Document:-
A/CN.4/SR.2013

Summary record of the 2013th meeting

Topic:
<multiple topics>

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

2013th MEETING

Thursday, 11 June 1987, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, 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. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Visit by a member of the International Court of Justice

1. The CHAIRMAN, speaking on behalf of the members of the Commission, extended a warm welcome to Mr. Ruda, a Judge of the International Court of Justice, a former member of the Commission and a former staff member of the Codification Division.

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 11 (Notification concerning proposed uses)

ARTICLE 12 (Period for reply to notification)

ARTICLE 13 (Reply to notification: consultation and negotiation concerning proposed uses)

ARTICLE 14 (Effect of failure to comply with articles 11 to 13) *and*

ARTICLE 15 (Proposed uses of utmost urgency)[4] (*continued*)

2. Mr. ROUCOUNAS said that the discussion of draft articles 11 to 15 had shown that the Commission first had to give draft article 10 precise legal content and then, once the principle of co-operation had been established, decide what forms co-operation might take. Articles 11 to 15 should thus be read in such a way that emphasis would be placed not on disputes arising in connection with watercourses, but rather on co-operation, since the purpose of those provisions was to safeguard the common interests of notifying and notified States.

3. Some of the misunderstandings with regard to draft article 11 had arisen because of the origin of that provision. The provisions now contained in articles 11 to 15 had originally been included in draft article 8, submitted by Mr. Schwebel in his third report and entitled "Responsibility for appreciable harm".[5] Having established that each State was entitled to equitable participation in the watercourse, provided that it did not cause appreciable harm to the interests of another State, that article then laid down procedural rules. It provided, for example, that the "proposing State" had to notify other system States before undertaking, authorizing or permitting a project or programme that might cause appreciable harm to their interests. That provision might answer Mr. Reuter's question (2008th meeting) about the time when notification became compulsory, as well as Mr. Tomuschat's question (2009th meeting) concerning activities undertaken not by a State, but by individuals under its jurisdiction.

4. The former draft article 8 provided for a graduated set of procedures ranging from notification to the peaceful settlement of disputes. That gradation was, however, less the result of the system concept used by Mr. Schwebel than of the idea of equitable utilization. Subsequently, part of that draft article 8 had become draft article 9 as submitted by Mr. Evensen, and the rest had become draft articles 11 *et seq.* as submitted by the present Special Rapporteur. Draft article 10 on the obligation to co-operate had then been inserted between articles 9 and 11, thereby breaking the continuity that had originally existed between the provision prohibiting appreciable harm and the articles containing procedural rules.

5. If the "harm" referred to in draft article 11 was taken to be the same as the "appreciable harm" referred to in draft article 9, article 11 could be said to duplicate article 9, since a State was responsible for any appreciable harm it might have caused, whether or not it had fufilled its obligation to notify. In his view, the scope of article 11 had to be enlarged, by referring, for example, to a new use which might "appreciably alter the volume, quality or régime of the waters of a watercourse".

6. The meaning of the term "new use" should also be spelled out in greater detail. In paragraph (3) of his comments on draft article 11, the Special Rapporteur indicated, of course, that the term comprehended "an addition to or alteration of an existing use", but he did not define the term "use". In his second report (A/CN.4/399 and Add.1 and 2, footnote 80), the Special Rapporteur had, however, explained that the term "use" was employed in its broad sense and "should be understood as denoting every possible utilization or use . . . including . . . the prevention of water pollution". However, since draft article 11 might also refer to the case where the pollution of an international river had been caused not by a new use, but by an increase in existing activities, he personally thought that reference should be made to "uses and activities".

[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 texts, see 2001st meeting, para. 33.

[5] *Yearbook . . . 1982*, vol. II (Part One), p. 103, document A/CN.4/348, para. 156.

7. Once the obligation to provide notification had been established, it should be possible to make the provisions of draft articles 12 to 15 more flexible by expanding the scope of article 11. In order to avoid any misunderstanding with regard to the possibility that the other watercourse States might have veto power, draft article 13 might refer to the obligation "to act in such a way as to safeguard the legitimate interests of all watercourse States".

8. The question of the peaceful settlement of disputes did not come within the framework of chapter III of the draft and should be dealt with in an annex. Questions of international responsibility also had no place in that chapter. He was certain that the Drafting Committee would be able to find satisfactory solutions to those problems.

