Document:-
A/CN.4/SR.2007

Summary record of the 2007th meeting

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

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

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-

---

[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.

ternational relations between sovereign States and should be presumed.

4. Again, the various international agreements cited as examples in the third report (*ibid.*, paras. 43-47) did not impose a general obligation to co-operate. Contrary to what the Special Rapporteur said, they simply provided for co-operation in specific fields such as hydroeconomics or the prevention of pollution. In all cases, the aim was to do something to achieve inter-State co-operation. It should be noted that the obligation to undertake negotiations came not under a general obligation to co-operate but under Article 33 of the Charter, relating to the peaceful settlement of disputes. As to the provisions of the Stockholm Declaration[5] which had been mentioned so many times, they too simply expressed a wish for State co-operation, more especially for the purpose of preserving the environment from pollution.

5. Thus, like other members, he considered that the obligation to co-operate was not and could not be a genuine legal rule, in other words one that created rights and duties. The only obligation that could be imposed was the obligation to respect the right of every State to equitable utilization of shared natural resources, with a view to achieving solidarity and co-operation between States.

6. Various formulations had been proposed to describe co-operation, such as "in good faith" or "in accordance with the principles of good-neighbourliness". As he had already pointed out, good faith was normally presumed; but good-neighbourly relations, as shown by the bitter experience of the Latin-American countries, were very difficult when the neighbour was a powerful State which had the means to impose its will.

7. The answer to the question as to which was the right chapter of the draft for article 10 would depend on the Commission's decision concerning the legal nature of the provision it contained. If the Commission saw co-operation as a desirable aim to ensure the harmonious management of international watercourses by riparian States, the provision should without doubt figure among the general principles. The way in which it was to be qualified, for example by using the phrase "in good faith", would not be of major importance, for co-operation would not constitute a legal rule and hence would not create rights and obligations. If, however, the Commission wished to elaborate an obligatory rule for all States parties, something which could very well prevent a large number of States from acceding to the instrument in its final form, account should be taken of Mr. Reuter's comments (2004th meeting), particularly the distinction between obligations of result and obligations of conduct, and between obligations to act and obligations not to act.

8. It would be premature to refer article 10 to the Drafting Committee until such time as the Commission had decided whether the obligation to co-operate should figure among the general principles or whether, on the contrary, it should constitute an obligatory legal rule, in which case the legal content of the notion of co-operation would first have to be defined.

9. Mr. SEPÚLVEDA GUTIÉRREZ said that the Special Rapporteur's detailed and well-documented third report (A/CN.4/406 and Add.1 and 2) showed all too clearly the complexity of the topic, which was due both to the technical, political, economic, legal, ecological and other interests involved and to the natural diversity of international watercourses. An examination of the ways in which international problems connected with watercourse systems had been solved in practice, and the realization of how difficult it was to find generally applicable solutions, revealed the full measure of the task facing the Commission. As Mr. Shi (2004th meeting) had rightly said, it was a task that related more to progressive development of the law than to codification. The Special Rapporteur should not feel discouraged by adverse comments and differences of approach, for his efforts were fully recognized by the Commission, which should move ahead slowly but surely in its difficult task.

10. He would confine himself to a few observations, for Mr. Yankov and Mr. Calero Rodrigues (2003rd meeting) had already made a perceptive and detailed analysis of draft article 10. The general obligation to co-operate was a new concept emerging in the elaboration of legal rules applicable to international watercourses and it should therefore be received with some caution, since it involved new types of action and also the requirement to refrain from taking action. In view of its major importance, article 10 called for an in-depth examination that would be difficult to complete in the time available; perhaps it would not prove possible to put the article into final form until the next session, by which time the Commission would have the advantage of the views of States on the matter. In addition, it would be advisable to transfer the article to the chapter on basic principles, for co-operation was a general principle and logically belonged among the provisions setting forth specific obligations.

11. As to the legal nature of international co-operation, neither doctrine nor practice had succeeded in properly defining the dividing line between a legal rule and a legal principle. The question had arisen, for example, in connection with non-intervention, which was, in his opinion, a guiding principle, and hence a source of related principles, but at the same time a rule of conduct. To ensure that the rule was respected, it had been included in various basic instruments, such as the Charter of OAS, the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty[6] and the 1970 Declaration on Friendly Relations and Co-operation among States.[7] Hence co-operation could be translated into tangible duties, and the general obligation to co-operate was an emerging rule that materialized, for instance, in situations in which a dispute had to be settled in good faith. The rules of co-operation were inherent in relations between the riparian States of an international watercourse, but they had not always been

[5] See 2002nd meeting, footnote 10.

