experts; thus the six-month period originally proposed was justified.

52. With regard to organizational matters, in view of the current financial situation of the United Nations, the idea of creating a permanent institution attached to the United Nations, rather than a regional organization, was perhaps not the best one. On the other hand, the option of mediation was essential and the Commission should lay the appropriate foundations in its draft. Mediation could play a paramount role, especially for developing countries, as the World Bank had proved in the case of India. Mediation would thus fill out the range of options open to the parties to a dispute of a quasi-territorial nature; providing only for negotiations between the parties was not an entirely satisfactory solution. The Commission should avoid any emotional terminology, but not any of the substance; that was why the previous Special Rapporteur had deleted the word "system" without abandoning the system concept. The Commission should also examine procedure very closely. If it was to draft a provision on a temporary régime, it would have to define a régime that was fairly flexible. Lastly, it would have to agree to some work on the organizational aspect and make use especially of the concept of mediation.

The meeting rose at 12.45 p.m.

1979th MEETING

Tuesday, 1 July 1986, at 10.10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Ushakov, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/393,[1] A/CN.4/399 and Add.1 and 2,[2] A/CN.4/L.398, sect. G, ILC(XXXVI)/Conf.Room Doc.4)

[Agenda item 6]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

NEW DRAFT ARTICLES 10 TO 14[3] (*continued*)

1. Mr. BALANDA congratulated the Special Rapporteur on his very clear second report (A/CN.4/399 and Add.1 and 2), which contained a wealth of material. The importance of the topic was plain for everyone to see. Watercourses provided a wide variety of resources which were capable of contributing to the development of States and justified the formulatio of a set of rules to govern their uses, which might be for drinking-water supplies, the construction of dams for rural electrification, fishing, irrigation, or the mining of precious raw materials.

2. The members of the Commission appeared to agree that the draft should take the form of a framework agreement providing guidelines for co-operation among States. He had no objection to the pragmatic approach

[1] Reproduced in *Yearbook ... 1985*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1986*, vol. II (Part One).

[3] For the texts, see 1976th meeting, para. 30. The revised text of the outline for a draft convention, comprising 41 draft article contained in six chapters, which the previous Special Rapporteur, Mr. Evensen, submitted in his second report, appears in *Yearbook ... 1984*, vol. II (Part One), p. 101, document A/CN.4/381.

adopted by the Special Rapporteur, who had chosen not to go into the question of definitions; but when the study reached a more advanced stage it might be wise for the Commission to decide on the nature of the uses to be covered by the rules and principles to be established.

3. At previous sessions, the Commission had discussed the "international watercourse system" concept, which some members had been unable to accept because it had a doctrinal connotation and could give rise to differences of opinion. Since most members of the Commission and the majority of representatives in the Sixth Committee of the General Assembly seemed to favour a framework agreement, however, a more flexible approach would have to be adopted so that States which wanted their co-operation to take a particular form could agree jointly on the utilization of the watercourses within their respective jurisdictions and would not be prevented from establishing a watercourse system if they so wished.

4. The Commission had also discussed the "shared natural resource" concept. It was quite true that the theory of absolute sovereignty was no longer acceptable with regard to the utilization of watercourses by States, even in their own national territories: every State had to take account of the rights of the other riparian States. Perhaps those who opposed that concept objected primarily to the idea of "sharing". In fact, the concept applied to the use of the watercourse by the riparian States on an equal footing, in other words to the equal rights and obligations of those States, not to the "physical" sharing of the waters to the advantage of one State or another. The previous Special Rapporteur had expressed the idea of sharing in draft articles 6 and 7, an idea in support of which the present Special Rapporteur cited some representative illustrations in his report. He personally hoped, therefore, that the framework agreement that would emerge from the Commission's work would not prevent States from pooling their resources for the purpose of sharing them if they so wished.

5. As to the overall structure of the draft that had taken shape thus far, he was struck by the fact that, although the Special Rapporteur and his predecessors had proposed a great many procedural rules relating to information, negotiation and co-operation, it was not at all clear what penalties would be applicable in the event of failure to comply with those rules. The proposed consultation machinery was thus based on the original point of departure.