9. Mr. SOLARI TUDELA said that the law of the non-navigational uses of international watercourses was a sensitive subject because States were suspicious of anything that might be regarded as a limitation on their territorial sovereignty. That was, however, not at all unusual in the history of international law, and many existing institutions established as a result of international solidarity and co-operation would once have been unthinkable because States had had such a narrow view of sovereignty. Although a very ambitious set of draft articles might not be accepted by States, that must not stop the Commission or prevent it from making progress in its work.

10. The draft articles should begin with a provision defining terms such as "appreciable harm", "new use" and "proposed new use". In his view, the term "watercourse system" clearly and objectively described hydrographic components constituting a unitary whole, but he could also agree to the term "international watercourse", provided that it had the meaning referred to in the provisional working hypothesis and would make the draft easier for States to accept.

11. Draft article 4 on the obligation to negotiate system agreements as and when necessary for the optimum utilization of a watercourse was particularly important. That provision represented a step forward in the progressive development of international law and the rule it embodied must not be watered down or weakened. The term "equitable utilization" called for further clarifications, such as those provided in the text adopted by the Drafting Committee, which contained a list of factors to be taken into account.

12. The title of chapter III of the draft seemed to place the general principles of co-operation, notification and provision of data and information on an equal footing, but in fact the chapter contained a substantive rule, namely that of co-operation, as well as a set of procedural rules designed to give effect to the principle of co-operation and to such principles as equitable utilization and the prohibition on causing harm. Although a legal obligation to co-operate existed on the basis of the Charter of the United Nations, that obligation was of a general nature and the forms such co-operation would take had to be spelled out in each particular case. Draft article 10 should therefore indicate the areas in which States should co-operate in respect of the use of international watercourses.

13. With regard to draft article 11, members of the Commission had been unable to agree whether there was a customary rule requiring States to provide notification. However, since one of the Commission's tasks was the progressive development of international law, he thought that that rule should be embodied in the draft, it being understood that the obligation to provide notification would be limited to cases where it could be objectively determined that appreciable harm would be caused to another State as a result of a proposed use of a watercourse. There again, the term "appreciable harm" would have to be defined more precisely.

14. Of the two alternatives proposed for paragraph 1 of draft article 12, he would prefer the one that set a fixed time-limit, provided it was a maximum period that could be extended at the request of the notified State. The Commission might, for example, decide to set a maximum period of six months, which could be extended for three months.

15. He agreed that the dispute-settlement procedures provided for in draft articles 13 and 14 should be included in an optional protocol or in an annex to the draft.

16. Mr. SEPÚLVEDA GUTIÉRREZ said that, as a new member of the Commission, he was rather concerned about the debate on international watercourses. His main concern was that the Commission would be unable to take a decision on draft articles 11 to 15 for quite some time and that it would go before the General Assembly practically empty-handed, perhaps with a few isolated articles on basic general principles, but without any provisions to give effect to those principles, and that the 14 new members of the Commission would be blamed.

17. He was firmly convinced of the importance of the present draft articles, which the General Assembly had been urging the Commission to complete rapidly, and he would be very discouraged if the Commission failed in its task. He also agreed with Mr. Reuter (2012th meeting) that the law of the non-navigational uses of international watercourses was a good topic and one that was likely, once the work on it had been completed, to enhance the Commission's prestige for a long time to come. He was quite certain that the members of the Commission were basically in agreement as to substance and that their differences of opinion related only to the wording of the articles and should therefore not be difficult to reconcile.

18. Draft articles 11 to 15 were a logical and essential adjunct to the articles on general principles, particularly that on co-operation, to which effect could be given only by means of procedural rules.

19. Widely varying points of view had been expressed on what the Commission could or could not do. He was inclined to think that the Commission should steer a middle course by considering all the possibilities available to it and contenting itself, as Mr. Reuter had proposed, with a modest but workable text. It must not be forgotten that procedural provisions were not an end in themselves, but only a means of getting States to act in a certain way. His impression was that draft articles 11 to 15 were basically acceptable, since no one had

suggested that they should be deleted. The proposed approach was entirely logical and rational: the starting-point was that a State which was planning a new use of a watercourse had an obligation to inform the other States concerned, that obligation being based on the principle of co-operation. During the consultation stage, the States concerned might be able to reach an agreement, but if they were unable to do so they could then go on to the negotiation stage, which was based on the sovereign equality of the parties. If negotiations broke down, the States concerned would have to resort to one of the third-party procedures for the peaceful settlement of disputes and he saw no reason why that possibility should not be referred to in the draft.

