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Summary record of the 2063rd meeting

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

Extract from the Yearbook of the International Law Commission:-
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tention that article 16 should cover that situation. Under article 18, however, a State would be under the obligation to notify other watercourse States and to take appropriate measures of protection to prevent further harm. It should be noted that pollution due to cattle was the result of a human activity and not a natural phenomenon; that type of pollution would be covered by article 16.

41. Mr. Barboza had also raised the question of the possible *erga omnes* effect of the provisions of article 17 and of their relationship with the provisions of articles 21 and 23 of part 1 of the draft articles on State responsibility. In reply, he drew attention to paragraph (6) of his comments on article 16, to the effect that there was no intention to establish a régime of strict liability, but rather "one of due diligence to see that appreciable harm is not caused to other watercourse States".

42. Nor was there any intention to give an *erga omnes* effect to the obligations under article 17. In that regard, he drew attention to article 5 of part 2 of the draft articles on State responsibility, which defined the term "injured State" for the purposes of those articles. In that definition, the term "injured State" was said to cover, *inter alia*, a State party to the treaty which had been violated, where the obligation was expressly stipulated "for the protection of the collective interests of the States parties". The concept of "collective interests" was not clearly defined, but the idea embodied in paragraph 2 (*e*) (iii) of article 5 of part 2 of those draft articles was in clear contradistinction from that in article 19 of part 1 of that draft. He himself drew a very sharp distinction between the level of responsibility envisaged in his proposed article 17 and that contemplated in the aforementioned article 19. The obligations which flowed from the two provisions were entirely different. Those under article 19 on State responsibility had an *erga omnes* effect, but those under draft article 17 now under discussion certainly did not. Article 17 imposed an obligation akin to that under article 5 of part 2 of the draft articles on State responsibility, in which the focus was on collective interests.

43. Mr. YANKOV asked the Special Rapporteur whether the protection against pollution as defined in paragraph 1 of article 16 was intended also to cover the protection of natural amenities. He also wished to know whether pollution by radioactivity was covered.

44. Mr. McCAFFREY (Special Rapporteur) said that the reference at the end of paragraph 1 of article 16 to "the conservation or protection of the environment" would seem to cover natural amenities in the broad sense. Admittedly, it was not altogether clear to what extent those amenities would be protected. Some clarification could be introduced in the commentary.

45. On the second question, he thought that the reference to "any physical, chemical or biological alteration" covered pollution by radioactivity. The commentary could explain that point, but consideration might also be given to introducing the words "substances or energy" in the text of article 16 at an appropriate place.

46. The CHAIRMAN announced that the meeting would rise to enable the Drafting Committee to meet.

The meeting rose at 11.40 a.m.

2063rd MEETING

Thursday, 16 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, Mr. Graefrath, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, 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.4/406 and Add.1 and 2,[1] A/CN.4/412 and Add.1 and 2,[2] A/CN.4/L.420, sect. C, ILC(XL)/Conf.Room Doc.1 and Add.1)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART V OF THE DRAFT ARTICLES:

ARTICLE 16 [17] (Pollution of international watercourse[s] [systems])

ARTICLE 17 [18] (Protection of the environment of international watercourse[s] [systems]) *and*

ARTICLE 18 [19] (Pollution or environmental emergencies)[3] (*continued*)

1. Mr. CALERO RODRIGUES said that he hesitated to speak at such an early stage of the discussion on draft article 16, since he disagreed with the Special Rapporteur on some points and had doubts with regard to the article. While sharing the view that pollution was the most serious problem arising in connection with international watercourses, he did not attach the same importance to the article as did the Special Rapporteur and some other members of the Commission. In his view, a single article on pollution was either too little or too much: too little if the Commission intended to develop rules on pollution, and too much if it considered that pollution was not different from other causes of harm.

2. As it stood, article 16 contained a definition (para. 1) and two rules (paras. 2 and 3). The definition, unlike those proposed by the previous special rap-

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

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[3] For the texts, see 2062nd meeting, para. 2.

porteurs, did not indicate that "alteration in the composition or quality of the waters" was the result of the introduction by man of certain substances or elements in those waters. Consequently the provision applied also to those cases where alteration was the result of the withdrawal of certain substances. For example, the construction of the Aswan Dam had meant that certain elements which had fertilized lands downstream of the dam were no longer carried down the Nile, with the result that crops, as well as Mediterranean fishing, had suffered. It would therefore be better if the notion of introduction were reinstated, making the definition less broad; the formulation suggested by the Special Rapporteur in his report (A/CN.4/412 and Add.1 and 2, footnote 207) might be used for that purpose.