6. He was also struck by the fact that the Special Rapporteurs had placed so much emphasis on the idea of harm and on the obligation to make reparation. By borrowing from other systems, might it not be possible to correct some of the more excessive elements of that approach? Furthermore, the operation of the proposed régime would depend almost entirely on the co-operation and good will of States, whereas in fact the utilization of watercourses gave rise to conflicts of interests. Good will might be lacking in some cases and, under the notification procedure, the initiation of a proposed new use that was important to a particular State or group of States might be delayed for quite some time. Hence the need to find new procedures that would make it easier for States to achieve what they regarded as being in their own interests.

7. The impact of the interests of States was also quite striking. It was apparent from earlier reports on the topic that the position of a State wishing to use the resources of a watercourse was regarded as individualistic, for that State was simply invited to co-operate with the other States concerned. The inevitable result was that there would always be an underlying clash of interests. The Commission therefore had to find some sort of corrective procedure if it wanted to establish an effective system. Thus Mr. Reuter (1978th meeting) had advocated mediation. The absence of procedures for conciliation, or at least for the settlement of disputes, could well hamper the functioning of the framework agreement. It therefore seemed to him that none of the Special Rapporteurs had followed the right approach.

8. As to the criteria used by the Special Rapporteurs to propose rules which, unfortunately, would not be easy to apply, the Commission still did not have clear-cut answers to such questions as what determined whether a State had exceeded its share of the uses of the waters of a particular watercourse; what constituted appreciable or significant injury or harm for which reparation would have to be made; and whether agreements governing the use of international watercourses were in keeping with the basic rules contained in the 1969 Vienna Convention on the Law of Treaties.

9. In his comparative law study (A/CN.4/399 and Add.1 and 2, chap. II, annex II), the Special Rapporteur referred to the Organization for the Development of the Senegal River, the Niger Basin Authority, the Organization for the Management and Development of the Kagera River Basin and the Economic Community of the Great Lakes Countries, but he did not go into the way those systems operated. They might none the less prove to be a source of inspiration. The Commission should therefore pay close attention to the African experience, since the countries concerned were prompted by the desire to work together in using joint resources.

10. Mr. Riphagen (1978th meeting) had suggested an interesting idea, namely a permanent organization for the management of shared resources. That was already being done by the African countries: a joint body managed the interests of all the watercourse States and evaluated the uses to be made of the watercourse. The States concerned all took part in the financing and also benefited from the uses. A key role was thus played by joint planning. What the Special Rapporteur was proposing was that each State, in its planning of uses of the waters, should take account of the interests of the other riparian States. Under the African system, one single body was in charge of the planning; the States concerned all shared in the benefits and did not have to notify one another of future projects or wait for replies to notifications before going ahead with their plans; nor did they have to co-operate on a piecemeal basis, since co-operation was institutionalized from the outset. In addition, there were no problems of time-limits and

confidentiality. So far, the concepts of injury and reparation had played a key role in the draft, but they had no meaning when resources were managed collectively.

11. Another important factor was the high cost of work on watercourses. If, in accordance with the Vienna Convention on the Law of Treaties, States were allowed to denounce an agreement at any time, entities sharing in the uses of the waters might suffer injury, because a State denouncing a treaty would jeopardize a joint water resources management project by depriving it of part of its financing. Some African States had therefore agreed to be bound by such a system for a period of 99 years: in the interests of the greater good, they had given up the freedom to which they were entitled under the Vienna Convention.

12. Such factors might give food for thought and shed new light on the régime proposed by the Special Rapporteur. They were preferable to prohibitions. The Special Rapporteur would do well to draw on a system which had been operating for nearly 15 years and which, despite its shortcomings, would provide answers to some of the questions that were bound to arise if the régime now under consideration were ever to be established.

13. With regard to the draft articles, the Special Rapporteur drew a distinction in connection with draft article 9 (A/CN.4/399 and Add.1 and 2, para. 181) between "harm" and "injury"; but in French law no such distinction existed. The Special Rapporteur also asked members to indicate which of the three alternatives he was proposing for article 9 (*ibid.*, paras. 182-184) they preferred. Personally, he had great difficulty in deciding. As he saw it, problems would inevitably arise if a prohibition were placed on injury; but since it was necessary to find an approach that would offer the fewest possible drawbacks, he tended to favour the third alternative.

14. The wording of draft article 10 should be amended, for it was not clear whether the words "with timely notice" referred to the planning stage or to the implementation stage. Referring to the last sentence of paragraph (9) of the comments on that article, he doubted whether a State which had been notified that another State intended to undertake a new use of a watercourse and which wanted further information so that it might evaluate the potential harm could be required to pay some of the costs incurred in producing such information. Did that mean that, if a State could not afford to pay any of the costs, it would be deprived of the information it needed and, consequently, of the possibility of knowing what risks it faced?