[6] General Assembly resolution 2131 (XX) of 21 December 1965.

[7] See 2003rd meeting, footnote 5.

manifested, sometimes because relations in that field were infrequent.

12. Co-operation in matters pertaining to shared rivers had its own dynamics: once co-operation was initiated, it developed, moved ahead and grew richer in substance. For example, co-operation between Mexico and the United States of America had steadily increased since the end of the last century. Initially a timid attempt to rectify certain parts of the Rio Bravo (Rio Grande), co-operation between the two countries had grown closer, with the establishment, for example, of the International Boundary and Water Commission and then the settlement of the Chamizal question. A number of treaties had been concluded, including the important 1944 Treaty on the utilization of the waters of the Rio Bravo and the Colorado River,[8] thanks to the endeavours of President Hoover and despite the opposition of seven federated states of the United States, and the 1983 Agreement on Co-operation for the Protection and Improvement of the Environment in the Border Area, mentioned by the Special Rapporteur (A/CN.4/406 and Add.1 and 2, para. 46). Some problems remained to be solved and both countries would still have to display the same will to co-operate. However, with such an example of progressive co-operation, he could not fail to endorse the point made by Mr. Calero Rodrigues (2003rd meeting) that the role of article 10 was to urge States to co-operate or to stimulate co-operation when it already existed.

13. The principle of co-operation should be given the same rank as the other principles enunciated in chapter II of the draft and should not, as was now the case, be placed above them—something which had perhaps led to some suspicion. The title of article 10 was too ambitious. It should be reduced to the necessary limits, although the provision should not, in the process, lose its character as a principle. Moreover, the content was too vague, for it failed to indicate the meaning to be attached to the words "other concerned States". The expression "in the fulfilment of their respective obligations" was also unsuitable, because nothing was known about the nature and scope of the obligations in question. Provisions could be added on the possible forms of co-operation between States, provisions necessarily tied in with optimum utilization, equitable participation and maximum benefits, so as to avoid any misinterpretation of the principle of co-operation. Perhaps an attempt should also be made to take into account the particular features of various watercourses in order to determine as far as possible the potential forms of co-operation. The difficulties varied, depending on the practical aims and the States involved.

14. It would be preferable not to prolong unduly the debate on the concept of co-operation, which still needed further examination, but to move ahead with the wording of articles 1 to 9 of the draft, which would then facilitate the drafting of article 10. He was grateful to the Special Rapporteur for including the concept of co-operation in the draft. The Commission would naturally have to move in new directions and, in so doing, sometimes have to take risks in order to engage in constructive work. Article 10, in its final form, should exercise a powerful influence on real co-operation.

15. Mr. KOROMA said that the need for rational management of the water resources of the planet could not be over-emphasized. An estimated one half of the population of the world did not have an adequate supply of clean water, and very many people did not have easy access to drinking-water. Moreover, according to WHO, 80 per cent of the world's diseases were directly linked to water.

16. A watercourse was a component part of the territory of the State through which it flowed, and the State exercised full sovereignty and jurisdiction over the watercourse. Some watercourses, however, flowed through more than one State and could affect the interests of other States as well, which explained the need for a régime to regulate their use. The best way of resolving the competing interests of the modern world lay in co-operation agreements, and accordingly the Special Rapporteur had proposed devoting an article to the principle of co-operation. Support for that principle was to be found not only in the Charter of the United Nations, but also in the 1970 Declaration on Friendly Relations and Co-operation among States,[9] in the Charter of Economic Rights and Duties of States[10] and in several articles of the 1982 United Nations Convention on the Law of the Sea concerning the preservation of the marine environment and the prevention of pollution. The principle of international co-operation was further recognized in a number of international treaties concerning watercourses, such as the two treaties which made up the River Niger régime, namely the Act regarding navigation and economic co-operation between the States of the Niger Basin, concluded at Niamey in 1963,[11] and the Agreement concerning the Niger River Commission and the navigation and transport on the River Niger, signed at Niamey in 1964,[12] under articles 4 and 12 of which, respectively, riparian States were required to establish close co-operation in the study and execution of any project likely to have an appreciable effect on the river. Similar provisions were to be found in the statutes governing the development of the Chad Basin.

17. The principle was also set forth in a number of other river agreements between African States, as well as in the 1968 African Convention on the Conservation of Nature and Natural Resources.[13] Non-governmental organizations had studied the matter in depth; the International Law Association and the Asian-African Legal Consultative Committee, for example, had decided to support the principle of international co-operation in the development and utilization of international watercourses.