3. Paragraph 2 of article 16 set forth the obligation not to cause appreciable harm to other watercourse States or to the ecology of the watercourse. That obligation already appeared, as regarded other States, in article 8, and as regarded the ecology of the watercourse, in article 6 and article 7, paragraph 1 (*e*). Thus the paragraph merely reaffirmed the obligation not to cause appreciable harm, and he wondered whether, if pollution was to be treated separately from other causes of harm, it should not receive rather fuller treatment. It would be noted that the Special Rapporteur envisaged drafting some additional articles.

4. In paragraph (6) of his comments, the Special Rapporteur said that the intention was not that the State in which the pollution originated should be held liable for any appreciable harm caused by that pollution, but simply to affirm the obligation to exercise due diligence. Personally, he did not think that was sufficient and remained unconvinced by the explanations drawn from the work of Pierre Dupuy and Johan G. Lammers. The exercise of due diligence might limit, but did not exclude, liability. As in the case of injurious consequences arising out of acts not prohibited by international law, anyone whose polluting activity caused appreciable harm should incur liability for that harm even if he had exercised due diligence.

5. In paragraph (13) of the comments, the Special Rapporteur, discussing the question of the relationship between harm and equitable utilization, concluded that the exception of equitable use did not apply to harm caused by pollution. Actually, the same should be true of all other forms of harm, for it was difficult to imagine that equitable utilization could cause appreciable harm to other States or to the environment. J. G. Lammers, quoted in paragraph (15) of the comments, appeared to take the same view in saying that there was "hardly any evidence of State conduct which would be in line with the no substantial harm principle . . . but not with the principle of equitable utilization". The no harm principle should prevail over the principle of equitable utilization; and the obligation to exercise due diligence, to which the Special Rapporteur reverted in paragraph (17) of the comments, was not sufficient for the purposes of drafting an effective provision on the subject.

6. The second obligation, set out in paragraph 3 of article 16, was to engage in consultation with a view to approving lists of substances or species the introduction of which into the waters of the international watercourse was to be prohibited, limited, investigated or monitored. The usefulness of preparing such lists of polluting substances was not in doubt, but should they be the sole object of consultations among States? Other articles provided for exchanges of data and information, consultations and negotiations, and the Commission might well draw on them when dealing with the specific problem of pollution. In his report (*ibid.*, para. 91), the Special Rapporteur indicated that he might prepare further articles, in particular on the exchange of data and information relating to pollution and the environment and on the concerted development of régimes of pollution control and environmental protection. Since the exchange of data and information was already covered by article 10 and the principle of the development of concerted régimes by article 9, it would seem logical to adapt those general provisions to the case of pollution.

7. Lastly, the Commission should consider article 16 in the light of the draft articles as a whole in order to decide whether pollution should form the subject of special provisions and, if so, how they should be connected with more general provisions, on the obligation to avoid causing appreciable harm, on exchange of information, and on consultation. Should a special régime be provided for consultations on pollution, or should the provisions on the exchange of information be sufficiently broad as to encompass the problem of pollution? The question needed to be considered. In his view, the problem of pollution, important as it was, did not seem to be so specific as to warrant totally separate treatment from other issues. In any case, article 16, as drafted, failed to meet the needs of the draft articles as a whole.

8. Mr. BEESLEY said that draft article 16 raised fundamental issues concerning the duties of States with respect to pollution and, by bringing out that aspect of the subject, demonstrated the need for a multilateral approach to the law of international watercourses. For that reason, while recognizing the validity of Mr. Calero Rodrigues's reasoning, he considered that a separate chapter should be devoted to pollution and that, in the particular case under consideration, pollution warranted special treatment.

9. All States had an interest in the creation of a régime applicable to all international rivers, if only because the ecosystem of the biosphere was indivisible; rivers flowed into oceans, and consequently pollution could affect States other than watercourse States. The proposed article reflected the increasing interdependence of States, as well as the interpenetration of different branches of international law, of national and international law, and of bilateral and multilateral rules.

10. The Special Rapporteur had sought to achieve a balance with other topics on the Commission's agenda, such as State responsibility and liability for injurious consequences arising out of acts not prohibited by international law, as was necessary in order to produce an integrated system of law rather than a series of independent and sometimes contradictory conventions.

11. Article 16 was well grounded in State practice, judicial decisions and treaty law. The Special Rap-

porteur was right to refer to Principles 21 and 22 of the Stockholm Declaration and to the provisions of part XII of the 1982 United Nations Convention on the Law of the Sea, which imposed upon States a positive obligation to preserve the marine environment as well as obligations specifically concerning land-based sources of pollution, particularly through rivers (articles 194, 207, paras. 1 and 4, and 213). As to whether those provisions reflected customary law, no State, either signatory or non-signatory, had denied them. The number of signatories was unprecedented, namely 159. While it should not be necessary to refer in that connection to article 18 of the 1969 Vienna Convention on the Law of Treaties, it was worth recalling that it provided that:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (*a*) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; . . .