20. The Commission's problem was to find wording for articles 11 to 15 that would dispel the doubts and calm the suspicions of those who thought that an attempt was being made to require a certain type of conduct of States, which had to be given some guarantees. A satisfactory balance also had to be established between legal principles and rules, between the legitimate interests of States, reasonable and equitable use, optimum utilization and the need to co-operate, and between rights and obligations. That was a difficult task, but not an impossible one. In addition, a link had to be established between draft articles 9 to 10, which the Drafting Committee was still considering, and the procedural rules contained in draft articles 11 to 15. Much unnecessary discussion might have been avoided if the Drafting Committee's text had been made available earlier.

21. He was convinced that, with the Special Rapporteur's assistance, the Commission would be able to agree on satisfactory wording for draft articles 11 to 15. It should not strive for perfection, for experience had shown that multilateral conventions, many of which were excellent, took years to ratify, although that did not prevent them from serving as guidelines for other instruments, from establishing rule-making practice or from helping to weave the fabric of customary law.

22. Mr. THIAM said that draft articles 11 to 15 were too narrow in scope. The use of an international watercourse could be viewed either as joint use, in co-operation with other States, or as individual use; but he had the impression that the proposed articles referred only to the latter, even though they came after draft article 10 on co-operation. There was thus something missing between draft article 10 and draft articles 11 to 15.

23. In his view, co-operation was not a legal obligation. But there was a need for it and the draft articles should contain more detailed provisions relating to it. A genuine positive law of co-operation existed and it included many conventions that had set up joint bodies, of which the Organization for the Development of the Senegal River was a prime example. Perhaps chapter III of the draft should be divided into two parts, one containing more detailed provisions on co-operation, and the other the rules proposed in draft articles 11 to 15, which were based primarily on the idea of the prevention of harm and compensation for damage.

24. With regard to the text of the draft articles, he had some doubts about the use of the word "available" in draft article 11, which should refer instead to "necessary" technical data and information. He was also concerned about the period of time to be provided for in draft article 12. It must be borne in mind that the situations that could arise were not all the same and that States did not all have the same resources. For example, when a technologically advanced country contemplated a new use of a watercourse and so notified a neighbouring State, that State would need more than six months to reply to the notification if it was a developing country. The Commission should give further thought to that problem in order to find an equitable solution. Furthermore, the wording of draft article 15 relating to proposed uses of utmost urgency was not precise enough. The words "or similar considerations" were much too vague and situations that were of the utmost urgency had to be clearly defined.

25. Mr. BARBOZA said that he was in favour of referring draft articles 11 to 15 to the Drafting Committee, provided of course that the Special Rapporteur so agreed. That had always been the Commission's practice once it had considered draft articles carefully enough to give the Drafting Committee all the elements it needed to prepare texts taking account of all the views expressed. If, contrary to that practice, the Commission requested the Special Rapporteur to submit revised texts, what would happen was exactly what Mr. Reuter (2012th meeting) had predicted: the Commission would again begin to discuss general questions, such as the characteristics of customary international law and the existence of an obligation to negotiate, and the General Assembly would, with good reason, begin to wonder whether the Commission was really the right body to help it in the task of the progressive development and codification of international law. The General Assembly might also begin to wonder whether, after 13 years of general debate, the Commission really had to start discussing a handful of procedural articles and whether the resolutions it had adopted year after year to encourage the Commission to make headway in its consideration of an important, urgent and controversial topic had had any effect at all. The Commission would thus deserve criticism concerning its methods of work.

26. As Mr. Sepúlveda Gutiérrez had just pointed out, the texts of the draft articles were good. All that remained to be done was to reconcile diverging points of view, but that was not possible in plenary meetings. In a spirit of compromise, he was prepared to agree that an exception should be made in the case of draft article 14, although he was fully aware that the predictions to which he had referred might come true. However, if the Commission at least referred the other draft articles to the Drafting Committee, it would have made some progress in its work.

27. Mr. Sreenivasa RAO said that the draft articles on the procedural requirements of notification, consultation, negotiation and the compulsory third-party settlement of disputes were as important as the substantive provisions which the Commission had earlier referred to the Drafting Committee. They not only gave practical effect and content—or what had been called "teeth"—to the more general substantive principles, but also were closely related to agreement, or lack of it, within the international community. They also

established obligations of a specific nature and involved a series of steps that had to be taken before any binding settlement of a dispute arising out of the interpretation and implementation of the more general principles could be arrived at. They therefore called for the most careful examination.