18. Some river agreements, on the other hand, made no reference to the principle of co-operation, but it was none the less possible to discern that the principle was an accepted norm, at least as far as the use of inter-

[8] United Nations, *Treaty Series*, vol. 3, p. 313.

[9] See 2003rd meeting, footnote 5.

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

[11] United Nations, *Treaty Series*, vol. 587, p. 9.

[12] *Ibid.*, p. 19.

[13] *Ibid.*, vol. 1001, p. 3.

national watercourses was concerned. An *opinio juris* also emerged from the examples he had cited, in particular from multilateral and bilateral treaties, international declarations and State practice. If, therefore, the Commission wished to show that the principle of co-operation existed as an autonomous principle, it should look to customary international law for support. Furthermore, under its mandate as laid down by General Assembly resolution 2669 (XXV), the Commission was required to examine the law of the non-navigational uses of international watercourses with a view to its progressive development and codification. Accordingly, draft article 10 could be regarded either as a synthesis of the progressive development and codification of international law, or as an attempt to develop the law as reflected in existing State practice and international legislation and doctrine.

19. The Special Rapporteur had attempted to couch the duty to co-operate in draft article 10 in legal language, so as to make it binding in character. The validity of the definition had rightly been queried, although all definitions, in his view, were by nature an exercise in semantics. The sole test of any definition was how useful the definition was in explaining a given mode of conduct. On that basis, article 10 could be said to have captured contemporary practice, at least in part.

20. The duty to co-operate, as set out in article 10, should be construed in accordance with the basic principles of international law, namely sovereignty and the sovereign equality of States and respect for the territorial sovereignty and integrity of the States concerned. It would also be appropriate for the article to refer to good faith as a principle, since the duty to co-operate stemmed from the obligation of a party to a treaty to refrain in good faith from acting in a way that would seriously hamper achievement of the purposes of the treaty. It was true that the principle of good faith was generally implicit in modern agreements and did not have to be spelt out. Given the nature of the topic under consideration, however, and the fact that the aim was to achieve a framework agreement, it would be preferable to make an express reference to the principle.

21. He agreed that article 10 should be transferred to chapter II of the draft, relating to general principles, although it had perhaps originally been included in chapter III in order to provide a framework for the principle and to make the duty of co-operation enforceable. He would none the less suggest the inclusion in chapter III of a provision similar to article 12 of the 1964 Niamey Agreement, under which riparian States were required to inform the Niger River Commission at the earliest stage of all studies and works upon which they proposed to embark, in order to achieve maximum co-operation in the study and execution of projects.

22. He endorsed the suggestion that reference should be made in article 10 to the purpose of co-operation, namely equitable utilization of the watercourse. The duty to co-operate as it applied to international watercourses was predicated on the principle of equitable utilization, which had a firmer basis than did the principle of good-neighbourliness. Equitable utilization recognized not only the principle of the sovereign equality of States, but also the need for close co-operation between States, which was often the only way of ensuring acquisition of benefits through joint exploitation, while taking account of the specific geographical, hydrological, economic and social conditions of a particular watercourse.

23. Mr. NJENGA expressed gratitude to the Special Rapporteur for his scholarly third report (A/CN.4/406 and Add.1 and 2) and carefully considered draft articles, which would provide the basis for concrete proposals from the Commission.

24. The first question that arose was whether draft article 10 constituted the codification of a generally accepted norm of international law or the progressive development of a desirable principle of law concerning a resource which could be equitably used only if the States involved worked together for their mutual benefit. The Special Rapporteur seemed to opt for the first alternative and to consider that there was already a normative principle of co-operation which riparian States were bound to observe in their relations with one another. That was borne out by the reference in his third report to 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).

25. As was apparent from the debate, however, the existence of such an obligation was far from established. What did emerge clearly from the examples given by the Special Rapporteur was that the point of departure for such co-operation was the sovereignty of each State over its natural resources, including the waters within its territory, and the resulting duty not to use those resources in a manner that would harm the interests of other States. It was plain from the provisions of the Delaware River Basin Compact (*ibid.*, paras. 13 *et seq.*), for instance, that the aim was not to impose stringent obligations but to provide for co-operation to the mutual benefit of all the basin States. The 1972 Convention relating to the status of the Senegal River, between Mali, Mauritania and Senegal (*ibid.*, paras. 21 *et seq.*), provided another example of voluntary co-operation for mutual benefit at the international level: it had created the Organization for the Development of the Senegal River, which had very broad responsibility for the elaboration of general policy concerning the management and development of the Senegal River. The key to the success of that agreement was not, in his view, the obligation to co-operate, but recognition of the need to co-operate and also recognition of the sovereignty of the neighbouring States over the resources within their territories. All the decisions of the Council, which was the Organization's decision-making body, were taken by unanimous vote.