12. The Special Rapporteur thus had good reason for including provisions on pollution in the draft. However, if the Commission decided to present those provisions in a special chapter, it should bring them into line with other provisions of the draft in the manner suggested by Mr. Calero Rodrigues.

13. With regard to the definition of pollution given in paragraph 1 of article 16, he agreed with Mr. Calero Rodrigues that the term "alteration" could also be understood to cover the extraction of substances; conversely, however, he was inclined to think that precisely for that reason the wider definition was preferable to the formulation suggested in the report (*ibid.*, footnote 207).

14. The Special Rapporteur had attempted in paragraph 2 to provide a basis for standard-setting by using the words "to cause appreciable harm to other watercourse States or to the ecology of the international watercourse [system]". Ideally, any harm ought to be forbidden, but in practice that could never be possible. As a framework agreement, the draft convention could not lay down precise standards, but acceptable standards based on available scientific and technical knowledge should be provided in the form of black lists/grey lists and, if those standards were exceeded, that would by definition constitute appreciable harm. The criterion of "appreciable harm" was adequate to avoid giving the impression that the standards could be elastic, although of course they might vary between different régimes, places and points in time. The Commission was certainly capable of working out a satisfactory formulation. For the time being, and bearing in mind the necessity for a process of negotiating specific watercourse agreements and devising specific standards, he could accept the Special Rapporteur's term of "appreciable harm" as providing sufficient guidance.

15. While he generally agreed with Mr. Calero Rodrigues's remarks on the interrelationship between the concept of appreciable harm and that of equitable utilization, his own conclusion was somewhat different. If an activity caused appreciable harm to a watercourse State or to the ecology of the watercourse, it could on no account be consistent with equitable utilization. Some might see that as an argument for eliminating the provision on pollution, but he personally thought the subject sufficiently important to warrant separate treatment.

16. As to some points raised by Mr. Barboza (2062nd meeting), the 1982 United Nations Convention on the Law of the Sea did indeed provide a series of specific obligations relating to the areas beyond the jurisdiction of any State. It might be asked whether such provisions had any point if there was no one to assert the rights recognized by them. Perhaps the paradox could be resolved by considering that all States were responsible for the planet as a whole and exercised a form of custodianship over the natural environment. That idea was currently gaining ground, more particularly in connection with outer space.

17. Paragraph 3 of article 16 underscored the need to identify the most dangerous forms of pollution and envisaged the possibility of establishing a list of prohibited substances or species. The actual contents of such lists should be left to specific watercourse agreements and should be both specific and flexible, for the lists would have to be reviewed periodically in the light of new technological developments. Joint fact-finding groups and international water management commissions could play a useful role in that connection. Without wishing to reopen a complicated debate, he wondered whether the Commission should not seek to draw on expert advice; if it wanted to define pollution, its formulation had to be irreproachable.

18. There might be some virtue in further reinforcing the obligation to consult, set out in paragraph 3, for consultation, especially through mechanisms such as joint commissions, was particularly important in the establishment and updating of black and grey lists. The Special Rapporteur seemed ready to develop further his analysis of the problem.

19. Lastly, it was difficult to envisage a text—whether guiding principles or a framework convention of a binding nature—that did not contain a provision on pollution. On that specific subject, which was entirely within its purview, the Commission could at least demonstrate to the international community the possibility of a multilateral approach.

20. Mr. GRAEFRATH congratulated the Special Rapporteur on his excellent fourth report (A/CN.4/412 and Add.1 and 2), which very properly stressed the need to protect the environment, to fight pollution and to safeguard the quality of water, a natural resource which was becoming increasingly scarce.

21. The material assembled by the Special Rapporteur demonstrated clearly the existence of a considerable gap between the opinion of experts, the proposals of non-governmental organizations and the resolutions of international organizations on the one hand, and the existing law on the other. In support of that remark, he cited the language employed in passages of treaties between Pakistan and India and between Canada and the United States of America. In addition, he pointed out that a draft convention against international watercourse pollution had been pending since 1974 at the Council of

Europe and drew attention to the careful wording of the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, particularly article 207.