28. Commenting on some of the basic principles to which the procedural requirements were designed to give effect, he said that rivers provided mankind with a perennial source of water for a wide variety of uses, ranging from agriculture and navigation to the protection of the environment and recreation. With the progress of science and technology, newer uses involving extensive planning and river development were being introduced to serve mankind's growing needs. In the case of international rivers flowing through more than one State, there was a need for accommodation based on a reasonable and equitable apportionment of the waters. That applied not only between riparian States, but also between the different categories of user within a particular State. It was, however, unnecessary to reconcile each and every use with other uses, since some uses could by their very nature be enjoyed by one or more States without affecting the quality or quantity of the water available to other States.

29. A State exercised exclusive authority and control over that portion of a watercourse that lay within its territorial boundaries, subject to the duty not to interfere unreasonably with or affect adversely and to an appreciable extent the interests and uses of other riparian States. The duty not to cause harm was a legal concept which applied solely to such uses as appreciably affected reasonable and equitable use by other riparian States.

30. The right of a State to reasonable and equitable use of a watercourse and its waters flowing through its territory had to be exercised so as to achieve, first, optimum benefits and uses for the people of the riparian States, and secondly, the protection and development of the watercourse itself. The principle of optimum utilization entailed the reconciliation of two other basic principles: the enjoyment of reasonable and equitable use and the avoidance of causing legal harm to other riparian States. Those sometimes conflicting principles gave rise to understandable controversy among planners and users. International watercourses were not unique in that respect, however, for the same conflict between the relevant principles gave rise to numerous claims and counter-claims in such fields as marine space, outer space and the Antarctic, with their respective resources, as well as in other legal fields such as diplomatic privileges and immunities, immigration and extradition.

31. The aim should therefore be to avoid underplaying one principle to the advantage of another and to define priorities, while recognizing that, in Mr. Schwebel's words, "no automatically applicable fixed sets of factors, or a given formula for ranking or weighing the factors, can be devised that would fit all situations".[6] Although the Commission had identified some of the principles and factors that would promote reconciliation in a given case, it had not completed the task and should therefore continue to search for common ground and specific criteria. There was no substitute for the process of claim and counter-claim as advanced and evaluated by States themselves and the other relevant decision-makers, even if States could be persuaded in a given case to agree to suitable arrangements for assessing the facts at issue.

32. Most of the authorities cited by the Special Rapporteur attested to the willingness of States to engage in a common watercourse régime when their common interests so required. The various agreements and arrangements into which they had entered covered a wide variety of situations and indicated avenues for the settlement of disputes. Within the overall context of co-operation, they had adopted graduated sets of procedures to resolve any potential or actual conflict, a common feature of such arrangements being a system for the routine exchange of data and for consultation. The question, however, was to what extent those practices could provide the basis for a prescription of a mandatory nature that would govern the activities of riparian States even in the absence of prior agreement. It was necessary to distinguish between an arrangement involving institutional co-operation and any suggestion that there was a mandatory rule to the effect that States must have such an arrangement. There was no disagreement with the need for a graduated set of procedures to be used by States in a spirit of co-operation for the purpose of identifying mutual interests and avoiding misunderstanding and potential conflict. As other members had already noted, in most cases where information was exchanged and consultations held, the desired objective of co-operation was achieved. That was due not so much to any legal obligation as to a desire to make information available and to provide a mutual assurance of co-operation on all matters of common interest.

33. As was apparent from State practice, negotiation was also not so much a legal obligation as a means of resolving differences and disputes in an amicable manner. Negotiation, however, was a more formal process with claims and counter-claims being advanced and assessed in a spirit of co-operation. The time-frame within which negotiations were held and the speed with which they were concluded were determined by the circumstances of the case. The failure of negotiations did not generally result in an abrupt breaking off of friendly relations, since mediation, conciliation and even compulsory judicial settlement were also available if the parties so desired. The essence of all such means of resolving conflict was the spirit of co-operation and the free choice of means. Compulsory settlement of disputes as the inevitable outcome of notification should not be regarded as constituting a precedent in State practice on which a mandatory rule could be based. In that connection, he agreed in particular with the remarks made by Mr. Ogiso (2010th meeting), Mr. Barsegov (2011th meeting), Mr. Graefrath (*ibid.*) and Mr. Pawlak (2012th meeting). He also agreed that a mechanism for the compulsory settlement of disputes should not even be proposed within the context of the progressive development of international law, for that would be to ignore the diversity of State practice, the flexibility of the relevant principles and the lack of any precise and acceptable factors to determine the case with fairness. Another

[6] *Ibid.*, p. 89, para. 101.

significant reason for rejecting compulsory judicial settlement was the lack of generally acceptable principles. The best judges of the common interest were therefore the parties to the dispute themselves, for a conscious choice by the parties would guarantee that the decisions reached would be faithfully implemented. Arbitrary choices made by external sources tended to be less credible.