15. As to draft article 11, he agreed with other members that a minimum period of time should be set: the proposed six-month period would be reasonable. It was, moreover, the State which proposed to make a new use of a watercourse that had to provide information to the other States concerned, without waiting for them to request it to do so.

16. He had doubts about draft article 13. How, for example, could other States be required to fulfil an obligation which should be incumbent only on the State which wished to make a new use of a watercourse? Since draft article 10 established obligations for a State proposing a new use, he did not see how other States could take the place of the State which did not fulfil its obligations. That might, however, be merely a drafting problem. Paragraph 2 of article 13 could pose problems for developing countries, which might need more time than other States to reply to a notification. The element of surprise should, moreover, be avoided. If a notification had been made and a reasonable period of time had elapsed, the other States should be given prior notice before any proposed use was undertaken, so that there would not be any misunderstanding on their part about protection of their interests.

17. Draft article 14 also gave rise to serious misgivings, for it allowed a State to claim that a proposed use which might affect the interests of other States was one of the utmost urgency. Such a provision would destroy the entire structure of co-operation, notification and negotiation provided for in the draft. Paragraph 2 of the article was very difficult to reconcile with the idea of utmost urgency: in such a case, how could the State proposing to initiate a new use be expected to provide notice and wait for expiry of the necessary period of time? The Commission should be more careful in deciding what provisions to include in article 14.

18. Mr. ARANGIO-RUIZ said that, speaking as a citizen of Italy, which had only a few very small international watercourses on its borders with France and Switzerland, he would confine his preliminary remarks to questions of technique or method rather than substance, such as those on which the Special Rapporteur had requested a response. His comments would hinge mainly on points made during the discussion by other members.

19. The first point was that raised by Mr. Ushakov (1976th meeting), who had drawn attention to a very real problem, namely the form that the draft should take. In that regard, he himself strongly favoured the idea of a framework convention, as did most members. If such an instrument could set forth some substantive general principles, meaning legal principles—as a matter either of codification or of progressive development of international law—it would be in the interests not only of riparian States, but also of the international community as a whole.

20. Bearing in mind the relationship between the present topic and the topics of State responsibility, international liability for injurious consequences arising out of acts not prohibited by international law, and the draft Code of Offences against the Peace and Security of Mankind, the Commission ought to be able to produce a significant set of draft articles on what was one of the more concrete and specific subjects on its agenda, a subject to which the rules codified or developed by the Commission on the other topics would have to apply. Should the Commission prove unable to do so, it would be casting doubt on the effectiveness and value of the rules it was establishing in its draft articles on the related topics. Besides, a framework convention could easily include, in addition to the general principles and rules

of "hard law", any declaratory statements deemed desirable.

21. As Mr. Reuter (1978th meeting) had said, the Commission was in danger of going round in circles in its discussions. It simply had to decide once and for all between a draft taking the form of recommendations and a draft framework convention. It also had to decide whether it wished to retain the concept of an international watercourse system, as well as that of a shared natural resource. Again, it would have to choose between the concepts of "harm" and "injury". He fully agreed with Mr. Reuter regarding the difficulty of framing legal rules in respect of watercourses, but did not entirely share his pessimism, which might have been prompted in part by the substantive differences between the positions taken by members.

22. In particular, he did not share the view that the régime of international watercourses was not governed by existing rules and principles (*lex lata*) and that the Commission's task with regard to the topic would therefore be exclusively one of legislation. A comparison might be useful, in that respect, with some aspects of the law of the sea, notably with the role of equity in the delimitation of sea-bed areas between neighbouring States.

23. The idea that article 6 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone contained a fundamental rule of equidistance was probably not as correct as had been thought in the early stages of its application. A number of judicial and arbitral decisions had soon made it clear that equidistance was a rule only in the sense of an ideal starting-point. Cases of two perfectly parallel coasts calling for a median parallel boundary existed only on paper. Once cases had to be decided in practice, the various factors involved inevitably had to be taken into account. It had thus become apparent, especially since 1969, that the basic rule in matters pertaining to delimitation was that of an equitable result. Of course, that created a difficulty for lawyers who placed equity outside substantive law and considered it as a procedural rule, regarding an "equity judgment" as a law-creating, legislative decision, rather than as a law-applying decision. Such had been the view expressed in 1969 by Judge Morelli in the *North Sea Continental Shelf* cases.[4] In his dissenting opinion, Judge Morelli had indicated that, with the fall of the rule of equidistance from its pedestal and the fact that its operation had become governed by considerations of equity, the coastal State's rights could no longer be said to exist *ab initio*.

