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Summary record of the 2006th meeting

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

Extract from the Yearbook of the International Law Commission:-
1987, vol. I

erence in article 10 to the preceding provisions of the draft. In any event, a general and all-encompassing duty to co-operate would be too broad, particularly since no such obligation was laid down in Article 55 of the Charter of the United Nations. A close reading of the principle of co-operation as set forth in the 1970 Declaration on Friendly Relations and Co-operation among States[5] also revealed that the drafters of the Declaration had been at pains not to place States in a strait-jacket of co-operation. Co-operation in the management of international watercourses was necessary, even essential, but the conditions and purposes thereof must be spelt out. In his opinion, the duty to co-operate was an ancillary principle designed to secure substantive rules that were still to be agreed on, but it did not have the quality of an autonomous rule modifying the basic principle of State sovereignty.

8. Mr. McCAFFREY (Special Rapporteur), referring to the timetable for the Commission's further consideration of the topic, suggested that the debate on draft article 10 should be concluded within two working days. It might also be a good idea, for consideration of the remaining articles, to divide them into two groups, consisting of articles 11 to 13 and articles 14 and 15, respectively.

9. Following an exchange of views in which Mr. THIAM, Mr. YANKOV, Mr. REUTER, Mr. NJENGA and Mr. BARSEGOV took part, the CHAIRMAN suggested that the debate on article 10 should be closed on Tuesday, 2 June 1987, although it could if necessary be extended until Wednesday, 3 June 1987, on the understanding that members could also speak on articles 11 to 15 of the draft.

It was so agreed.

The meeting rose at 10.50 a.m.

[5] See 2003rd meeting, footnote 5.

2006th MEETING

Friday, 29 May 1987, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/399 and Add.1 and 2,[1] A/CN.4/406 and Add.1 and 2,[2] A/CN.4/L.410, sect. G)

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

[2] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CHAPTER III OF THE DRAFT:[3]

ARTICLE 10 (General obligation to co-operate)[4] (*continued*)

1. Mr. ROUCOUNAS said that, before considering draft article 10, it was necessary to distinguish between general co-operation and the sources, and therefore the legal effects, of co-operation. Co-operation was an intrinsic part of the process of development of international relations, in a wide variety of activities ranging from juxtaposed fields of competence to full integration. More often than not, it was synonymous with organization on an international level. It was described sometimes as horizontal, when two or more States acted in concert to achieve a particular objective, and more often as structural, when it reached a stage at which it acquired an institutional apparatus of its own. The greater the number of joint actions, the greater became the number of support structures; the more pronounced the legal personality of the international organization, the more fierce the struggle became for the allocation of fields of competence under international law, in the name of co-operation between States. It was doubtful whether, with the requisite logic, the same legal foundation could be identified for each and every form of co-operation.

2. Again, co-operation had different sources and produced different legal effects. The Charter of the United Nations unquestionably issued an appeal for co-operation and provided for a number of mechanisms in that regard; but it was preferable to scrutinize the conduct of States, for the Commission's approach in the case of international watercourse systems did not, at the present stage, provide for any institutional mechanisms. In the 1970 Declaration on Friendly Relations and Co-operation among States,[5] the fourth principle did indeed regard co-operation as a more or less strict legal obligation in a number of areas: the maintenance of international peace and security, the protection of human rights, and the economic field.

3. The Charter of Economic Rights and Duties of States[6] contained a large number of provisions on State co-operation in many fields. Alongside duties to co-operate (arts. 7, 14, 27, etc.), it enunciated rights to co-operation (arts. 5, 12, etc.). A number of legal instruments revealed the different aspects of co-operation. Some obligations to co-operate that were stipulated in the Charter of the United Nations, such as

[3] The revised text of the outline for a draft convention, comprising 41 draft articles 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.

[4] For the text, see 2001st meeting, para. 33.

[5] See 2003rd meeting, footnote 5.

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

the maintenance of international peace and security, were of a well-established legal character, whereas others were less strict, for the term "should" was often used instead of "shall". The Charter of Economic Rights and Duties of States, on the other hand, viewed the concept of co-operation either as a duty or as a right. Again, co-operation was mentioned in instruments such as the 1982 United Nations Convention on the Law of the Sea and the Helsinki Rules,[7] and in documents such as the report of ECE's Committee on Water Problems on its eighteenth session,[8] which set out principles regarding co-operation in the field of transboundary waters and established programmes of activity in that connection.

4. Draft article 10 was particularly welcome, for it was in line with the evolution in concepts of international law. However, the extent of the legal obligation on international watercourse system States to engage in co-operation still had to be determined, although the Special Rapporteur had explained that article 10 did not relate solely to new uses. The Commission could provisionally use the outline prepared by the previous Special Rapporteur to establish which situations and activities would be covered by the obligation to co-operate, and then proceed with chapters III and IV of the draft. Chapter V, concerning the peaceful settlement of disputes, did not enter into account, since it was part of an entirely different problem, as was the reference by the Special Rapporteur in his third report to the *North Sea Continental Shelf* cases (A/CN.4/406 and Add.1 and 2, para. 49).