22. On that point, therefore, there was a wide gap between what constituted the law and what was considered to be the law—as shown by the cautious approach reflected in the report of the Experts Group on Environmental Law and its "General principles concerning natural resources and environmental interferences", which were proposed as elements for a draft convention (*ibid.*, para. 75). The Commission, however, was not mandated to draft a lofty proclamation of desirable goals: it was called upon to draft a framework convention to help States in their endeavours to protect watercourses and to co-operate for that purpose. To that end, the Commission should try to bridge the gap between existing law and desirable law, without losing sight of the fact that it was seeking above all to promote the progressive development of international law. It was therefore necessary that the proposed rules should, first and foremost, be feasible under existing circumstances and, in addition, should prove acceptable to a large number of States. That would be so if the rules were based on reasonable premises and if they were applicable in the context of international co-operation.

23. Draft article 16 set out a definition and a prohibition. It did not seem a good idea to combine those two elements in a single article and to confine the substance of the article to a naked prohibition. Article 10 [15] [16][4] began with a general rule, stating the duty to co-operate in relation to planned measures. Since the aim of the draft convention was to organize co-operation between watercourse States and enable them both to protect and to make the best use of the watercourse, it would perhaps be preferable to formulate a rule on co-operation at the beginning of the provisions on pollution.

24. The rule in question would specify the general duty already stated in article 9 [10][5] with regard to the "adequate protection of an international watercourse [system]". That was all the more necessary since article 9, as now worded, was extremely general in scope and did not adequately identify the area covered by the concrete obligation to co-operate. The former Special Rapporteur, Mr. Evensen, had begun chapter IV of his draft (Environmental protection, pollution, health hazards, natural hazards, safety and national and regional sites) with a provision which defined in a more detailed and precise manner the obligation of watercourse States to take, individually and in co-operation, "to the extent possible", the necessary measures to protect the environment" not only against man-made pollution but also against pollution from natural causes. He had not limited the provision to a prohibition.

25. Furthermore, to proclaim at the beginning of part V of the draft articles the principle of the duty to co-operate would also be consistent with the structure of the provisions of the 1982 United Nations Convention on the Law of the Sea, and in particular with the approach adopted in article 194 (paras. 1 and 2) and article 207, which dealt precisely with co-operation among States in combating pollution. That method had the merit of being realistic, because it took as its starting point the existing situation. In his view, it would be advisable to follow the various examples which he had cited and which also had the advantage of having been accepted by States.

26. It was also necessary to consider not only the prevention of pollution, but also the abatement of existing pollution. They were two very different aspects of one and the same problem, but both of them called for a concerted effort on the part of watercourse States. The Special Rapporteur referred to that problem in paragraph (10) of his comments on article 16, but without making the distinction in question or introducing it into the text of the article itself. In paragraph (11), however, he admitted that States showed a "tendency to allow each other a reasonable period of time" to comply with their obligations. While that statement was true, it did not give a complete picture of State practice. Nearly all watercourse agreements which contained detailed provisions on pollution necessarily drew a distinction between existing pollution and new pollution, if only for the reason that different measures were necessary in the two cases. Again, it could not be assumed that any State would be prepared to accept a rule which from today would convert the existing practice into an internationally wrongful act. A State would be more likely to accept an obligation to reduce existing pollution in order to mitigate the harm it caused, in keeping with the means at its disposal or in co-operation with other States. That was why existing treaties often used phrases such as "as far as practicable" or "to make maximum efforts" or "using for this purpose the best practicable means at their disposal and in accordance with their capabilities". Other treaties set priorities in establishing lists of polluting products, beginning with the most dangerous or toxic contaminants—a solution to which the Special Rapporteur had given some thought but which was only reflected in paragraph 3 of the draft article under consideration.

27. He therefore proposed that article 16 should start by stating a general rule providing for co-operation in reducing, preventing and controlling watercourse pollution in order to abate and prevent harmful effects and to ensure adequate protection of the ecological environment. Such a formula was consonant with the approach reflected in article 10 of the General principles adopted by the Experts Group on Environmental Law, which the Special Rapporteur himself quoted in his report (*ibid.*, para. 75).

28. Such an approach would be especially necessary if the proposed broad definition of pollution were to be accepted. The Special Rapporteur should explain the difference between the "detrimental effects" spoken of in paragraph 1, which characterized pollution, and the "appreciable harm" mentioned in paragraph 2, which was used as a criterion for a wrongful act. The difference must be considerable, because the Special Rapporteur stated in paragraph (4) of his comments that paragraph 2 of the article "does not proscribe all pollution" and that it was only "when such pollution

[4] Article adopted by the Drafting Committee, see 2071st meeting, para. 6, below.

[5] *Idem*, see 2070th meeting, para. 71.

causes appreciable harm to another watercourse State that it becomes internationally wrongful". It therefore seemed that paragraph 1 dealt with pollution which produced detrimental effects to human health or safety but without causing appreciable harm within the meaning of paragraph 2. While it was perhaps useful to rely on a very general definition of pollution, it was all the more necessary to be careful in formulating the obligation incumbent upon States and the definition of pollution damage that triggered State responsibility. It was not sufficient to formulate a prohibition which practically made State responsibility a result of not having prevented pollution.