24. For his own part, however, he believed that equity did not lie outside the scope of substantive law. The rule concerning equitable criteria to achieve an equitable result was a substantive rule and could operate as between the States themselves, even without the help of a tribunal. Accordingly, States' rights did exist *ab initio*, notwithstanding the redimensioning of the alleged rule or principle of equidistance.

25. As far as international watercourses were concerned, the difficulties were much greater, because what was involved was not a delimitation of space but a delimitation of quantities and qualities of water and its uses. He did not propose to take a stand, for the time being, on the substantive issues involved, and would hear with interest the views of those members who had experience of the great international watercourses. He would none the less emphasize that not all the provisions to be included in the framework agreement would constitute new rules, or in other words represent progressive development of the law. Some of them would undoubtedly be declaratory and have the character of codification of existing law. Clearly, general international law contained certain principles and rules concerning the non-navigational uses of international watercourses, and such rules and principles included equity as an integral part of existing substantive law.

26. In the Commission's work on other topics, such as those of State responsibility and international liability for injurious consequences arising out of acts not prohibited by international law, principles and rules were being framed that would govern the uses of non-international rivers. He thus felt sure that there existed *a fortiori* principles and rules concerning international rivers which States themselves applied and which arbitral tribunals and the ICJ would apply as judicial bodies, not as legislative bodies.

27. It was essential not to overlook a feature peculiar to watercourses, one which distinguished them from the sea-bed, land areas and even celestial bodies. The feature was a consequence of the nature of water. From the point of view of sovereignty, water was not entirely dissimilar from the part of outer space that did not consist of celestial bodies and their atmospheres. Water moved, and not only in the bed of the watercourses, but also in the atmosphere, the clouds and the sea. It was possible to appropriate the fish in water, or the energy from water, but not the element itself. It was therefore difficult to conceive that those matters would lie ouside the purview of the principles and rules of general international law, a number of which had been reviewed by the former Special Rapporteur, Mr. Schwebel. It was the Commission's task to discuss them and use them in formulating a framework agreement. That part of the work would not constitute legislation in the sense in which the Commission could be said to legislate: it would be codification. Only as a distinct further step could the Commission seek to identify any points or issues for the purpose of progressive development of the law.

28. On a point of method, he suggested that the Special Rapporteur should endeavour to submit to the Commission, as from the next session onwards, two distinct sets of proposals: the first would cover matters *de lege lata* and the second matters *de lege ferenda*. Among the latter, it would be for the Commission to decide which should be included in the framework agreement and which should be left to agreement between the States concerned. It was essential also to determine which points should be covered by legal rules or principles and which should form the subject of mere recommendations.

[4] See *North Sea Continental Shelf*, Judgment of 20 February 1969, *I.C.J. Reports 1969*, pp. 206 *et seq.*, dissenting opinion of Judge Morelli, paras. 11 *et seq.*

29. Most of the questions raised by the Special Rapporteur could be viewed in the light of those comments. He saw some value in the "system" concept, but did not wish to express a definite opinion on the subject at the present stage. As to the choice between "harm" and "injury", he failed to see the difference between the two: surely a harm covered by a legal rule or a harm resulting in legal consequences constituted an "injury" in the legal sense. Lastly, the problem of optimum utilization and that of the possible role of international organizations were clearly matters *de lege ferenda*.

30. Mr. ROUKOUNAS, referring to the questions raised by the Special Rapporteur in his second report (A/CN.4/399 and Add.1 and 2), said that the "system" concept sought to transpose hydrological and physical factors to the legal plane. The watercourse "system", which underscored the functional aspect, was in many respects a unit that afforded the requisite flexibility to take account of specific situations. The "system" placed emphasis on the uses of the waters, on the interdependence of those uses and on the interdependence of the States concerned. The working hypothesis referred to the Drafting Committee, like the draft articles submitted up until 1984, was founded on the "system" concept, which was both modern and old in the sense that H. A. Smith had used it as early as 1931, undoubtedly on the basis of sound scientific and practical criteria. Nevertheless, he would have no objection to the Special Rapporteur's suggestion that the consideration of draft article 1 should be deferred (*ibid.*, para. 63).