5. It had been proposed that article 10 should be transferred to chapter II of the draft; but did that mean that it should be elevated to the status of a principle? The term "principle" implied a general norm of conduct, whereas a "rule" was tailored to a more precise and sometimes limited object. International jurisprudence, often called upon to distinguish between principles and rules, was directly interested in the content of the legal obligation. In short, the answer to the question whether the obligation to co-operate should stand as a rule or a principle would depend on the text and on the context. For his part, he hoped that article 10 would be moved to chapter II, but the field of application of the article should be made clear. In that way, the norm regarding co-operation would decisively reinforce the principle of equitable utilization.

6. Mr. BARSEGOV said that the present topic was as complex as the others on the Commission's agenda, since questions pertaining to inter-State relations were never easy. In view of the rules and principles that were involved, no law on the non-navigational uses of international watercourses existed as such. The difficulty of elaborating provisions on inter-State relations in that matter was explained by the fact that the question had a direct bearing on territorial integrity and on the sovereignty of States over their natural resources. In other words, it was bound up with matters that fell exclusively within the jurisdiction of States. The problems of conservation and rational use of such a fundamental natural resource as water were acute in many countries and were felt very sharply even in countries as vast as the Soviet Union. The task of formulating norms of international law to govern all the modalities of the utilization of watercourses also entailed a need for the Commission to hold itself aloof from individual cases of watercourse use.

7. On what rules of law, on what legal elements, could the Commission base its work? Above all, on long-established practice and concrete precedents. He could not agree with the Special Rapporteur's evaluation of practice or with some of the conclusions drawn from that evaluation. Did the material gathered and discussed by the Special Rapporteur make it possible to arrive at general conclusions and build up a concept whereby draft articles could be elaborated? Personally, he fully understood the temptation to use all the precedents that related in one way or another to the topic under consideration, but it was none the less difficult to find a link between the *Corfu Channel*, the *North Sea Continental Shelf* and the *Trail Smelter* cases, on the one hand, and the law of the non-navigational uses of international watercourses, on the other. Such examples convinced no one. *A fortiori*, those drawn from the internal practice of the United States of America could not afford evidence to assert the existence of rules of international law in the field in question. Moreover, it should be remembered that every case in international law might well involve different factors that had to be interpreted in a specific context.

8. Referring to the *Lake Lanoux* case, discussed by the Special Rapporteur in his second report (A/CN.4/399 and Add.1 and 2, paras. 111-124), he said that the essential point in that precedent was not only the position adopted by the parties, but also the actual settlement of the dispute, namely the arbitral award. The arbitral tribunal had taken as its point of departure the idea of sovereignty and had taken into account the limitations thereon under the treaties in question; it had denied the existence of international rules and even local rules, and had accepted France's rights to its waters, subject to articles 9 and 10 of the Additional Act to the 1866 Treaty of Bayonne. Thus, according to the arbitral tribunal:

> . . . the upper riparian State, under the rules of good faith, has an obligation to take into consideration the various interests concerned, to seek to give them every satisfaction compatible with the pursuit of its own interests and to show that it has, in this matter, a real desire to reconcile the interests of the other riparian with its own.

Mr. Reuter (2004th meeting) had explained the political circumstances in which that case had occurred, circumstances which were of great importance in understanding the background to the case.

9. More generally, the practice of States as revealed in treaties was of decisive importance. The interests of downstream States were recognized to a greater or lesser extent, depending on how close political relations were between the States concerned. Yet, in all the cases he was aware of, relations were based on recognition of a State's sovereignty over its water resources, which implied the State's freedom to do with them as it saw fit. Undeniably, States took positions in international law

[7] See 2002nd meeting, footnote 5.

[8] ECE/WATER/47 (2 March 1987).

that reflected their political, economic and other interests. The Harmon Doctrine was not fortuitous and was not merely an error which had then been rectified.

10. For a proper grasp of the evolution of positions in international law, it was important to look at the way in which a State had settled successive disputes with neighbouring States. For example, the United States of America had first had a dispute with Mexico, in which it had been the upstream State, and later another with Canada, in which its geographical position had been quite the opposite. In the dispute with Canada, international law had been cited instead of the Harmon Doctrine. That example emphasized that international law had values of its own and that it should not follow the various political developments in one State or another. Legal rules, fundamental principles, did exist in inter-State relations, and it was essential to abide by them.

11. In his examination of practice, he had thought it judicious to look at the subject of the settlement in each case. Had it involved a watercourse, a lake or a "system"? Moreover, what had been the basis for the decisions in each individual case? Had it been general rules of international law or a particular international agreement? From his own study of the legal materials he could not endorse the conclusion reached by the Special Rapporteur in his second report (A/CN.4/399 and Add.1 and 2, para. 88). In their international relations concerning the use of international watercourses, States always took as their point of departure the principle of their sovereignty over water resources in their territory. Other States endeavouring to secure recognition of their own interests invoked international treaties or rights and easements "acquired" in the past, or an earlier territorial situation. With regard to the "equitable apportionment" of waters, in every case the decisions had taken account of the political circumstances and had been confirmed by agreements. Accordingly, he inferred from an overall evaluation of current practice that the legal régime for a watercourse was based, as it had been in the past, on an agreement between the riparian States, in the light of the characteristics of each watercourse, and hence that there were no universal rules to govern the legal relations of States in the matter.