29. Paragraph 2 of article 16 prohibited pollution that caused "appreciable harm", a term used in article 8 [9], which the Commission had already examined.[6] In both cases, the rule looked like a strict liability rule. It referred to appreciable harm as a factual event and not to the violation of a right. That was a considerable departure from the proposal of the previous Special Rapporteur, Mr. Evensen, which had expressly related the appreciable harm to the rights and interests of other watercourse States. The present Special Rapporteur explained in paragraph (6) of his comments that his formula, in paragraph 2, was not intended as a rule of strict liability but as referring to the duty of due diligence. Did that mean that a State which caused appreciable harm would be committing an internationally wrongful act only if it had not fulfilled its duty of due diligence in the use of the watercourse—in other words, if it had violated the obligations laid down in article 6? In that case, the State in question would be bound to cease the polluting activity, to undo the damage caused and to compensate the injured parties—at least under the terms of article 21 of the General principles adopted by the Experts Group on Environmental Law (*ibid.*). But the Group considered even substantial harm—which according to the Special Rapporteur was more than appreciable harm—only as entailing liability, meaning a duty to ensure that compensation was provided for.

30. According to the experts, substantial harm was harm that was not "minor" or "insignificant". For his part, the Special Rapporteur explained that "appreciable" harm meant harm that was "significant—i.e. not trivial or inconsequential—but less than substantial". In the Special Rapporteur's view, for appreciable harm to exist, there "must be an actual impairment of use, injury to health or property, or a detrimental effect upon the ecology of the watercourse". It should be noted in that connection that the expression "detrimental effect" was the one used in the English version to define pollution, so that it was difficult to draw a distinction between "appreciable harm" and "detrimental effect". When therefore the Special Rapporteur made "appreciable harm" the criterion for the wrongfulness of an activity and the threshold of State responsibility, he was formulating an extremely rigid rule.

31. The problem was obvious: one Special Rapporteur used "appreciable harm" to define liability, and the other used it as the criterion for State responsibility. In other words, what was considered a lawful activity under one topic was wrongful under another. The explanations given by the present Special Rapporteur in paragraphs (6) to (8) of his comments did not shed any light on the question. Unfortunately, "appreciable harm" as such was not a proper criterion for determining that a State had not acted with due diligence and had therefore incurred responsibility. What would happen in a case in which a State had taken the necessary administrative and legislative measures but was none the less at the origin of pollution which caused appreciable harm? State responsibility could not simply result from appreciable harm caused: it presupposed a breach of the obligation to prevent the harm and that the harm was due to the failure of the preventive measures. All that presupposed an obligation of the State to make impact assessments, to take preventive measures, etc., all of which could not be couched in a single phrase stating simply that States must not "cause or permit" the pollution of international watercourses.

32. Several times, the Special Rapporteur referred to article 9, now article 8 [9], seeing it as a rule which established the responsibility of the State causing appreciable harm by violating the rights or infringing the agreed standards of equitable and reasonable use laid down in article 6. However, such a content could not be deduced from the wording of either article 8 [9] or article 16, paragraph 2.

33. Furthermore, in paragraph (13) of his comments the Special Rapporteur proposed a different interpretation of the wording of article 16: the expression "appreciable harm" should not be related to article 6, which set forth the rights and the duties of watercourse States in regard to equitable and reasonable use of a watercourse, but should be understood as an independent rule. In other words, causing appreciable pollution harm would be regarded as being *per se* inequitable and unreasonable. The act would be wrongful, and would entail State responsibility even if the State had fulfilled the obligation of due diligence. In view of the broad definition of pollution and the extremely low threshold of harm, the proposed rule would be very rigid and would be unlikely to command acceptance by States. It would also be confusing to use identical wording to define different régimes of State responsibility, which had nothing in common except for the fact that they both looked like liability rules built on causing harm without violating an international obligation.

34. The Special Rapporteur stated in paragraph (11) of his comments that the "list" approach was "not appropriate in a framework instrument". Personally, he was not at all convinced of the truth of that statement, since much depended on how the list was used. It might very well be possible to recommend that States should, in fighting existing pollution, start with the elimination of the most toxic substances. Such a goal could be achieved quite efficiently with the help of a list. It was common practice, but the Special Rapporteur accepted that approach in paragraph 3 of the article only if it was requested by a State. In that case, the Special Rapporteur seemed to accept a distinction between existing and new pollution. He even envisaged that pollution by certain substances should not be prohibited but only

[6] *Idem*, para. 34.

limited, investigated or monitored, and did not entail State responsibility or the obligation to make reparation in accordance with paragraph 2. The fact remained that existing pollution could not be ignored, nor could it be eliminated by a mere prohibition. The list approach was particularly useful in that respect. It was therefore necessary not only to specify that lists could be prepared at the request of States but also to encourage that practice, which was a useful form of co-operation.

