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Summary record of the 2163rd meeting

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

Extract from the Yearbook of the International Law Commission:-
1990, vol. I

that those obligations were sufficiently precise. Given the crucial importance of the articles on implementation, he would have preferred them to be incorporated in the body of the draft, rather than in an annex, and he wondered why the Special Rapporteur had not adopted such a course. Also, many other articles in the draft already dealt with implementation. In any event, the title of annex I would have to be modified, for the special feature of the annex was the fact that it dealt with the active role accorded to individuals, not the fact that it dealt with implementation.

52. He agreed with the substance of draft article 2 of annex I, but would ask, first, by what criteria "another State" would be identified. To put it more bluntly, were the provisions of the annex also designed to operate in favour of third States that were not parties to the articles? Was article 2 to be conceived as a provision conferring rights on third States irrespective of considerations of reciprocity? Again, with regard to the title of the article, one normally spoke of non-discrimination in reference to a right bestowed on a person. Under the terms of article 2, however, State agencies were enjoined to take harm caused abroad as seriously as harm caused at home. In the circumstances, he would prefer some other wording, such as "Identity of standards of assessment".

53. He agreed in principle with draft article 3, yet considered that the order of the remedies should be reversed. Indeed, throughout the draft, the main emphasis should be on prevention, financial compensation being treated as a subsidiary remedy. The reason was simple: in many instances, environmental damage could never be made good, and that was justification enough for departing from the model afforded by article 235 of the 1982 United Nations Convention on the Law of the Sea.

54. He fully endorsed the rule, laid down in draft article 4, of equal right of access to administrative and judicial procedures in the State of origin, but considered that the article as worded, like the OECD Council recommendation cited by the Special Rapporteur in paragraph (1) of his comments on the article, missed the point, namely that there should be equality of treatment between alien victims of harm and the nationals of the State of origin—to the extent that, apart from the criterion of nationality, the circumstances were the same or similar, of course. The essence of the rule, to his mind, should lie in a prohibition on discrimination on the ground of nationality. States should be under an obligation to treat everyone alike, taking account solely of the extent to which the person concerned was affected. Many States had not so far granted foreign citizens the right to participate in administrative proceedings or to challenge an administrative decision before the courts. In that connection, the decision of 17 December 1986 by the Federal Administrative Court of the Federal Republic of Germany,[12] referred to in the Special Rapporteur's comments (A/CN.4/427 and Add.1, footnote 97), represented a landmark. That decision, however, was somewhat more limited in scope than the excerpt cited by the Special Rapporteur seemed to suggest, for the court had hinted that one of its main considerations was the existence of strong ties of solidarity within the EEC. It was not clear, therefore, whether the court would extend its case-law for the benefit of countries outside the EEC which did not grant reciprocal treatment.

55. Draft article 6 seemed unnecessary, for it regulated a situation already fully covered by draft article 4. If article 4 were clearly formulated, there would be no need for a provision that enunciated the same rule in slightly restricted terms. Also, he would prefer not to speak of "immunity" in cases where the judicial system of the State of origin did not provide for a remedy. Immunity should remain a term of art for cases in which a foreign State was impleaded in a forum State. The Special Rapporteur did not deal, however, with situations in which an aggrieved individual sued the State of origin before the courts of another country, since that fell within the scope of the topic of jurisdictional immunities. Obviously, the management of a watercourse did not qualify as a commercial activity and would therefore come under the special protection of sovereign immunity.

56. Paragraph 2 of article 6 was also unnecessary. If such a provision were deemed essential, however, then it should be set forth in the first part of the draft. A number of treaties in which the obvious was stated sprang to mind—article 2 of the International Covenant on Civil and Political Rights and article 2 of the International Covenant on Economic, Social and Cultural Rights being cases in point—but, strictly speaking, such reminders were superfluous.

The meeting rose at 1 p.m.

2163rd MEETING

Friday, 25 May 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Graefrath, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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[12] *Entscheidungen des Bundesverwaltungsgerichts*, vol. 75 (1987), p. 285.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/421 and Add.1 and 2,[1] A/CN.4/427 and Add.1,[2] A/CN.4/L.443, sect. F, ILC (XLII)/Conf.Room Doc.3)

[Agenda item 6]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

PARTS VII TO X OF THE DRAFT ARTICLES:

ARTICLE 24 (Relationship between navigational and non-navigational uses; absence of priority among uses)

ARTICLE 25 (Regulation of international watercourses)

ARTICLE 26 (Joint institutional management)

ARTICLE 27 (Protection of water resources and installations) *and*

ARTICLE 28 (Status of international watercourses and water installations in time of armed conflict) (*continued*)

ANNEX I (Implementation of the articles)[3] (*continued*)

1. Mr. CALERO RODRIGUES said that the Special Rapporteur's fifth and sixth reports (A/CN.4/421 and Add.1 and 2 and A/CN.4/427 and Add.1) were, as usual, excellent. However, he had doubts about some of the proposed articles.