12. What conclusions could be drawn from that situation in order to develop rules of international law? Was it possible to ignore or diminish the permanent sovereignty of States over their natural resources? Was it possible to create a supranational law consisting of an international system of regulation and management for all water resources? Such a solution, although it did contain a progressive element, was neither realistic nor legally sound.

13. It had to be admitted, frankly, that there was no convergence of views among members of the Commission on how to proceed with the study of the topic. There were apparently two approaches. One, a "maximalist" approach, diminished the importance of the sovereignty of a State over its water resources and would lead to the elaboration of a universal convention establishing a supranational order with a view to collective utilization of the water resources, which would be considered a "shared natural resource", and to the constitution of a "common property" shared among all system States in the form of apportionment either of the water itself or of the benefits deriving from its use. The other approach took account of objective realities such as the sovereignty of States over their natural resources. In his opinion, analysis confirmed that there were no material grounds for speaking of a right of collective utilization or acquisition of water resources. Consequently, rules could not be formulated to compel States to make joint use of watercourses and thus deny their sovereignty over their natural resources.

14. Did that conclusion rule out the need for and possibility of progressive development of international law and imply that the Commission should engage solely in the task of codification? Certainly not. The development and increasingly intensive utilization of water resources demanded that the rules of law should be refined so as to achieve optimum utilization of those resources. Consideration of objective realities in itself signified progressive development of the law. Codification and progressive development were interdependent processes and, for that reason, the Commission should formulate legal rules in the light of both the fundamental principles of international law and the major tendencies in the development thereof. Under the law at the present time, or in keeping with the positive rules of international law and with State practice, a legal system for the non-navigational uses of international watercourses could take shape only after agreement was reached between the riparian States, having in mind the characteristics of the particular watercourse and the way it was used. The Commission should therefore help States themselves to find the means for reconciling their own interests and those of other riparian States. International co-operation between riparian States was thus essential.

15. Draft article 10 laid down the obligation to co-operate, an extremely important idea from the conceptual standpoint, among others. The practical task in that regard involved the need to prevent any possible harmful consequences of a particular use of an international watercourse. Hence co-operation in the optimum utilization of international watercourses was of major importance: it was a fundamental principle that should govern State relations in that clearly defined field.

16. It was essential not to lose sight of the role of co-operation in current international relations. International co-operation could no longer be regarded merely as an aspect of the unilateral will of States which changed according to their political interests and diplomatic considerations. It was indispensable in modern times: a rule of conduct for all States. Problems that affected the whole of mankind could not be solved by one single State or one single group of States, since they called for world-wide co-operation, for close and constructive interaction among the majority of States, on the basis of the principle of full equality of rights, respect for the sovereignty of others and fulfilment in good faith of obligations entered into under the rules of international law. International co-operation opened up new prospects for mankind, imparting a civilized character to inter-State relations and filling in the gaps

in treaties. The principle of co-operation had been confirmed, for example, by the General Assembly in the 1970 Declaration on Friendly Relations and Co-operation among States.[9] Its substance differed acording to the particular field of international relations involved, and its scope depended on the state of the political relations between the States directly concerned. Since the principle of co-operation affected all States and all areas of international relations, the obligation to co-operate was necessary under the current legal system without regard to differences in political, economic and social systems. Clearly, co-operation should satisfy national interests and international interests, whether in bilateral, regional or world-wide relations.

17. Consequently, co-operation should figure in the draft articles as a general principle that created general obligations. A broad conceptual interpretation of the moral, political and legal effects of co-operation determined the place for the principle in the draft. It should be ranked equally with all the other fundamental principles of international law therein. It entailed respect for the rights of States, and hence their permanent sovereignty over their natural resources. Those principles did not appear to be properly reflected in the articles under discussion, for the principle of co-operation concerned the entire draft, not only chapter III. But it should not lose its value when it was moved to another chapter: if the principle was to be effective and practical, it should be enunciated in such a way as to specify both the subject and the objective of co-operation, namely the optimum utilization of international watercourses, including the economical management of reserves and their preservation for future generations.

18. International juridical practice was rich in methods for the practical application of the principle of co-operation. The methods chosen would depend on the physical characteristics of the various international watercourses, the modalities of utilization and the relations between riparian States. All those factors combined could lead to different degrees of co-operation. An instrument that was to be adopted by States and was to be effective should embody the minimum of international rules that were commonly accepted, yet lead to broader co-operation.