31. The "shared natural resource" concept could also be of assistance to the Commission in working out the régime to be established. It highlighted the fact that a riparian State could use a part, but not all of the watercourse, hence the need to arrange for effective international co-operation. If a community of interests really existed, there had to be equality of rights. Consequently, the concept should be used as a basis for the Commission's work.

32. Similarly, draft article 8 was essential and its content should not be transferred to an annex or a commentary, although it would of course have to be accompanied by the necessary explanations. In that connection, the Special Rapporteur stated that the delimitation of maritime boundaries was in some ways analogous to the apportionment of the uses and benefits of an international watercourse, since "both areas are fundamentally concerned with the allocation of resources as between two or more States" (*ibid.*, footnote to paragraph 174). In his own view, however, those were two entirely different matters and called for some comment.

33. First, the customary rule embodied in article 15 of the 1982 United Nations Convention on the Law of the Sea, relating to delimitation of the territorial sea between States with opposite or adjacent coasts, contained no reference to any principle of equity. Secondly, articles 74 and 83 of the Convention stated that the delimitation of the exclusive economic zone and of the continental shelf would be effected by agreement on the basis of international law in order to achieve an equitable solution. It was in that way that the concept of equity entered into a rule of law. In his opinion, the draft should therefore incorporate a provision indicating the general meaning of that concept. Thirdly, greater care should be taken in quoting passages from judgments of the ICJ. In 1969, in its judgment in the *North Sea Continental Shelf* cases, the Court had adopted a position of principle—which the Special Rapporteur did not mention—and had explained what it had meant by the term "equitable principles",[5] an interpretation which had not changed either in the Court or in practice. The Commission, however, was dealing with an entirely different matter, since the uses of an international watercourse were one thing and the delimitation of maritime boundaries as between two or more States was quite another. Incidentally, he did not share Mr. Arangio-Ruiz's view concerning the median line.

34. The "equitable powers" referred to by the Special Rapporteur (*ibid.*, footnote to paragraph 174) were not powers that were likely to be used by the ICJ on the basis of Article 38 of its Statute; rather, they were powers which the parties to a dispute could, by agreement, use in the absence of applicable rules or when they intended to set aside a rule of law. To his knowledge, the ICJ had never been given such powers by the parties to a dispute.

35. The Special Rapporteur had raised questions about the nature of "harm" and the way it should be qualified in draft article 9, as well as about the form of the relationship between harm and equitable utilization. In the latter connection, further clarification would be needed. The relationship should be established not by means of the negative wording used in the third alternative proposed for article 9 (*ibid.*, para. 184), but by referring to the régime to be established in the draft. The provision concerning harm might therefore begin with the words: "In applying the present articles, a State ...". At the current stage, it would, moreover, be premature to frame the issue of harm or injury in too restrictive a manner. All the documentation he had consulted spoke either of "harm", or of "appreciable", "significant" or "serious" harm, and even drew a distinction between harm and mere inconvenience. The best course would be to retain the basic idea of harm, as in the first or second alternatives for article 9 (*ibid.*, paras. 182-183), without qualifying it. In some cases, the uses of watercourses could constitute typical examples of responsibility either for lawful acts or for wrongful acts. Since the three Special Rapporteurs concerned had not yet engaged in any real co-ordination of views to adopt a logical approach to harm, it would be difficult to move ahead in regulating one aspect of responsibility, namely harm caused by the use of an international watercourse.

36. Mr. OGISO said he had no difficulty in accepting the Special Rapporteur's suggestion that the Commission should not attempt to define the "international watercourse" or "international watercourse system" concepts before adopting the substantive draft articles (A/CN.4/399 and Add.1 and 2, para. 63). However, as he had indicated at the thirty-sixth session,[6] the Commission should not preclude the possibility of defining

[5] *Ibid.*, pp. 48 *et seq.*, paras. 88 *et seq.*

[6] See *Yearbook ... 1984*, vol. I, p. 252, 1856th meeting, para. 34.

the concept of an "international watercourse system". If the discussion was to be based on the physical fact that an international watercourse constituted a unit and had a wide variety of components, so that any consideration of its development and utilization should take into account the basic reality of the watercourse, a reasonable conclusion might be that it would be desirable to have a definition of the "system" concept in the draft articles. Nevertheless, there might be cases in which the application of the "system" concept was not appropriate, as a result of the geographical peculiarities of the watercourses in question. Consequently, the concept could be retained in the draft articles, but for application subject to the agreement of all the system States concerned.