34. For all those reasons, careful consideration should be given to the Special Rapporteur's proposition in his third report that

> . . . in the absence of procedures permitting a State to determine its equitable share in advance and in consultation with other concerned States . . . [the] doctrine of equitable utilization would . . . operate only as a *post hoc* check on the State's use of the international watercourse in question. . . . (A/CN.4/406 and Add.1 and 2, para. 33.)

In his view, the process of claim and counter-claim was the only normal means employed by States to determine equitable allocation, whether or not a formal institutional structure existed to govern the uses of a particular international watercourse.

35. Compulsory third-party settlement had not always resolved differences satisfactorily and was no panacea. Even where States had organized institutional co-operation to regulate the use of an international watercourse, political adjustment and good faith were crucial for its optimum utilization. Institutional régimes were a reflection of the State's desire for co-operation and were not intended to serve as substitutes or remedies for the lack of co-operation. Any procedural requirement should therefore focus on co-operation and should not be predicated on a presumption of conflict among States, still less on the presumption that the geographically advantaged State not only had the opportunity, but was also willing to inflict a legal injury on a State or States that were less geographically advantaged with regard to the watercourse. In that respect, he agreed entirely that what was needed was a procedural framework focusing on co-operation, but not inevitably leading to a mechanism for the compulsory settlement of disputes.

36. Turning to the draft articles, he said that, in his view, appreciable harm was not a very appropriate criterion on which to base a State's obligation under draft article 11 to notify other watercourse States. Not only would the adoption of such a criterion involve an admission of guilt on the part of the notifying State, but it was also unrealistic to assume that under normal circumstances a State would knowingly and willingly attempt to cause appreciable harm or legal injury to the rights and interests of other riparian States. What was more likely to happen was that a State planning a new use would exceed its normal reasonable and equitable share of the use of a watercourse and its waters, genuinely believing that no real or legal injury would result for other riparian States. In such circumstances, notification would appear to invite opposition to the new use from the other riparian States merely because a new use was involved and because the notifying State might draw more than its usual share of water from the watercourse. "Reasonable and equitable use" and "appreciable harm" should therefore be interpreted so as to permit new uses unless the other riparian States could show that such uses would unreasonably and adversely interfere with their right to make reasonable and equitable use of the watercourse. Accordingly, article 11 should be redrafted to provide for the obligation of States to share information upon request with other riparian States if those States had reason to believe that the new use could unreasonably and adversely affect their rights and interests. That would be more in keeping with the basic principle whereby a State was allowed to make reasonable and equitable use of a watercourse provided it did not cause legal injury to other riparian States. So far as a *fait accompli* was concerned, it was fair to assume that, in the absence of accommodation, a State would not proceed with a use that had a known potential for causing appreciable harm to other riparian States.

37. With regard to draft article 12, once the relevant information had been provided, the notified State should have a reasonable period of time to study the matter and arrive at its conclusion. It would be better not to impose any strict time-limit, but to leave the matter to be decided in the light of the particular circumstances and of what was reasonable. The question of freezing the project or new use until any doubts were eliminated should not normally arise.

38. As for draft article 13, the determination of "appreciable harm" by the State seeking information should be well reasoned and made in writing. The State planning the new use should have the opportunity to study the objections raised by the notified State and, if necessary, to seek further clarification. The emphasis at that point should be on the process of consultation, and negotiation should be provided for in a separate article so as to make it clear that it constituted a separate stage which might be necessary to resolve a difference or dispute. The settlement of a dispute after the negotiation stage should be in accordance with a free choice of means. Any insistence on compulsory judicial settlement would be rejected outright by States.

39. In the light of his comments on draft article 11, he believed that draft article 14 should either be deleted or be redrafted in such a way as to eliminate any notion of penalty or liability on the part of the State proposing a new use which, in its opinion, did not involve appreciable harm to other riparian States.

40. A question had been raised in connection with draft article 15 as to the appropriateness of dealing in the procedural articles with proposed uses of utmost urgency. The regulation of emergency situations and the basis for reconciling such situations with the principles of reasonable and equitable use and optimum utilization differed. Moreover, it did not seem appropriate to link the question of uses of utmost urgency to the question of liability for appreciable harm. The matter therefore required careful consideration so that the relevant policies and principles were taken into account.

41. He agreed with much of what had been said by other members and trusted that the Special Rapporteur would take account of all their comments. He had the utmost confidence in the Special Rapporteur's ability to redraft the articles with a view to making them more balanced.