19. On the basis of the present legal situation, the Commission should confine itself to elaborating general principles that were in the nature of recommendations. He shared the view of Mr. Calero Rodrigues (2003rd meeting), who advocated provisions that would act as a spur to co-operation but would not turn it into a straitjacket. One question in that regard was what the nature and form of the draft should be. A very wide variety of views had been expressed, and some difficulties had been left aside to be settled later. Apparently, the idea was that, if agreement could be reached on the substance, the Commission could then agree on the nature and form of the draft. It was important, however, not to forget the very close link between form and substance. A draft consisting of recommendations could include a range of options from which States could choose the solutions best suited to their circumstances. On the other hand, a very rigid draft that included peremptory provisions irrespective of the particular characteristics of individual watercourses would, in all likelihood, fail to command acceptance by States and would be "stillborn". Unfortunately, the history of the Commission was not without regrettable examples of that kind. To avoid such a turn of events, it was desirable to define the nature of the draft and settle certain fundamental issues that affected its subject and its scope.

20. As a new member of the Commission, and thus speaking since the working hypothesis had been adopted, he wished to explain his views on a number of issues. If the Commission considered the treaty practice of States, it would find that the concept of an "international watercourse system" was unfounded and ultimately encompassed all the world's waters, even the oceans and the water in the atmosphere. The advocates of that concept took the view that the "system" included not only international watercourses and their tributaries, but also lakes, canals and glaciers—all the waters linked by nature. Obviously, the subject of the draft should be defined by a valid scientific term; but the concept of an international watercourse system was so wide-ranging that it brought into question the very possibility of progressive development of international law in that field. The system concept could be applied to almost all the waters of a large number of small and medium-sized States, which would mean that those water resources should be endowed with international legal status. Indeed, according to that concept, all States that had any kind of link, however tenuous, with a watercourse system could take part in regulating it.

21. State practice could not justify that approach. There was no strict scientific definition of a watercourse system, or even of a watercourse. In considering the draft articles submitted, the Commission had to bear in mind the scope of international legal arrangements encompassing utilization, management and regulation. Under the working hypothesis, a State would lose the power and the right to dispose of its own water resources. The idea of a "shared natural resource", as applied to watercourse uses, was out of place; the point was not to share the waters, but to enable States to use international watercourses within their own territory. Obviously, the concept underlying the working hypothesis was incompatible with the principle of the permanent sovereignty of States over their natural resources, as a number of members had already pointed out.

22. That kind of contradiction also affected the attempt to replace the concept of a shared natural resource by that of shared use. Although use itself could obviously not be shared, it was possible to participate in the utilization of the waters on the basis of agreements that took account of State sovereignty. He could not agree that the shared natural resource concept was the sole basis for preventing harm to other riparian States. The crucial point was the principle of co-operation between sovereign States, and only if it accepted that principle unreservedly could the Commission eliminate the contradictions contained in the draft.

[9] See 2003rd meeting, footnote 5.

23. The arbitral award in the *Lake Lanoux* case had stated that the question as to who was to determine the reasonable and equitable utilization of a watercourse and the modalities thereof was a matter of national sovereignty. Moreover, he was entirely against the presumption of culpability of States set forth in draft article 8. There again, the same arbitral award had confirmed the presumption of good faith by stating: "it is a well-established general principle of law that bad faith is not presumed". Stating the issue in a clearly unjustified manner would not encourage co-operation between States. Indeed, if the criteria for reasonable and equitable utilization were interpreted in the broad sense, if the subject of the draft was an international watercourse system, and if the Commission did not place a limit on the modalities of implementation, States might well turn against one another. Lastly, the notion of "appreciable harm" was imprecise and could be a source of disputes and conflicts, for it was not known who would determine whether harm was appreciable and what methods would be used to make such a determination.

24. Mr. PAWLAK said that the particular value of the Special Rapporteur's third report (A/CN.4/406 and Add.1 and 2) lay in the commendable effort to find correct formulations for the articles concerning the general principles of co-operation and notification. As pointed out by the Special Rapporteur himself:

> ... the rule of equitable utilization would mean little in the absence of procedures at least permitting States to determine in advance whether their actions would violate it. (*Ibid.*, para. 40.)

25. The present topic was very complex and sensitive and touched the vital interests of many States, large and small alike. For all of them, fresh water supply, fisheries, pollution control and water as a source of energy were extremely important issues. There could be no doubt that the international community as a whole needed, and awaited, some guidance in the matter from the United Nations and its International Law Commission. The time had therefore come to attempt to codify rules of international law on the subject, on the basis of many international conventions, court decisions and studies by learned bodies, as well as important resolutions of various organizations. It had to be remembered that some two thirds of the 200 international watercourses in the world were not governed by agreements between the riparian States.

26. The difficulty of codifying the topic was due to the great variety of non-navigational uses of watercourses and even more to the sensitivity of States with regard to their sovereignty. Many States viewed the Commission's current exercise with some suspicion. That was why the crucial definition constituting the basis for the draft articles had been changed four times and the Commission had not yet resolved many important theoretical issues. Accordingly, the success of the Commission's endeavours depended not only on the skill of its members and their dedication to fulfilling the current task, but also on a clear view of the direction of the work and of the limitations that would be encountered.

27. The work should be directed along three main lines. The first was to continue the approach of preparing a "framework" legal instrument or agreement consisting of general principles and rules to govern the non-navigational uses of international watercourses in the absence of bilateral or multilateral regional agreements. For that purpose, the Commission should first determine the existing substantive rules of conduct for States and then elaborate future substantive rules of conduct to be used by States when they came to conclude agreements.