2. In the first place, chapter II of the fifth report, entitled "Relationship between non-navigational and navigational uses", provided a good demonstration of the fact that, as a general rule, navigation no longer enjoyed preference over other uses, although it might be given such preference in specific instances and preference might also be given to any other use. Those two ideas were clearly expressed in paragraph 1 of draft article 24, which had his support.

3. In section C of the same chapter, the Special Rapporteur raised the question: "how is a conflict between navigational and other uses to be resolved under contemporary international law?", to which he gave the answer: "Such a problem would be resolved in the same way as would a conflict between competing non-navigational uses: by considering all relevant factors, as provided in article 7 of the present draft, with a view to arriving at an equitable allocation of the uses and benefits of the international watercourse system in question." (A/CN.4/421 and Add.1 and 2, para. 125.) Accordingly, paragraph 2 of article 24 had been worded to read: "In the event that uses... conflict, they shall be weighed along with other factors relevant to the particular watercourse in establishing equitable utilization thereof...". That paragraph, which did not refer to navigation at all, seemed to answer a question that was wider than the one posed in the report. Moreover, paragraph 1 of the article provided that "neither navigation nor any other use enjoys an inherent priority over other uses", and that made it quite clear that the provision was intended to address not only the question of the relationship and possible conflicts between navigational and non-navigational uses, but also the relationship between any uses. He agreed entirely with that approach and believed that the wording of paragraph 2, which was entirely satisfactory in other respects, could be improved to leave no possible room for doubt that the intention was to indicate how conflicts between any uses should be resolved. He also considered that the reference to the resolution of conflicts should be modified and that, instead of providing that the uses in conflict should be "weighed along with other factors" (those mentioned in articles 6 and 7 of the draft), it would be better to state that they should be "weighed against each other, taking into account" those factors. The Drafting Committee could, of course, deal with the changes he had suggested, whose purpose was to reflect more completely the broad intent of article 24.

4. For reasons that he would explain, he would refer to draft article 25, on the regulation of international watercourses, and draft article 26, on the management of watercourses, together.

5. A sizeable part of the Special Rapporteur's sixth report (A/CN.4/427 and Add.1) was devoted to demonstrating that joint arrangements for watercourse management had been, and still were, widely used, the apparent purpose being to prove that a reference to such arrangements should be included in the draft articles. Without elaborating on the point, he considered that, no matter how sound the demonstration might be, it could equally well be concluded that a provision to that effect was not necessary and that States would continue to conclude such arrangements as they had done until the present time, without the need to rely on the articles.

6. In the sixth report (*ibid.*, para. 7), the Special Rapporteur recognized that there was no obligation under general international law to form joint bodies for the management of international watercourses. That premise was quite correct, but it left very little room for a provision having significant legal content. Draft article 26 therefore merely imposed an obligation on watercourse States to enter into consultations with a view to the establishment of a joint organization for the management of an international watercourse when any one watercourse State so requested. In paragraph (4) of his comments on the article, the Special Rapporteur envisaged the possibility of going further and establishing an obligation to enter into "negotiations", as Mr. Schwebel had suggested in his third report. The Special Rapporteur had not incorporated that obligation in article 26, first because the obligation to establish joint institutions did not exist under general international law; secondly, because such establishment "may not even be necessary", as he stated in his comments; and, thirdly, because previous debates in the Commission on article 7 and articles 11 to 21 of the draft did not seem to favour the introduction of such an obligation. He himself could not but agree, although it was a matter of regret to him that the Commission had decided against any difference in the treatment of contiguous and successive rivers. On that specific point, one might well take the view that, in the case of successive rivers, consultations would suffice, whereas, in

[1] Reproduced in *Yearbook ... 1989*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1990*, vol. II (Part One).

[3] For the texts, see 2162nd meeting, para. 26.

the case of contiguous rivers, the nature of the co-operation required would justify an obligation of negotiation. As matters stood, only the obligation of consultation was recognized. He wondered, however, whether that did not involve a duplication of the terms of paragraph 3 of article 4 as provisionally adopted by the Commission,[4] which read:

> Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics and uses of a particular international watercourse [system], watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a [watercourse] [system] agreement or agreements.