35. Mr. YANKOV, stressing the importance of the protection and conservation of the environment of watercourses, said that more than 80 per cent of marine pollution came from land-based sources and almost all of that came from rivers. The situation was particularly critical for enclosed and semi-enclosed seas. Yet the number of international agreements containing provisions on that subject was very limited, and the provisions were themselves very general in nature. By way of example, he cited the relevant provisions of the 1958 Convention concerning Fishing in the Waters of the Danube, the 1961 Protocol concerning the Establishment of an International Commission to Protect the Moselle against Pollution, the 1963 Act regarding Navigation and Economic Co-operation between the States of the Niger Basin, and the 1968 European Agreement on the Restriction of the Use of Certain Detergents in Washing and Cleaning Products. It was exceptional to find provisions as precise as those of the 1976 Convention on the Protection of the Rhine against Chemical Pollution, with annexes containing lists of pollutants classified according to their harmfulness.[7]

36. First of all, the very notion of "protection of the environment" had to be clarified. Traditionally, the term had been used to designate measures to reduce and control pollution hazards and damage. Today, however, the concept had become broader, and modern environmental law focused more on prevention and on the objectives of preservation; it was a matter not only of fighting existing pollution but of "preserving" the natural environment, in other words, preventing its future deterioration but also, where possible, improving its quality, a matter of particular importance in the case of watercourses. Those aspects of the issue would have to be taken into account in the definition of pollution, if indeed the Commission decided to include one in the draft article. In that connection he would suggest drawing on article 195 of the 1982 United Nations Convention on the Law of the Sea:

Article 195. Duty not to transfer damage or hazards or transform one type of pollution into another

In taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another.

That provision was particularly relevant to watercourses, which by their nature were in perpetual movement. Similarly, the Commission could make use of paragraph 1 of article 196, a provision more concerned with the future:

Article 196. Use of technologies or introduction of alien or new species

1. States shall take all measures necessary to prevent, reduce and control pollution of the marine environment resulting from the use of technologies under their jurisdiction or control, or in the intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant and harmful changes thereto.

37. He was however inclined to query the need for a definition, which would doubtless offer the advantage of highlighting the importance of the protection and preservation of the environment of international watercourses, and would contribute towards a more coherent presentation of the set of rules. Indeed, if no reference at all were made to pollution, it might be asked why that had not been done. However, the prevailing practice of States in the law of the sea, for example, was to provide a definition of pollution only in conventions specially dealing with protection of the environment; the United Nations Convention on the Law of the Sea formed an exception in that respect.

38. In any case, if a definition was thought necessary, it should appear in a separate article or, better still, in the part of the draft containing definitions. It should also be more in line with modern concepts of environmental law as evidenced by the most recent examples, such as the United Nations Convention on the Law of the Sea or certain regional conventions on the protection and preservation of the marine environment: the 1974 Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area (art. 2, para. 1), the 1976 Barcelona Convention for the Protection of the Mediterranean Sea (art. 2 (*a*)), the 1978 Kuwait Regional Convention (art. 1 (*a*)), or the 1974 Paris Convention on the Prevention of Marine Pollution from Land-Based Sources (art. 1, para. 1).[8] Account should also be taken of the definition prepared by the Joint Group of Experts on the Scientific Aspects of Marine Pollution (GESAMP), which had become something of a model in the field.

39. Accordingly, the elements missing from the definition proposed in paragraph 1 of article 16 should be supplied by adding the following: (*a*) the idea—mentioned by Mr. Calero Rodrigues—of the introduction by man of substances or energy into the environment of watercourses (that would link up with the provisions of article 196 of the United Nations Convention on the Law of the Sea); (*b*) the concept of effects detrimental to all legitimate activities, such as fishing, leisure, health, etc., rather than merely to the use of the waters for any beneficial purpose, as was the case at present; (*c*) alteration in quality from the point of view of the utilization of the watercourses, which was one of the elements of the GESAMP definition; (*d*) the reduction of amenities. The Special Rapporteur should also give some thought to the question of alteration in the properties of the water, mentioned by Mr. Calero Rodrigues and Mr. Beesley.