28. Secondly, the draft articles should constitute not a draft multilateral convention, but rather a set of general principles and rules providing general guidelines that the States concerned could use and adapt in specific agreements relating to particular watercourses.

29. Thirdly, the draft could not realistically be expected to solve all the problems relating to the topic. It could only provide general guidelines and offer riparian States an important international instrument that would facilitate both co-operation and the negotiation of future agreements. The problems existing in different regions as a result of local geographical, economic, hydrologic and historical conditions could be solved solely through bilateral or regional agreements.

30. In the light of those directions, the draft should necessarily include a general rule on the subject of co-operation in relations between States concerning watercourses. The Special Rapporteur, on the basis of a wealth of international agreements and other legal sources, had arrived at the conclusion that there was "broad recognition of the obligation of States to co-operate in their relations in respect of common natural resources in general, and international watercourses in particular" (*ibid.*, para. 59). The Special Rapporteur also pointed out that the obligation to co-operate arose from the need to achieve optimum development and allocation of international fresh water resources.

31. Generally speaking, he agreed with the Special Rapporteur in that regard; but draft article 10, relating as it did to the obligation to co-operate, was out of place in chapter III of the draft, which contained procedural provisions. The article should be viewed more broadly as a rule of conduct for States. It was therefore wise to propose its transfer to chapter II.

32. The content and formulation of article 10 should be made to reflect more accurately the general character of its subject-matter and, at the same time, the reference to "good faith" introduced by the Special Rapporteur should be retained. Account should also be taken of Mr. Barsegov's point regarding the legal background to international co-operation among sovereign States and the recognition of the sovereign rights of States over their watercourses.

33. The Special Rapporteur had rightly affirmed that "good faith" and "good-neighbourliness" were the formulation of the duty to co-operate. Consequently, he agreed with the arguments advanced by Mr. Ogiso and Mr. Koroma (2003rd meeting) in support of a reference in article 10 to the principle of good-neighbourliness. The Drafting Committee could endeavour to incorporate it properly in the text.

34. He tended to concur with Mr. Roucounas that article 10 should specify the exact fields of co-operation involved. In that connection, he cited the 1964 Agree-

ment between Poland and the USSR concerning the use of water resources in frontier waters (A/CN.4/406 and Add.1 and 2, para. 44), article 3 of which referred to the various areas of co-operation, such as the economic and scientific fields. Another international instrument which specified areas of co-operation was the 1962 Convention between France and Switzerland concerning protection of the waters of Lake Geneva against pollution (*ibid.*, para. 45).

35. In conclusion, he suggested that article 10 should be referred to the Drafting Committee with the recommendation that it be transferred to chapter II. An attempt could then be made to formulate cautiously the general duty of States to co-operate in the utilization of international watercourses, as an essential basis for the smooth functioning of international co-operation to achieve and maintain equitable uses and benefits.

36. Mr. THIAM warmly congratulated the Special Rapporteur on his outstanding third report (A/CN.4/406 and Add.1 and 2), which called for but few comments, mainly in regard to form.

37. In the matter of form, the title of chapter III of the draft referred to general principles of co-operation and also to rules of procedure, which the Special Rapporteur considered as being linked with the topic. Perhaps it would be better to separate the two aspects, especially as the principles set forth in the draft were fundamental principles. Moreover, the title of chapter III spoke of "principles" in the plural, but enunciated only one, namely the principle of co-operation.

38. In the matter of substance, draft article 10 said that "States shall co-operate in good faith . . ."; but he wondered about the meaning of the verb "co-operate", which often had a political content. In the resolutions of the General Assembly, the word was used chiefly in general declarations and in the preambular parts. Admittedly the language of politics lent itself to a lack of precision, something that was even necessary from time to time, but the Commission was dealing with law, a delicate field in which it was essental to have a proper grasp of what "co-operation" meant. To co-operate meant acting together in order to achieve a particular aim, yet co-operation was also shaped by its form. In terms of form, State co-operation could range from a mere exchange of data or technical information to the establishment of joint co-ordination, even decision-making, institutions.

39. The Special Rapporteur described the institutions of the Organization for the Development of the Senegal River as supranational (*ibid.*, para. 27). They were not in fact entirely supranational, for decisions were taken unanimously, but it was none the less a highly integrated intergovernmental organization in which the States concerned acted in concert by partly renouncing their sovereignty. Once they were adopted, the decisions were binding on all member States. Unlike that unique system of truly integrated co-operation, the treaty régime covering the River Niger simply provided for a co-ordinating body with no decision-making power, such power being reserved for the seven States through which the river flowed.

40. The Special Rapporteur, for his part, was proposing a still more flexible form of co-operation, which would be confined to a bilateral exchange of data, information, etc., with strict respect for State sovereignty. The content of all co-operation differed, but the Special Rapporteur spoke of co-operation without indicating either its degree or its form. A scrutiny of the meaning of the expression "general obligation to co-operate" raised the problem of State sovereignty, one that was encountered in all subjects of international law. In other words, the topic under consideration was caught between State sovereignty, on the one hand, and a growing need for international co-operation, particularly in the utilization of watercourses, on the other. Hence the question: did a general obligation to co-operate exist in the present case?