26. Similar agreements had been concluded by the States of the Niger Basin, the Gambia Basin, the Lake Chad Basin and the Mano River Basin. The Agreement for the Establishment of the Organization for the Management and Development of the Kagera River Basin,[14] signed in 1977 by the riparian States, Burundi,

[14] *Ibid.*, vol. 1089, p. 165.

Rwanda and the United Republic of Tanzania, and subsequently acceded to by Uganda, was not only regulatory but development-oriented and it empowered the governing body to assume obligations with international institutions and with other Governments for technical assistance and financing. It had thus been largely possible in Africa, with its common objectives and common development problems, to advance the principle of co-operation further than in any other region, on the basis of voluntary co-operation and in full respect for the territorial sovereignty of all riparian States.

27. His point was further illustrated by the failure to establish a similar commission to regulate the longest river in the world, the Nile. Of the eight riparian States, Zaire, Rwanda, Burundi, Uganda, Kenya, Ethiopia, Sudan and Egypt, six contributed to the waters of the Nile in differing shares but two, Sudan and Egypt, merely consumed the water resources. Paradoxically, in the period from 1891 to 1959, when the Agreement between the United Arab Republic and Sudan for the full utilization of the Nile waters[15] had been concluded, only the interests of those two States seemed to have counted, to the exclusion of those of all other riparian States, by virtue of the principle of acquired rights. A series of treaties had been concluded between the United Kingdom and certain other countries with the aim of preventing any modification of the flow of water into the Nile. Under the Nile waters agreement concluded between the United Kingdom and Egypt in 1929,[16] Sudan and the then British dependencies upstream had had to secure the prior agreement of Egypt before undertaking any irrigation works for the purposes of power generation. That agreement had in fact been cited by the Special Rapporteur in his second report (A/CN.4/399 and Add.1 and 2, para. 92) to justify the theory of limited sovereignty or equitable utilization. Under the agreement, Egypt was recognized as having "natural and historical rights" to waters to which it did not contribute and to the exclusion of most of the upper riparian States then under British domination. It was little wonder that all the States affected by the 1929 Nile waters agreement had denounced it when they had attained independence. In his opinion, any reliance on that agreement or on the earlier agreements concerning the Nile as a basis for a normative obligation to co-operate rested on very uncertain ground.

28. Like Mr. Reuter (2004th meeting), who had given a very persuasive analysis of the limitations of the *Lake Lanoux* arbitration, he was convinced that the only obligation with regard to co-operation to be inferred from State practice and case-law was a general obligation of conduct and not an obligation of result. Such co-operation was based on the principles of good-neighbourly relations, in particular as spelt out in the 1970 Declaration on Friendly Relations and Co-operation among States,[17] which took account of the sovereign equality of States. Also, as recognized in recommendation 90 of the Mar del Plata Action Plan,[18] Principle 21 of the Stockholm Declaration[19] was highly relevant, for under the terms of that principle States had the sovereign right to exploit their own resources and, at the same time, the responsibility to ensure that activities within their jurisdiction or control did not cause damage to the environment of other States. There were also a number of articles in the 1982 United Nations Convention on the Law of the Sea that were pertinent in that regard.

29. Draft article 10 would impose a mandatory obligation to co-operate and to achieve certain results, which was totally unrealistic. The most that could be hoped for was an obligation of conduct that would not give rise to State responsibility. In that connection, he also agreed that a general obligation was involved and that it should be placed in chapter II of the draft. Since the scope of co-operation was of fundamental importance, the principles of good-neighbourliness and optimum utilization of the watercourse should also be reflected in the article. While he was fully prepared to consider the alternative formulation proposed by Mr. Yankov (2003rd meeting, para. 10), he also thought that the Drafting Committee should take a closer look at paragraph 1 of article 10 as proposed by Mr. Evensen in his second report, which offered a realistic basis for meaningful co-operation among riparian States.

30. Lastly, he wished to assure the Commission that he was speaking entirely from conviction and not as a member from an upper riparian State.