42. Mr. ARANGIO-RUIZ said that the Commission had to find well-balanced solutions to the problems

dealt with in draft articles 11 to 15 on the basis of a provision relating to the principle of co-operation, which had to be understood and enunciated as a duty.

43. The Commission now had a choice between draft article 10 as submitted in the Special Rapporteur's third report (A/CN.4/406 and Add.1 and 2) and the amended text the Special Rapporteur had proposed at the 2008th meeting (para. 28). If those two texts were to be combined, the duty to co-operate had to be considered in the light of other fundamental principles, such as sovereignty and independence. The utmost care should, however, be taken not to encumber the principle of co-operation with references to the static principles of territorial sovereignty and sovereignty itself, although both those elements should, of course, be present and due account should also be taken of such basic principles as the equality of States, good faith and good-neighbourliness.

44. As he had stressed in his earlier statement (2007th meeting), account also had to be taken of the nature of watercourses, whose waters were comparable to resources—such as oil deposits—that formed the subject of the territorial sovereignty or of the exclusive sovereign rights of two or more States. The fact that they were in a constant state of flux made it essential to treat them as something that was shared, or to be shared, in an equitable manner.

45. It was therefore clear that no limitations should be placed on the obligation to co-operate. Moreover, the principle of co-operation should be formulated so as to cover not only the uses of water, but also its conservation, protection and development in the widest sense.

46. The topic under consideration had many points in common with the topic of international liability for injurious consequences arising out of acts not prohibited by international law, and perhaps the most prominent of those points was interdependence. In that connection, he had welcomed Mr. Barsegov's reference at the 2011th meeting to the Soviet memorandum on the development of international law.[7] That document stated that international law must become *a law of comprehensive security and collective State responsibility towards mankind* and *a law based on recognition of the interdependence of today's world.* It also stressed that "a particularly important task of the international law of interdependence . . . is the . . . restructuring of international economic relations on a just, egalitarian and democratic basis" and that:

> . . . Universal and comprehensive security is not simply the absence of war . . . Its foundation and central core is broad and comprehensive co-operation among States. This co-operation must expand in existing directions and encompass new ones. . . . *The further development of international law should stimulate international co-operation, ensuring that it is based increasingly on equality and mutual benefit, and promote the initiation of constructive, creative interaction of States and peoples all over the planet, so as to solve the problems facing mankind together and in the interests of all.*

47. That document was an illustration of the warning by Mr. Reuter (2008th meeting) that the intelligence of States must not be underestimated. It also brought to mind the following passage from the fourth report of the late Robert Q. Quentin-Baxter, the former Special Rapporteur for the topic of international liability, as quoted by Sir Ian Sinclair at the Commission's thirty-sixth session:[8]

> . . . In one sense, therefore, the question which underlies this topic is whether lawyers take so narrow a view of their discipline that they do not share the sense of responsibility of others who influence the behaviour of States, and wait until the latter have provided the materials from which general rules of prohibition may be discerned.

48. The Commission would soon have to decide whether draft articles 11 to 15 should be referred to the Drafting Committee. With regard to draft article 11, he agreed with those members who had warned against the adoption of a text that might offer the State under the obligation to notify the choice between failing to comply with that obligation and admitting that it might be committing a wrongful act involving international responsibility.

49. He also agreed that draft article 12 should not be couched in terms that would give the notified State veto power. But there was nothing about that article that could not be resolved by the Drafting Committee in the light of the Commission's discussion.

50. In conclusion, he supported the suggestion made by Mr. Reuter and other members that draft articles 11 and 12 should be referred to the Drafting Committee.

51. Mr. YANKOV said that divergent views had been expressed during the lengthy discussion of draft articles 11 to 15 and a number of procedural suggestions had been made with regard to the Commission's future work. Two factors lay at the root of the divergence of views. The first was that draft article 10 was inadequately formulated and the second was that draft article 9 had been prepared by the previous Special Rapporteur. Articles 11 to 15 had, moreover, been intended by the Special Rapporteur as an adjunct to the rule of co-operation embodied in article 10, which was unfortunately too narrow in scope and content.

52. If the principle of co-operation was to be meaningful, three requirements would have to be met. First, the provision to be drafted would have to indicate the scope and content of co-operation; secondly, the principle of co-operation had to be considered jointly with other basic principles of international law; and thirdly, reference had to be made to the means of implementing the duty to co-operate. As it now stood, article 10 lacked those three basic elements, which the Commission would therefore have to spell out in formulating the obligation to co-operate with a view to the reasonable and equitable utilization of international watercourses.