What was the "establishment of a joint organization for the management of an international watercourse" (art. 26, para. 1) if not an agreement to apply the provisions of the articles, or, in other words, a "watercourse agreement"? The obligation to consult thus arose under paragraph 3 of article 4 and there was no need to repeat it in paragraph 1 of article 26.

7. As the Special Rapporteur pointed out in paragraphs (5) and (6) of his comments, paragraph 2 of article 26 contained "an illustrative list of functions that joint organizations might perform", while paragraph 3 proposed "a non-exhaustive list of additional functions" that might be entrusted to such an organization. He saw no need for article 26, but, if the Commission decided to retain it, he considered that, instead of trying to illustrate the possible functions of joint organizations, it would be better to try to define "management", with which the joint organization would, after all, be concerned. In that connection, he would follow the definition of "water resource management" laid down in section 2.1 of the *Canada Water Act, 1969-1970*, which read: " 'water resource management' means the conservation, development and utilization of water resources, and includes, with respect thereto, research, data collection and the maintaining of inventories, planning and the implementation of plans, and the control and regulation of water quantity and quality". If the words "water resource management" were replaced by "international watercourse management", that would be an excellent definition which would have the advantage of introducing the concept of regulation—the subject of draft article 25.

8. Draft article 25 was even more devoid of legal content than draft article 26, merely providing in paragraph 1 that "Watercourse States shall co-operate in identifying needs and opportunities for regulation of international watercourses". A general obligation of co-operation to "attain optimum utilization and adequate protection of an international watercourse" was already laid down in article 9 of the draft. Was it necessary to reaffirm that obligation in the matter of regulation? As to paragraph 2 of article 25, which introduced the concept of equitable cost-sharing, the principle was sound, but why should its application be limited to the field of regulation? Should it not apply to all aspects of watercourse management? In short, article 25 seemed as unnecessary as article 26, since "regulation" should in any event be treated as part of "management".

9. Chapter II of the sixth report was entitled "Security of hydraulic installations", whereas part X of the draft articles and draft article 27 were entitled "Protection of water resources and installations". There was no substantial difference between "security" and "protection" or, in the end, perhaps between "hydraulic installations" and "installations". However, the addition of the words "water resources" might considerably broaden the scope of the article. That was one of the questions on which he wished to comment, the other being the question whether the draft should address the problems arising out of situations of armed conflict.

10. There was no doubt that attention should be paid to the security of hydraulic installations, for, if they were not properly monitored, they could release "dangerous forces" which might harm international watercourses. The security of hydraulic installations was therefore directly linked to the protection of a watercourse. It should be noted that the damage to the watercourse might affect only one State or it might spread to parts of the watercourse in the territory of other States. In the latter case, those other States would have a direct interest in the security of the installations and that consideration should be the foundation of any provision on the subject which might be included in the draft articles. In that connection, he referred to the 1963 Convention between France and Switzerland on the Emosson hydroelectric project and the 1957 Convention between Switzerland and Italy concerning the use of the water power of the Spöl mentioned in the sixth report (A/CN.4/427 and Add.1, paras. 25-26 and annex). In both cases, the installations had been set up by joint action of the two States concerned and it was only natural that they should involve security specifications. However, he was not aware of any case in which installations in one country which did not affect an international watercourse in another country could be made subject to a system of security on which that other country would have the right to give its opinion. That had perhaps not been the Special Rapporteur's intention in proposing paragraph 2 of article 27, but that was what was contained in that provision, which stated:

> 2. Watercourse States shall enter into consultations with a view to concluding agreements or arrangements concerning:
>
> (*a*) general conditions and specifications for the establishment, operation and maintenance of installations, facilities and other works;
>
> (*b*) the establishment of adequate safety standards and security measures . . .

There was no indication of the conditions and circumstances in which those consultations and agreements would be required.

11. He also noted that paragraphs 1 and 2 of draft article 27 referred to the protection of both international watercourses and related installations. The protection of installations was a well-defined concept which seemed easy to manage in the framework of a legal provision. The protection of international watercourses, however, was a much broader question and he had the impression that the whole exercise of drafting the present articles was in one way or another aimed at such protection. In that connection, it was enough to

[4] *Yearbook . . . 1987*, vol. II (Part Two), pp. 26-27.

refer to paragraphs 1 and 2 of article 6[5] and to article 9,[6] already provisionally adopted by the Commission, as well as to draft article 17 [18],[7] referred to the Drafting Committee in 1988, and draft articles 22 and 23,[8] referred to the Drafting Committee in 1989. The protection of international watercourses could be achieved only through strict observance of the rights and obligations assumed under the present articles and through the conclusion of the agreements provided for in articles 4 and 5. In the circumstances, was it really necessary to say in paragraph 1 of draft article 27 that "Watercourse States shall employ their best efforts to... protect international watercourses..." and in paragraph 2 that they should enter into consultations with a view to concluding agreements or arrangements concerning "the establishment of adequate safety standards and security measures for the protection of international watercourses..."?