41. He had examined many international treaties, more particularly in regard to watercourses, and nowhere had he found a general legal obligation to co-operate. True, co-operation was encouraged as a definite vital need, but so far no international legal instrument specified that it constituted a legal obligation. Even the declaration on rights and duties of States was founded more on respect for sovereignty and good-neighbourliness than on an obligation to co-operate. It had to be recognized that co-operation was not an obligation, but that it was bound up with policy considerations, with the environment. Co-operation was possible once States established relations of mutual confidence, respect and good-neighbourliness. Moreover, to a greater extent, it was important for policies to concur. In most international organizations, co-operation stemmed from the harmonization of general concepts and policies. Accordingly, he had come to the conclusion that no legal obligation to co-operate existed as yet. Some people would maintain that that was *lex lata* and that the Commission should proceed *de lege ferenda*. In any event, an extremely flexible solution was essential.

42. To reconcile the various positions, the Special Rapporteur could well assign a chapter of the draft to the various forms of co-operation. States would then be free to choose the one that suited them and a single rigid framework would be avoided. In the case of the Organization for the Development of the Senegal River, he would point out that three States, namely Senegal, Mali and Mauritania, had encountered a special need to co-operate, unlike Guinea, the upstream State in which the source of the river was located. It had not proved possible to compel Guinea to co-operate and three States had therefore established an organization, allowing the fourth State the fullest opportunity to join when it so wished. Consequently, he was in favour of a flexible solution, as advocated from the outset by many members of the Commission when they had spoken of a framework agreement, under which each State would be able to act in keeping with its needs. To employ a gastronomic image, an *à la carte* menu was preferable to a set menu.

43. Some members had argued that an integrated form of co-operation would not come under international law, yet he wished to emphasize that not only States, but unions of States did fall under international law. The question therefore was to determine whether the Com-

mission should contemplate forms of integration or whether, after finding that they ran counter to State sovereignty, it would envisage much more flexible procedures, confined to the exchange of data, and so on. The draft articles should take all those aspects into account, for which reason it would be useful to have a chapter setting out the various forms of co-operation and the various choices possible.

44. Mr. GRAEFRATH commended the Special Rapporteur for his learned third report (A/CN.4/406 and Add.1 and 2) and his clear introduction. The topic had been in the Commission's programme of work for more than 15 years and the Commission now had before it a wealth of material, including the substantive comments made in the Sixth Committee of the General Assembly. He therefore appreciated the Special Rapporteur's efforts to take all those factors into consideration in his report.

45. The codification of the rules of the non-navigational uses of international watercourses had proved rather difficult because relatively few rules had commanded general recognition, the international practice of States being reflected for the most part in bilateral agreements relating mainly to specific uses. Hence it was not surprising that some of the basic questions raised in the draft had not been answered so far. It was difficult to draw up rules on the more detailed issues when the fundamental concepts and purposes of the work had not been formulated. It was therefore important to bear in mind that the whole project was designed to facilitate co-operation between sovereign States in an area of common interest which also involved the delicate matter of territorial sovereignty.

46. In his second report (A/CN.4/399 and Add.1 and 2, para. 13), the Special Rapporteur had stated that the framework agreement approach seemed to be broadly acceptable to the Commission, and that Mr. Evensen, like Mr. Schwebel, had believed that, in the absence of an agreement among the States concerned, the Commission's aim should be to lay down the general principles and rules governing international watercourses. It was apparent from the debate in the Sixth Committee, however, that the concept of a framework agreement was open to widely differing interpretations. For instance, a framework agreement had been variously understood as an instrument that laid down general principles regarding the rights and duties of States; an instrument that served as the basis for the conclusion of bilateral or regional agreements; an instrument that set forth general guidelines to facilitate co-operation and the negotiation of specific agreements; an instrument limited to projects, principles and general guidelines; and an instrument providing recommendations and guidelines not for a convention, but leaving the conclusion of agreements to the parties concerned. Only a few representatives in the Sixth Committee had regarded a framework agreement as a means of determining residual rules that were binding on States.

47. Yet the draft was based on the assumption that, where no specific agreement existed, the rules it set forth constituted binding law, something which was clear from articles 2, 4 and 8 and also from the Special Rapporteur's second report. Given the views expressed in the Sixth Committee, the idea underlying the draft seemed somewhat narrow and could hinder the Commission's efforts to pay more attention to guidelines for co-operation between the States concerned. He would point out in that connection that ECE had adopted principles regarding co-operation in the field of transboundary waters[10] that concentrated on facilitating the conclusion of co-operation agreements between riparian States and took account of the special geographical situation and needs of the States concerned. In his view, it would be a mistake to seek to distil rules from certain exceptional and all-encompassing watercourse system agreements in the belief that other States, in very different situations, would or could accept those rules.