40. With regard to the scope, content and legal implications of the obligations set out in paragraphs 2 and 3 of article 16, he considered that the provisions of part

[7] The texts of the instruments mentioned in this paragraph are reproduced in UNEP, *Selected Multilateral Treaties in the Field of the Environment*, Reference Series 3 (Nairobi, 1983).

[8] *Ibid.*

XII of the United Nations Convention on the Law of the Sea, and particularly the basic principles of articles 192, 193 and 195, although formulated as general norms, nevertheless entailed legal obligations which were spelt out further on in the sections of the Convention on standard-setting, enforcement and safeguards.

41. As to paragraph 3, it was necessary, as Mr. Graefrath had said, to emphasize the importance of international co-operation. One way would be to add an article or a paragraph, based on article 195 of the United Nations Convention on the Law of the Sea, on the obligation not to transfer damage or hazards and not to transform one type of pollution into another. Such a provision would be useful, for in cases of accidental pollution the remedy might sometimes seem worse than the evil; such a question had arisen in the wake of accidents such as that of the *Torrey Canyon* (1967).

42. Paragraphs 2 and 3, as drafted, seemed sometimes to be merely the illustration—or the application to a specific field—of certain general principles, particularly those appearing in articles 6, 8 [9], 9 [10], and 10 [11] to 14 [15] of the draft. As Mr. Calero Rodrigues had pointed out, any duplication of general provisions by the provisions relating to the protection of the environment should be avoided.

43. The question of drawing up a black list had been raised. True, some conventions, particularly among those on the protection of the marine environment, contained lists of that kind (such was, for example, the case in the aforementioned 1974 Paris Convention). But the question was whether, in articles as general as those being considered, it was possible to include a list detailed enough to cover all sources of pollution in various watercourses using criteria such as persistence, bioaccumulation, radioactive impact, etc. The Commission might perhaps confine itself to stating in general terms that, in order to prevent, reduce and control pollution of the environment of a watercourse, States should, by agreement among themselves, adopt specific rules on various sources of pollution and harmful substances.

44. In addition to his suggestions with regard to the definition of pollution, he wished to propose some amendments to article 16: (*a*) it would seem more judicious to entitle part V "Protection of the environment of international watercourses"; (*b*) the word "ecology", in paragraph 2, was too vague; it would be preferable to speak of "ecosystems"; (*c*) the draft article in its present form was heterogeneous, containing, as it did, a definition as well as two obligations; it should be split up; (*d*) a distinction should be drawn in the obligations set forth in the text between responsibility for wrongful acts and the obligation to compensate harm, when the matter was not regulated by a particular convention.

45. In his opinion, article 16, together with members' comments and the Special Rapporteur's replies, could be referred to the Drafting Committee.

46. Mr. BEESLEY, noting that useful suggestions had been made concerning the definition of pollution, said that it might well be appropriate to have a section on definitions at the beginning of the whole set of draft articles, as in the United Nations Convention on the Law of the Sea.

47. While it was true that many regional agreements on international river systems were very general when they dealt with the preservation of the environment and the prevention of pollution, or laid down specific standards to be followed in the matter, they were very often hortatory on that issue. The Commission might therefore wish to suggest that more specific provisions were needed in that particular case, if all members agreed that the degradation of biological resources eventually affected the whole of mankind, and bearing in mind Mr. Yankov's comment that 80 per cent of the pollution of the marine environment came from land-based sources, and mainly from rivers.

48. He would have difficulty in interpreting part XII of the United Nations Convention on the Law of the Sea as being merely hortatory. The first obligation set forth in that part, which he regarded as a breakthrough in terms of the protection and preservation of the marine environment and the environment as a whole, was couched in the following terms: "States have the obligation to protect and preserve the marine environment." (art. 192); the article did not, however, say that States ought to co-operate. Article 193, of course, reflected Principle 21 of the Stockholm Declaration, stipulating the sovereign right of States to exploit their natural resources pursuant to their environmental policies, but adding, it should be noted, "in accordance with their duty to protect and preserve the marine environment". Paragraphs 1 and 2 of article 194 both opened with the words "States shall take", not "States should take" or "States ought to consider taking". Similarly, paragraph 3 contained the words "the measures taken . . . shall deal", while paragraph 3 (*a*) specifically referred to the release of toxic, harmful or noxious substances, especially those which were persistent, from land-based sources. Article 195, relating to the duty not to transfer damage or hazards or transform one type of pollution into another, contained the words "States shall act", while article 196 started with the words "States shall take all measures". In the light of such wording, it was difficult to see how the United Nations Convention on the Law of the Sea could be regarded as merely indicating guidelines of a hortatory nature.