12. He therefore proposed that, in article 27, the references to the protection of international watercourses should be deleted, thus leaving only three elements in the article: the obligation for States to "employ their best efforts" to protect installations (para. 1); the obligation to enter into consultations with a view to concluding agreements or arrangements concerning the establishment and operation of installations and the adoption of safety measures to protect them (para. 2); and the obligation to "exchange data and information concerning the protection" of installations (para. 3). Even if they were shortened in that way, those provisions would still be much too broad in scope. The obligations envisaged should be maintained only in cases where the malfunctioning of the installation or an accident or disaster could have effects on the watercourse beyond the borders of the State in which they occurred. Strictly speaking, he had doubts, in the light of other articles of the draft, whether those obligations should really be provided for in draft article 27. The obligation set forth in paragraph 1 was already included in articles 6 and 8; the one stated in paragraph 2 was contained in paragraph 3 of article 4; and the one provided for in paragraph 3 came under paragraph 1 of article 10. Since the Commission was preparing a framework agreement which, by its very nature, should not go into much detail, he was not convinced that a provision on installations was needed. His position was, however, flexible and he was prepared to reconsider it if good arguments were advanced against it.

13. On the question whether the draft articles should contain a provision on situations of armed conflict, there were three possible approaches: to deal somewhat extensively with the subject, as Mr. Schwebel had done in his third report; not to deal with it at all, the approach of Mr. Evensen in his first report; and to deal with it in very general terms, as Mr. Evensen had done in his second report (see A/CN.4/427 and Add.1, para. 21). The Special Rapporteur had decided to follow the third approach and proposed an article 28 which was based on draft article 28 *bis* submitted by Mr. Evensen in his second report. According to the article, international watercourses and related installations, facilities and other works "shall be used exclusively for peaceful purposes" and "shall be inviolable in time of international as well as internal armed conflicts". The intention was good and he himself would have no objection to that approach if he did not have some doubts about the proposed wording.

14. In the first place, "watercourses" and "installations" were once again grouped together as in draft article 27. Furthermore, the concepts of "exclusive use for peaceful purposes" and "inviolability" were far from clear. Article 88 of the 1982 United Nations Convention on the Law of the Sea provided that "The high seas shall be reserved for peaceful purposes". That did not, however, imply the demilitarization of the high seas, since not only did the high seas remain open to warships, but naval warfare on the high seas could not be said to have been prohibited by that provision. The same would probably be the case with draft article 28. Was it realistic to believe, for example, that hostilities would stop at the edge of watercourses? If that was not the case, however, what was the meaning of the assertion that international watercourses "shall be used exclusively for peaceful purposes"? The concept of "inviolability" also gave rise to problems. Reference could, of course, be made to the inviolability of the premises of a diplomatic mission, but what was meant by the inviolability of watercourses "in time of international as well as internal armed conflicts"? Did that mean that an invading army had to stop when it reached the edge of a watercourse? As far as installations were concerned, the 1977 Additional Protocols to the 1949 Geneva Conventions did not refer to inviolability and simply stated that installations containing dangerous forces must not be made the object of attacks. If that was the meaning to be attached to the concept of inviolability, it would be preferable not to use different wording.

15. He did not believe that either the Special Rapporteur or Mr. Evensen could have done any better because those drafting problems seemed inherent in any attempt to deal with the question in a single article. On the other hand, the approach adopted by Mr. Schwebel involved the risk, to which Mr. Evensen had drawn attention (*ibid.*), that the new provisions might be considered as constituting an amendment or an addition to the 1977 Additional Protocols and might reopen the discussion on the principles and rules pertaining to international and internal armed conflicts. The formulation of the draft articles on the law of the non-navigational uses of international watercourses should have neither the purpose nor the effect of reopening that discussion.

16. In the light of those considerations, he agreed with Mr. Tomuschat (2162nd meeting) that the Commission should revert to the approach proposed in Mr. Evensen's first report and not include in the draft articles any provision on the status of international watercourses and related installations in situations of armed conflict.

[5] *Ibid.*, p. 31.

[6] *Yearbook... 1988*, vol. II (Part Two), p. 41.

[7] *Ibid.*, p. 31, footnote 91.