37. The Special Rapporteur, while not opposed to the "shared natural resource" concept, appeared to regard it as neither necessary nor desirable to define the concept at the present stage, since its substance, namely the principle of "equitable utilization", had already been incorporated in the draft articles of 1984. His own view, which he had stated before, was that it would be premature to rule out the concept entirely.[7] In fact, it might be useful for riparian States to adopt the concept in concluding agreements on joint development projects. Hence that concept, too, should be retained in the draft, with some margin of flexibility for applying it in certain instances.

38. He had no strong views as to whether the factors referred to in draft article 8, paragraph 1, should be retained in the article itself or transferred to the commentary and he could therefore subscribe to the view of the majority.

39. In the draft articles of 1984, and in the five new draft articles submitted by the Special Rapporteur, the word "appreciable" was used frequently, in such expressions as "to an appreciable extent" (art. 4, para. 2, and art. 5, para. 2) and "appreciable harm" (art. 9). However, the significance of the word appeared to vary, depending on the context. Draft article 9, for example, which defined the obligations of watercourse States towards one another, could be interpreted as meaning that any violation of those obligations could give rise to an internationally wrongful act. In the third report of the second Special Rapporteur, Mr. Schwebel, it was stated that one legal definition of the term "appreciable" was: "capable of being estimated, weighed, judged of, or recognized by the mind; capable of being perceived or recognized by the senses; perceptible but not a synonym of substantial".[8] Thus draft article 9 could be interpreted as applying in cases where a watercourse State failed to refrain from or prevent a use of an international watercourse resulting in harm to the rights or interests of other States which could be estimated but which was not substantial. Moreover, "interests" could be construed as meaning potential or planned use of the water. Accordingly, to call upon States to refrain from and prevent uses or activities causing harm to the interests of other States was to impose too heavy an obligation on them. In that connection, it would be noted that the word "interests" did not appear in the three alternatives proposed for article 9 by the present Special Rapporteur (A/CN.4/399 and Add.1 and 2, paras. 182-184).

40. Mr. DÍAZ GONZÁLEZ said that it had become an increasingly common, but inappropriate and even harmful practice for the Commission to hold very superficial discussions of reports, discussions in which members were urged to make only very general comments because of the lack of time, and then simply refer the draft articles submitted by the Special Rapporteurs to the Drafting Committee with a request that it should consider them in detail and take a decision on them. When the draft articles were then referred back to the Commission, it still did not have enough time to spend on them and it therefore transmitted them to the General Assembly with the largest possible number of passages between square brackets, thereby refraining from taking the slightest decision on them. The Commission's function had thus become one of preparing draft articles which the General Assembly later decided to retain or reject. It was an extremely unfortunate development. If the Commission wished to continue to serve some purpose, it would in future have to make an effort to give detailed consideration to all the reports submitted and, if necessary, would have to request the General Assembly to allow it more time to carry out its task properly.

41. The point that emerged most clearly from the Special Rapporteur's thorough yet concise second report (A/CN.4/399 and Add.1 and 2) was the Commission's uncertainty with regard to the present topic. That uncertainty, for which the present Special Rapporteur was in no way responsible, was the result of the way in which the work on the topic had been carried out. Compared with the extremely interesting proposals made by the second Special Rapporteur, Mr. Schwebel, draft articles 1 to 9 submitted in the second report of the third Special Rapporteur, Mr. Evensen, had been a step backwards, because they had called into question some of the basic ideas embodied in the draft articles already provisionally adopted by the Commission. For some unexplained and unjustified reason, the Commission had referred draft articles 1 to 9 to the Drafting Committee without having decided what should be done with the other texts provisionally adopted and despite the fact that the majority of members would have preferred to give them further consideration in plenary, since the amendments introduced by Mr. Evensen had related to substance, not to form.

42. As a result, the Drafting Committee now had before it draft articles submitted by the second Special Rapporteur, Mr. Schwebel, which the Commission had adopted on first reading, and nine other draft articles submitted by the third Special Rapporteur, Mr. Evensen. If the Commission so decided, the Committee might even have before it the five draft articles submitted by the present Special Rapporteur. Such a situation could not go on indefinitely. The Commission had to decide what it intended to do with all those texts.

43. The first question raised by the present Special Rapporteur related to the use of the term "international

[7] *Ibid.*, p. 253, para. 43.