31. Mr. FRANCIS said that, as a citizen of an island State, he was mainly concerned with the way in which the matter under discussion affected relations between States. With the topic of international watercourses the Commission was breaking new ground, since the only existing precedents were bilateral arrangements and multilateral instruments of a limited nature. The Commission would have to rely on those precedents, as well as on the general principles of international law, to codify and develop the law on the subject.

32. As he had already pointed out (2004th meeting), only the State in whose territory a watercourse originated had actual sovereignty over the waters of the watercourse. All other riparian States had only sovereign rights in respect of the uses of the waters. It was as well to remember that all downstream States were also in a sense upstream States, and that was true even of the State of the estuary, in other words the point at which the river entered the sea or a lake. The estuary State had a duty not to pollute the waters of the sea or lake into which the river flowed and from that point of view was thus in the position of an upstream State.

33. As to draft article 10, it was essential to start from the notion of a shared resource. The situation was one in which all riparian States had a community of interest in the uses of the waters, which called for co-operation among them, not only in management but also in other fields.

[15] *Ibid.*, vol. 453, p. 51.

[16] League of Nations, *Treaty Series*, vol. XCIII, p. 43.

[17] See 2003rd meeting, footnote 5.

[18] See *Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977* (United Nations publication, Sales No. E.77.II.A.12), p. 53, chap. I.

[19] See 2002nd meeting, footnote 10.

34. As the discussion had shown, article 10 gave rise to the delicate problem of whether there should be a substantive rule imposing an obligation to co-operate. Co-operation was, of course, a very general concept and appeared as such in many international instruments. In the present instance, however, the question of co-operation was a very sensitive one, since water was a matter of life and death for millions. Accordingly, he could accept the suggestion to transfer article 10 to chapter II of the draft, relating to general principles. The form of language used in the article, however, should be forceful, so as to make it clear that it imposed an obligation on the States concerned and that any breach of the obligation would give rise to international responsibility.

35. With regard to the question of imposing on States an obligation to co-operate, two interesting precedents could be drawn from a different area of international law. The first was the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, which had been based on a draft prepared by the Commission. Article 4 of the Convention imposed on the States parties a duty to "co-operate in the prevention of the crimes set forth in article 2", and in particular to take "all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories" and to exchange information and co-ordinate the taking of administrative and other measures to prevent those crimes. Article 5 required a State party, in the event of the flight of the alleged offender from its territory, to "communicate to all other States concerned . . . all the pertinent facts regarding the crime committed and all available information regarding the identity of the alleged offender".

36. The second example was the 1979 International Convention against the Taking of Hostages, article 4 of which contained identical provisions to those in article 4 of the 1973 Convention which he had just cited. Those two examples illustrated the need to draw information from all sources in the preparation of the draft articles on the present topic.

37. Mr. ARANGIO-RUIZ said that the many interesting statements made during the discussion had provided much food for thought. It was also gratifying that the Special Rapporteur gave tentative replies in advance of his final summing-up, a new method of work that was a very positive feature. Members of the Commission, unlike representatives in the Sixth Committee of the General Assembly, should be able to change their minds under each other's influence, even in the course of a session.

38. The first point he wished to touch on was the impact of the question of sovereignty on the present topic. It had been said that the primary consideration must necessarily be the sovereignty of each riparian State over its part of the watercourse. It was therefore claimed that the Commission should not elaborate a régime for the non-navigational uses of watercourses on the basis of analogies drawn from régimes of waterways in national legal systems. A warning had also been issued against attempting to transform natural rules into legal rules. The concept of a watercourse or its waters as a "shared resource" had been described as a dangerous one in relations between sovereign States. The discussions in the Sixth Committee had been said to support those various postulates and the Commission had consequently been urged to be content with drafting a framework agreement. Such an agreement had to be understood not simply as a set of residual rules but perhaps as a set of broad principles, guidelines and recommendations—what was commonly known as "soft law". According to that minimalist approach, the only rules to be included in the draft would be those of equitable and reasonable utilization of the waters by watercourse States, and co-operation, the latter being understood as a principle and hence as a kind of "soft law".

39. With regard to the question of sovereignty, no one would deny that, in the case of international watercourses, the Commission was dealing with relations between sovereign States. The Wyoming State legislation and the Delaware River Basin Compact, cited by the Special Rapporteur in his third report (A/CN.4/406 and Add.1 and 2, paras. 11 *et seq.*), did not of course come under that heading, and he agreed with those who criticized the use of the federal analogy in international law. As he saw it, the Special Rapporteur had mentioned those two examples from the United States of America simply to show how state and federal legal systems were dealing with the exigencies of watercourse utilization and management under a multiplicity of "jurisdictions", a multiplicity that should not lead one to ignore the natural, technical, social and economic unity which characterized a watercourse or a watercourse system.