53. The duty to co-operate had to be stressed as a fundamental rule of international law, but the text as it now stood confined that duty to the observance of procedural rules and merely referred to the need to avoid causing appreciable harm and to compensation for such harm when it had occurred.

54. As a result of those shortcomings, there was an obvious lack of balance in the provisions of draft articles 11 to 15, which were biased against an upstream State contemplating a new use of a watercourse and tended to favour other riparian States. It was true that draft ar-

[7] See 2011th meeting, footnote 7.

[8] *Yearbook . . . 1984*, vol. 1, p. 208, 1849th meeting, para. 22.

ticle 12, paragraph 3, stated that the negotiations in question "shall not unduly delay the initiation of the contemplated use", but unfortunately, as articles 11 to 15 now stood, delays were almost certain to occur.

55. In view of that lack of balance, articles 11 to 15 had to be reconsidered—and not only from the point of view of drafting. Account had to be taken of the fact that co-operation could relate to matters such as joint management, common activities for the protection of the environment and joint projects relating to watercourses, whereas the draft articles now dealt exclusively with the problem of appreciable harm and its avoidance. The Special Rapporteur should therefore consider that problem, since it was at the root of all the Commission's present difficulties. An effort should be made to enunciate the principle of co-operation adequately, with due regard for the other relevant principles of international law, particularly sovereign equality, territorial sovereignty and good faith.

56. In conclusion, he urged the Commission to concentrate on solving those problems of substance rather than on the question whether articles 11 to 15 should be referred to the Drafting Committee. In their present form, he did not think that they were ready for such referral.

57. The CHAIRMAN, speaking as a member of the Commission, said that the debate on draft articles 11 to 15 had been valuable and wide-ranging and had not been confined to the draft articles themselves. The delay in studying the topic might perhaps be explained by the fact that it had unfortunately been entrusted to several special rapporteurs in succession. The discussion had shown, however, that the topic needed more thorough study.

58. The General Assembly had given the Commission a mandate defining the parameters of the topic. It had asked the Commission to draw up a set of legal rules applicable to the conflicts that might arise between sovereign States concerning the utilization of an extremely important natural resource, namely water. It had specified that the rules were to be residual and flexible ones that States could take as guidelines when concluding bilateral or multilateral agreements on the utilization of international watercourses. States therefore expected the Commission to prepare draft articles taking account not only of doctrine, jurisprudence, international agreements and State practice, but also, in accordance with the Charter of the United Nations and the Commission's own rules, of the need to promote the progressive development of international law. If there was one topic that lent itself particularly well to progressive development, it was the law of the non-navigational uses of international watercourses.

59. Some took the view that every watercourse system or every international watercourse had its own characteristics and that only the riparian States could determine how to use it without harming each other. He drew attention to the provisional working hypothesis which the Commission had adopted in 1980 and on which it would be inadvisable to go back, unless the Commission adopted another.

60. In his view, draft articles 11 to 15 followed logically from draft article 10, which stated the general principle of co-operation. Unlike other members of the Commission, Mr. Thiam (2006th meeting) believed that the principle of co-operation was not an obligatory legal rule. Mr. Bennouna (2008th meeting) had spoken, in that context, of the state of mind of States. Co-operation, as he himself had already pointed out (2007th meeting), was the goal to be achieved, whereas the draft articles proposed by the Special Rapporteur were the means of achieving it. Mr. Barboza (2011th meeting) had said that the origin of the draft articles was not to be sought in the obligatory nature of co-operation. In fact, the obligation placed on States was to avoid causing damage or harm to other States having rights over the waters concerned; and, as Mr. Bennouna had suggested at the previous meeting, those rights were to be understood as legitimate interests which should be protected. All riparian States had legitimate interests in an international watercourse and the protection of those interests called for the application of certain rules based on co-operation, which was a principle established by the Charter of the United Nations, but whose status as a binding legal rule could be challenged, as certain members of the Commission had shown.

61. He concluded from the debate that no member of the Commission was opposed to the substance of the draft articles, that the objections related to terminology and that legal expression must be given to the arguments for the protection of the legitimate interests of the States concerned. In his view, draft article 11 should specify that it was a "riparian" State which could contemplate a new use and that every State had a right to require notification of new uses and of changes in the uses contemplated. As to the qualification of the word "harm", it would be for the Drafting Committee to find the appropriate adjective. It should also be specified that the notifying State must provide the other States with available technical data and information that were sufficient "and necessary" to enable them to evaluate the proposed new use and accept or oppose it.