49. It was an acknowledged fact that it was not possible to legislate for co-operation. Nevertheless, the United Nations Convention on the Law of the Sea went as far as it was possible to go in that direction. Article 197, which provided for co-operation on a global or regional basis, started with the words "States shall co-operate". He would not cite all the relevant articles in support of his proposition, but would simply draw attention to the opening words of article 200, concerning studies, research programmes and exchange of information and data, reading "States shall co-operate", although the second sentence of the article, starting with the words "They shall endeavour", was of a hortatory nature. Article 201, entitled "Scientific criteria for regulations", contained the same words, "States shall co-operate" and, while that article could not be interpreted to mean that all knowledge in that field was ripe

for codification in the form of "black" or "grey" lists, it none the less placed very clear-cut obligations on States. Again, paragraph 1 of article 207, on pollution from land-based sources, began with the words "States shall adopt laws and regulations" and paragraph 2, with the words "States shall take . . .". Owing to their content, however, paragraphs 3 and 4 were drafted in different terms: "States shall endeavour".

50. He had quoted those provisions of part XII of the Convention in order to dispel any misunderstanding as to the nature of the obligations they set forth and in light of the fact that part XII not only constituted a precedent but was also a part of a treaty which was regarded as reflecting customary international law. In addition, part XII of the Convention had deliberately been drafted as an umbrella or framework convention and did not attempt to be exhaustive. Indeed, the Commission might well take as a precedent article 311 of the Convention, which governed the relation of the Convention to other conventions and international agreements.

51. As the Special Rapporteur had requested, he would refrain from commenting on the effects of the topic under consideration on the topic of liability, without, however, questioning the right, or even duty, of anyone who wished to address the matter. He read out article 213 of the United Nations Convention on the Law of the Sea, which dealt with the enforcement of regulations with respect to pollution from land-based sources and which was again drafted in language that was not hortatory, starting: "States shall enforce". The tendency to interpret the whole of part XII of the Convention as a series of provisions designed to establish a régime of liability was understandable, but he would point out that, even in that case, article 235, entitled "Responsibility and liability", provided in paragraph 3 that "States shall co-operate in the . . . development of international law relating to responsibility and liability". While that rule might not bind the Commission, it did have a certain relationship with its work. As far as he was concerned, all those provisions of part XII of the Convention on the Law of the Sea were norms, not general guidelines. While he recognized that other conventions did not go so far, he trusted that the Commission would once again look upon the Convention in that light.

52. Although he had no definite opinion in the matter, he did not think a clear-cut distinction could be made between pre-existing and new pollution. The difficulty was that pre-existing pollution could be aggravated by creating pollution that was not necessarily new. He was not, however, belittling the difficulties in reaching agreement on how to deal with the problem and how to prevent further degradation and to preserve the environment, which was the ultimate objective. Lastly, he endorsed Mr. Yankov's comments, for the reasons he had already explained.

53. Mr. Sreenivasa RAO, commenting on the reasons for the disagreement as to whether there should be a flexible definition or, as Mr. Beesley wanted, a strict one, said that the central issue was to decide, on the one hand, what constituted pollution and, on the other, what were the obligations of States parties to the United Nations Convention on the Law of the Sea. In that connection, the relevant practice and instruments demonstrated the great importance of protecting and preserving the natural environment and preventing pollution. He therefore sought the Special Rapporteur's clarification as to the kind of standards the Commission was required to develop and the kind of activities regarded as unreasonable.

The meeting rose at 1 p.m.

2064th MEETING

Friday, 17 June 1988, at 10 a.m.

Chairman: Mr. Leonardo DÍAZ GONZÁLEZ

later: Mr. Bernhard GRAEFRATH

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Francis, 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.4/406 and Add.1 and 2,[1] A/CN.4/412 and Add.1 and 2,[2] A/CN.4/L.420, sect. C, ILC(XL)/Conf.Room Doc.1 and Add.1)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

PART V OF THE DRAFT ARTICLES:

ARTICLE 16 [17] (Pollution of international watercourse[s] [systems])

ARTICLE 17 [18] (Protection of the environment of international watercourse[s] [systems]) *and*

ARTICLE 18 [19] (Pollution or environmental emergencies)[3] (*continued*)

1. Mr. BENNOUNA congratulated the Special Rapporteur on his fourth report (A/CN.4/412 and Add.1 and 2), chapter III of which contained a wealth of material on doctrine and practice. The Special Rapporteur rightly emphasized therein the interdependence of ecosystems and the need for a global and co-ordinated approach to the dangers of pollution (*ibid.*, paras. 29-37). The urgent need for robust international action matched the growing demands on water resources and the increasingly advanced technology

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

[2] Reproduced in *Yearbook . . . 1988*, vol. II (Part One).

[3] For the texts, see 2062nd meeting, para. 2.