48. Moreover, he was not convinced that valid results would be achieved if efforts were based on the assumption that general uniform rules could or should be derived from the hydrologic and geographical system. The transformation of a natural system into a system of legal rules was by no means a logical or automatic process. Rather, it depended on a political decision by the States concerned, one which necessarily involved many other important aspects and could not, therefore, be taken for granted. In reality, it was much easier for States to agree to specific uses, procedures and rules on a step-by-step basis. That was even confirmed by the title of the present topic, which did not refer to one of the main uses of international watercourses, namely navigational uses, on which certain rules already existed. Most of the agreements on other uses which had been cited concerned specific uses and particular watercourses or parts of watercourses. All the general drafts formulated by scientific organizations were projects, not legal rules or a reflection of State practice—an important point that should not be ignored. Hence the emphasis on an all-encompassing instrument covering an entire watercourse system would make it difficult to conclude a meaningful framework agreement.

49. The close interrelationship between the form, general scope and purpose of the draft explained the continuing preoccupation with such expressions as watercourse, watercourse system, equitable utilization, equitable share and shared resources. Yet the question was not so much one of terminology as of different approaches and concepts. Hydrologists necessarily had to treat a watercourse as a drainage system, whereas States were not obliged to do so. A framework concept which was designed to be universally applicable had to be founded on broad principles and recommendations that would facilitate the conclusion of specific watercourse agreements, since that was the means by which sovereign States co-operated. It should be left to the States concerned to determine which waters should be covered by the framework instrument. Such an approach would preclude the need to work on the hypothesis that the rules of the framework agreement would apply if nothing more specific was agreed.

50. It was interesting that the ECE principles, which were based on the assumption that transboundary

[10] Decision I (42) of 10 April 1987 (*Official Records of the Economic and Social Council, 1987, Supplement No. 13* (E/1987/33-E/ECE/1148), chap. IV).

waters required co-operation between riparian countries, did not seek to impose rules on watercourse system States, but instead encouraged States to define the waters to which their treaties should apply. In that way, the rules governing a particular watercourse were bound to be the result of an agreement between the States concerned. It made no sense to juxtapose absolute sovereignty, as expressed in the Harmon Doctrine, and the principle of shared resources, which did not take sufficient account of the sovereign rights of States. A realistic approach could be based only on the fact that every State had a sovereign right to use its own water resources in keeping with its national policy, and must, in a spirit of co-operation, take account of the rights of other watercourse States.

51. International co-operation under modern international law, as defined in the 1970 Declaration on Friendly Relations and Co-operation among States,[11] was not only a legal principle in itself, but also a necessary element of the principle of the sovereign equality of States. Equitable utilization of international watercourses and participation in such utilization by several States were not based on any abstract principle but on sovereign equality and agreed policies which allowed for optimum utilization and concerted action to improve the quality of the water, to protect and develop watercourses and to safeguard against accidents. The principles of sovereign equality and peaceful co-operation were the bedrock on which the doctrine and practice of equitable utilization rested. In that connection, he basically agreed with the view expressed by the Special Rapporteur in his second report (*ibid.*, para. 190) that the need for adjustments implicit in the principle of equitable utilization could best be provided for in specific agreements tailored to take account of the unique characteristics of the individual States and watercourses concerned.

52. Co-operation was very much at the heart of the topic and he therefore welcomed the Special Rapporteur's proposal for a separate article defining the duty to co-operate. Further elaboration was none the less required, since co-operation was not simply a lofty principle, but a legal duty. The fact that States were free to determine the modalities of their co-operation did not divest the principle of its legal content. As he understood it, the principle could comprise obligations of conduct and obligations of result that would depend entirely on the content given to the principle by the State concerned. In his second report (*ibid.*, para. 191), the Special Raporteur had in a sense created the obligation to co-operate as a rule for implementing the principle of equitable utilization, inasmuch as the equitable utilization of a watercourse and the participation of watercourse States in the uses and benefits of a watercourse would result from fruitful co-operation between watercourse States.

53. However, in his third report (A/CN.4/406 and Add.1 and 2), the Special Rapporteur treated the duty to co-operate more or less as the basis for procedural rules and thereby unnecessarily narrowed that duty. Article 10 as proposed by Mr. Evensen had not been confined to notification and consultation on new uses; it had referred to uses, projects, programmes, planning and developments. Moreover, it was clear from a number of agreements, including the 1983 co-operation agreement between the United States of America and Mexico (*ibid.*, para. 46) and the 1964 Agreement between Poland and the USSR, mentioned by Mr. Pawlak, that the field of co-operation was much broader than that envisaged in draft articles 10 to 15. It could, for example, cover the important field of research, and also exchange of data, development plans and programmes, protection against accidents, joint commissions and warning systems. In particular, a framework agreement could offer guidelines for the broadest possible co-operation and should not be limited to procedural rules. The thrust of the draft should therefore be directed at the use and protection of international watercourses, and not at the establishment of procedures to govern new uses. Accordingly, the provision relating to co-operation should have a central place in the draft.