62. So many opinions had already been expressed on the draft articles that the members of the Commission now had to agree on how they should be drafted to take those opinions into account.

63. He recognized that the ideal solution would be to make provision in the draft for the compulsory settlement of disputes, but he also knew that no State would accept that. He therefore believed that the formula allowing States to choose their own method of settlement in accordance with Article 33 of the Charter of the United Nations would be acceptable.

64. He would have no objection to the procedural articles being referred to the Drafting Committee together with draft article 10. Mr. Reuter (2012th meeting) had been right to ask the Commission to produce a minimum, even if it did not amount to much. It was important for the Commission to show that it had studied the topic and to propose texts which States could accept or reject. It should therefore endeavour to co-ordinate the procedural articles, which, like draft article 11, were of fundamental importance, since they determined the practical application of co-operation and the elements which States must take into account in co-operating. The Commission should therefore refer those articles to

the Drafting Committee so that it could find generally acceptable formulas.

65. Mr. TOMUSCHAT noted that some members of the Commission wished to refer draft articles 11 to 15 to the Drafting Committee, whereas others were against doing so because the texts had not yet reached "maturity". The difference between those two positions was, however, not very great. It was true that the principle of co-operation had been interpreted rather unilaterally in the sense of prevention of harm and, possibly, reparation for damage; but the scope of that principle could easily be enlarged. However, such a provision could be included in the draft only as an indication. He fully agreed with Mr. Graefrath (2011th meeting) that there were very fruitful forms of co-operation in the practice of States, such as river commissions, but he did not think that that form of co-operation could be imposed on a universal scale. The Commission could draw up some sort of list enumerating the different forms of co-operation, as an indication without binding force. The addition of a draft article of that kind need not hold up the work of the Drafting Committee.

66. There seemed to be agreement on the need to delete draft article 14, which stated very strict rules on responsibility—a matter that would continue to be governed by the general régime applicable. Members of the Commission also seemed to consider that the time had not yet come to propose rules on third-party settlement of disputes. He believed that, in order to fill a very definite gap in the draft, it was necessary to insert an additional draft article on structural pollution, which was a matter of particular concern to the industrialized countries.

67. Finally, he saw no need for the Special Rapporteur to draft new provisions, especially as the General Assembly expected the Commission to submit draft articles and the Commission was in a position to do so.

68. Mr. KOROMA said that, as he understood it, the duty to co-operate did not constitute a binding obligation that could give rise to penalties in the event of non-compliance. He saw co-operation as a means of preventing conflicts and of avoiding causing appreciable harm to riparian States.

69. It was regrettable that the discussion should have taken the form of a debate on whether the entire set of draft articles under discussion should be referred to the Drafting Committee. He did think that such an approach offered members a fair choice. It would be preferable, on the basis of the discussion, to decide whether any particular article or articles should be referred to the Drafting Committee.

70. He hoped that, in summing up the discussion, the Special Rapporteur would offer some suggestions to remedy a gap in the draft, which did not contain any provisions on multilateral co-operation. That point could not be left for the Drafting Committee to decide.

71. Mr. THIAM said that he thought it would be best to leave the decision on whether the draft articles should be referred to the Drafting Committee until after the Special Rapporteur had summed up the discussion. The referral of those texts to the Drafting Committee would not prevent the Special Rapporteur from proposing others, if necessary, at the Commission's next session, including provisions on forms of co-operation.

72. Mr. McCAFFREY (Special Rapporteur), replying to the questions raised by Mr. Tomuschat and Mr. Koroma concerning the inclusion in the draft of provisions on broader forms of co-operation, recalled that, in his second report (A/CN.4/399 and Add.1 and 2, para. 59), he had suggested that the Commission should concentrate initially on the formulation of general principles and rules providing guidelines to be followed by States in negotiating and implementing international watercourse agreements and that, at a later stage, it could attempt to draw up articles or simply some indicative procedures to be used as models by States in making their own arrangements for co-operation with regard to the administration and management of international watercourses. As he had put it:

> . . . Once that task has been accomplished, the Commission may wish to consider whether it would be advisable to go on to make recommendations concerning various forms of non-binding provisions, for example the establishment of institutional mechanisms for implementing the obligations provided for in the articles. (*Ibid.*)

The question of provisions on broader forms of co-operation, such as the joint management of watercourses, could thus be taken up at that later stage.

The meeting rose at 1 p.m.

2014th MEETING

Friday, 12 June 1987, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, 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. Solari Tudela, 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]

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

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