[8] *Yearbook ... 1982*, vol. II (Part One), p. 100, document A/CN.4/348, footnote 292.

watercourse system", which had been proposed by the second Special Rapporteur in 1980. In order to move ahead, the Commission had decided to retain that term, the only one on which there had been a consensus, but it had refrained from defining it. The third Special Rapporteur, Mr. Evensen, had proposed using the term "international watercourse", but the definition he gave it had been tautological. In his own view, the Commission should use the term "international watercourse system", which encompassed a large number of elements not taken into account by the term "international watercourse", which denoted only the main watercourse.

44. The present Special Rapporteur was proposing that the Commission should use the working hypothesis accepted in 1980 (*ibid.*, para. 63). That hypothesis was, however, based on the "international watercourse system" and "shared natural resource" concepts, which therefore had to be retained. Although the term "shared natural resources" was far from perfect, what mattered was that it conveyed the idea of equal rights and equal obligations. Again, whether the Commission used the term "international watercourse system" or simply "international watercourse", the international character of the watercourses in question was entirely relative, because they were used for non-navigational purposes only by riparian States or watercourse system States.

45. The General Assembly had decided that the Commission should prepare not a draft convention but a framework agreement that could be used by States as a basis for multilateral, regional or bilateral agreements. The fact remained, however, that every system had its own economic, social and human characteristics and it was therefore extremely difficult to formulate rules of a universal nature that would apply to all watercourse systems. The Commission had to have firm foundations in order to elaborate a framework agreement; but no progress would be possible if each new Special Rapporteur called into question the basic principles defined by his predecessors.

46. The present discussion merely went over ground covered four years earlier and would serve no purpose at all. To make any headway, the Commission had to decide what it wanted to do and define the basis for its work, taking into account the General Assembly's instructions. If it intended to leave aside the principles underlying the draft articles which it had adopted on first reading, it would have to start from scratch, in other words draft new articles 1 to 9 before discussing those submitted by the present Special Rapporteur. The topic under consideration was far too complex for the Commission not to discuss it seriously and simply to prepare draft articles for submission to the General Assembly without going into the basic principles. All the arbitral awards and all the decisions by the ICJ and national courts mentioned by the Special Rapporteur in his report (*ibid.*, paras. 100-133 and 164-168) dealt with the general rules of river law. Agreements concluded by States belonging to the same watercourse system had, moreover, been based on the general rules of river law. It was therefore absolutely necessary to formulate rules. Judges themselves, who were not lawmakers, needed rules; but the rules in question had to be of a universal nature.

47. He preferred the term "equitable utilization" to "optimum utilization", because it was essential to stress that every riparian State had to be able to make equitable use of the waters of the international watercourse sytem to which it belonged.

48. Before becoming Special Rapporteur, Mr. McCaffrey had proposed that the concept of "equity" should be combined with the idea of "benefit".[9] But who would benefit? If, for example, Sudan decided to divert the waters of the Nile and share the benefits of that operation with Egypt, the Egyptian people would not benefit in the slightest because they would be deprived of water.

49. Thus, no matter what questions were raised, there was always the basic problem of what the Commission intended to do and on what basis it would formulate the draft articles. It could delay no further in shaping and following a specific course of action.

The meeting rose at 12.20 p.m.

[9] See *Yearbook ... 1984*, vol. I, pp. 244-245, 1855th meeting, paras. 27-28.

1980th MEETING

Wednesday, 2 July 1986, at 10 a.m.

Chairman: Mr. Doudou THIAM

Present: Chief Akinjide, Mr. Arangio-Ruiz, Mr. Balanda, Mr. Barboza, Mr. Calero Rodrigues, Mr. Díaz González, Mr. El Rasheed Mohamed Ahmed, Mr. Flitan, Mr. Francis, Mr. Illueca, Mr. Koroma, Mr. Lacleta Muñoz, Mr. Mahiou, Mr. Malek, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Razafindralambo, Mr. Reuter, Mr. Riphagen, Mr. Roukounas, Sir Ian Sinclair, Mr. Tomuschat, Mr. Ushakov, Mr. Yankov.

Co-operation with other bodies (*concluded*)*

[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRMAN invited Mr. Rubin, Observer for the Inter-American Juridical Committee, to address the Commission.

2. Mr. RUBIN (Observer for the Inter-American Juridical Committee) said that the Inter-American

* Resumed from the 1958th meeting.