54. Draft article 10 should certainly refer to some of the legal principles that were essential for fruitful co-operation. There were a number of possibilities. The ECE principles, for example, referred to co-operation on the basis of reciprocity, good faith and good-neighbourliness. Article 10 as proposed by Mr. Evensen had referred to the principles of equality, sovereignty and territorial integrity. The 1983 Agreement between Mexico and the United States mentioned the principles of equality, reciprocity and mutual benefit. The decision in the *Lake Lanoux* case had been firmly rooted in the sovereignty of the State concerned. All those principles had been invoked as a basis for the duty to co-operate, a duty that should be clearly determined within the framework of the fundamental principles of modern international law and of the sovereign equality of States.

55. Mr. McCAFFREY (Special Rapporteur) said that, for the reasons already stated by other members, he agreed that the proper place for article 10 was in chapter II of the draft, which dealt with general principles, rather than in chapter III. Mr. Evensen, however, had placed article 10 in chapter III, and he himself had left it there.

56. The use of the word "principles", in the plural, in the title of chapter III did not signify that he intended to propose additional principles. It had been employed merely to cover notification and the provision of data and information, but did not preclude the possibility of a chapter on the modalities of co-operation. The matter would require further thought and a decision could perhaps be deferred until there was a clearer idea of what the draft as a whole would involve.

57. A number of members had asked whether there was a legal duty to co-operate. His own view was that there could be such a duty, but "obligation to co-operate" was really an umbrella term which covered a number of other more specific obligations. Another question raised was how that legal obligation, if it existed, could be violated. From abundant jurisprudence in that respect it was apparent that, if a State failed to take account of the representations of another State

[11] See 2003rd meeting, footnote 5.

during the process of diplomatic negotiations, there might well be repercussions. He had in mind, in particular, the decision in the *Lake Lanoux* case and also the decisions of the ICJ on maritime delimitations and access to fisheries.

58. With regard to sovereign equality and territorial sovereignty, he had never sought to cast doubt on those principles, which lay at the very basis of international relations. Nevertheless, it was important to remember that international watercourses involved the sovereignty not just of one State, but of at least two. Just as one State had the right to use the waters within its territorial jurisdiction, so did another: the one might be affected by the other's use and had the right not to be harmed by that use. That idea was well expressed by the concept of sovereign equality.

59. The Commission's major task was the progressive development and codification of the rules of international law. Previous special rapporteurs had suggested that it might be useful to set forth guidelines and models for use by States in drawing up specific watercourse agreements; but it would be desirable to keep the two undertakings separate. The Commission should first try to agree upon the rules that had been developed and recognized by States and it could then set forth, in annexes or in a separate part of the draft, models for the regulation and management of international watercourses. It could profit greatly from the work already carried out by ECE, for example, but it should also bear in mind State practice, as reflected not only in the treaties concluded, but also in judicial decisions, the writings of noted publicists and the other sources listed in Article 38 of the Statute of the ICJ.

60. Mr. KOROMA said that he was grateful for the Special Rapporteur's willingness to transfer article 10, on the obligation to co-operate, to chapter II of the draft, relating to general principles. However, the Special Rapporteur had doubtless had good reasons for placing the article in chapter III, one of them possibly being that he wished to vest the obligation with an enforceable element.

61. Mr. THIAM said that, in affirming that the obligation to co-operate had no legal foundation, it had not been his intention to say that no attempt should be made to establish such an obligation *de lege ferenda*. He, too, favoured the progressive development of international law and understood that the Special Rapporteur was endeavouring to propose a text for co-operation between States. The Commission should none the less be cautious in its approach. At a later stage in its work, it would be able to see how the obligation should be formulated.

The meeting rose at 1 p.m.

2007th MEETING

Tuesday, 2 June 1987, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Thiam, Mr. Tomuschat.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/399 and Add.1 and 2,[1] A/CN.4/406 and Add.1 and 2,[2] A/CN.4/L.410, sect. G)

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CHAPTER III OF THE DRAFT:[3]

ARTICLE 10 (General obligation to co-operate)[4] (*continued*)

1. The CHAIRMAN extended a warm welcome to the participants in the International Law Seminar, who had come to attend the Commission's meeting, and expressed the hope that they would have a fruitful stay in Geneva.

2. Speaking as a member of the Commission, he congratulated the Special Rapporteur on the calibre of this third report (A/CN.4/406 and Add.1 and 2). Unfortunately, some of the terms used in the Spanish translation were not in keeping with legal terminology, at least in the Latin-American countries. For example, the word *ordenación*, for the English term "management", was not appropriate and should be replaced by *administración*, for instance.

3. He had not so far heard any legal argument to convince him that a general obligation to co-operate should be included in the draft. Indeed, the Special Rapporteur's explanations further persuaded him that, unlike draft article 10, the texts cited by the Special Rapporteur did not view co-operation as a legal obligation on the States parties. Co-operation was regarded not as a means of securing application of the provisions of the instruments in question, but as a desirable end. In Article 1 of the Charter of the United Nations, co-operation was listed as one of the purposes of the Organization, yet Article 2 enunciated the principle of the sovereign equality of all States Members, for which reason it was difficult to see how a State could be compelled to co-operate with another. Article 2 of the Charter also set forth the principle of good faith, but that was a principle that lay at the very foundation of in-

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

[2] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[3] The revised text of the outline for a draft convention, comprising 41 draft articles 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.

[4] For the text, see 2001st meeting, para. 33.