40. Naturally, the situation was radically different when the multiple jurisdictions were not co-ordinated and integrated within the fabric of a unitary or federal State, as happened in relations between sovereign States. In their case, separate, distinct and original sovereignties coexisted. At the same time, it had to be recognized that the physical characteristics of watercourses did result in a difference between the waters, on the one hand, and the other elements of the territory of neighbouring States, on the other. The problem lay in the fact that there was more than one sovereignty, for there were as many sovereignties as there were riparian States. The particular nature of water as a living thing, in perpetual movement and constant change, also had to be borne in mind, particularly in speaking without qualification of an international watercourse as a portion of the territory of a riparian State.

41. The truth of the matter was that, with respect to the waters, none of the riparian States could really claim the same total, unlimited and exclusive right as it could claim over dry land, airspace or even territorial waters in the sea. The fact called for something more than the ordinary concepts, rules and principles which applied to elements of a State's physical domain other than water. The aim should be not only to reject the erroneous Harmon Doctrine, but to try to come as close as possible to the notion of a "shared" or "common" resource, something mentioned even by such a conservative as

Secretary of State Stettinius in connection with United States-Mexican litigation over a watercourse problem.

42. His second point related to the assertion that natural law could not be transformed or transferred into legal rules. Legal rules and principles must none the less take account of physical as well as human realities. To ignore the essential features of a river's waters would be to ignore those realities, to the detriment of watercourse States and mankind as a whole.

43. Another point to be considered was the relationship between the Commission and States. As the servant of the General Assembly, the Commission was under a duty to pay regard to the wishes and attitudes of States, and it could not therefore embark on a pointless enterprise of progressive development of the law in any field. At the same time, in the interests of the United Nations and of States themselves, the Commission should not be too reluctant to make reasonably progressive suggestions whenever they seemed necessary. It should not be discouraged by the possibility that some of them would not find favour with States, which were in any event free to reject any element of progressive development of the law that did not appeal to them.

44. He fully agreed that the duty to co-operate should not be expressed in unduly general and vague terms. It was a duty that should be stated in terms of the specific aims of watercourse utilization, conservation and development, and strengthened by an indication of appropriate procedures and methods. Moreover, the obligation to co-operate should be formulated by reference to such fundamental principles as sovereignty, territorial integrity, good faith, equality and good-neighbourliness. At the same time, the Drafting Committee should bear in mind that, while equality, good faith and good-neighbourliness were likely to exert a positive influence on compliance with the duty to co-operate, too much emphasis on sovereignty would weaken the duty to co-operate.

45. At the previous session, the Commission had arrived at a consensus on the organization or arrangement of the draft articles and had requested the Special Rapporteur to prepare a set of rules and principles corresponding to the existing rules and principles of international law on the subject, as well as a set of guidelines and recommendations, including machinery. The guidelines and recommendations, being "soft law", were to be placed in a section separate from the one containing the "hard law", namely the principles and rules. The distinction thus drawn between hard law and soft law had not been strictly adhered to at the present session. More particularly, the notion of a "principle" had sometimes been treated as soft law. He could not accept that approach, for the international legal system had its own general principles, which were part of hard law. They played an essential role in the application and development of legal rules and also served to fill the gaps in the rules.

46. The essential distinction between binding rules and principles, on the one hand, and non-binding guidelines and recommendations, on the other, had been blurred in the course of the discussion. He therefore urged the Commission to maintain that distinction.

The meeting rose at 1 p.m.

2008th MEETING

Wednesday, 3 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. 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, 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)

[Agenda item 6]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

CHAPTER III OF THE DRAFT:[3]

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

1. Mr. BENNOUNA said that the Commission and the Sixth Committee of the General Assembly appeared to have reached a consensus on the approach to be taken to the formulation of draft articles which would give States a general framework for the harmonization of their relations in respect of the non-navigational uses of international watercourses. Such a general framework would be extremely useful, for although there had been many examples of positive and mutually beneficial arrangements and agreements, there had unfortunately also been many failures, as well as many disputes concerning the use of water. That was not at all surprising in view of the problems of that kind that could arise between communities in the same country. In his own country, for example, a complex set of customary rules had been developed to govern water uses and settle disputes arising therefrom.

---

[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.