[8] *Yearbook... 1989*, vol. II (Part Two), p. 124, para. 637, and p. 125, para. 641, respectively.

17. Mr. MAHIOU said that the Special Rapporteur's fifth and sixth reports (A/CN.4/421 and Add.1 and 2 and A/CN.4/427 and Add.1) were fully in keeping with his previous reports and, like them, would serve as an excellent basis for the Commission's work.

18. Concerning draft article 24 (Relationship between navigational and non-navigational uses; absence of priority among uses), he agreed with the Special Rapporteur that the subject should be dealt with in the draft articles: the Commission should consider possible priorities among the uses of international watercourses, for that problem arose in practice. He also agreed with the Special Rapporteur that the answer to that question had to be qualified on the basis of considerations such as those set out in article 24. It was impossible to give preference to one use rather than another, but, since conflicts might arise among the different uses, the Commission should establish some rules of conduct for States, taking account of certain factors that were important enough to list. Apparently, however, it could only provide some very general indications. Once it had posited the principle of equitable use, it would be difficult for it to go further. The Special Rapporteur himself, who was aware of that problem, had invited the Commission to think about the advisability of establishing a ranked order of uses for international watercourses, while urging it to be cautious. Caution was fully justified in the present case, for it was difficult, if not pointless, to try to formulate general rules to govern situations that were variable in more than one respect. The uses of watercourses could vary according to region, especially in terms of geography, according to time or season and according to human factors. It was therefore difficult to draw up an exact list of all the parameters involved. In any event, it was obvious that the priorities could not be the same in a desert area as in a rainy area, for example: it was possible that, in the former, agricultural and domestic requirements would take precedence over the others and that, in the latter, where such requirements were met by natural rainfall, priority would go to energy production and navigation. It was ultimately for the watercourse States to decide, in the framework of each watercourse system, which parameters might be used for determining priorities. That was why, in a framework agreement such as the one under consideration, the only possible approach was to allow the States concerned to agree on the best possible uses of a watercourse and to establish priorities, and simply recommend that they should take account of certain factors and principles, such as equity. It was thus in the light of the principle of equity that article 24 should be considered and its wording improved.

19. With regard to draft article 25 (Regulation of international watercourses), he shared the view expressed by the Special Rapporteur in his fifth report (A/CN.4/421 and Add.1 and 2, para. 130) that the unilateral regulation of waters by one watercourse State would operate either to the advantage or to the disadvantage of the other watercourse States. Of course, the advantages should be fostered and the adverse effects discouraged. In that connection, he wondered whether the Commission should proceed along those lines or whether it would not ultimately be enough to prohibit the adverse effects. If the unilateral regulation operated to the advantage of all the States of the watercourse in question, there was no reason to prohibit it, but, if it had adverse effects, then joint planning and co-operation should come into play precisely in order to prevent them. *A priori*, the situation thus appeared simple. The Commission could confine itself to preventing the unfavourable consequences of unilateral regulation. From that point of view, it would be useful to specify first of all that each watercourse State could regulate an international watercourse provided that such regulation had no negative or harmful effects for any other watercourse State, and then to urge the States concerned to co-operate in exploring possibilities of regulation that would be profitable to all, and finally to enunciate the principle of equitable distribution of the burdens that might arise from joint regulation. A paragraph should therefore be added at the beginning of article 25 to take account of the first element, namely a watercourse State's power of regulation.

20. Turning to the sixth report (A/CN.4/427 and Add.1), and in particular draft article 26 (Joint institutional management), he wondered whether, by introducing the concept of international management, that title would not give rise to contention and debate. It was true, as the Special Rapporteur had demonstrated, that watercourse management was particularly well suited to institutional co-operation. The Commission might thus be tempted to be ambitious and decide on all the details of the organization of such co-operation, including its machinery. It might, however, also hesitate to go that far. The Special Rapporteur asked, both in the body of his report (*ibid.*, para. 19) and in paragraph (1) of his comments on article 26, whether the subtopic should be dealt with in the draft articles themselves or in an annex. He himself was inclined to think that the principle of such institutional co-operation had a place in the draft articles themselves, but that the details and machinery of co-operation should be dealt with in an annex. Thus, in his view, article 26 should be drafted in that spirit and the machinery of institutional co-operation, which related in a way to implementation, should be set out in the proposed annex.

21. There was still the problem of how to enunciate the principle of institutional co-operation. In paragraph (4) of his comments on article 26, the Special Rapporteur explained that he had attempted to strike a balance by not requiring the establishment of joint institutions—to which certain States might react negatively—and also by not making a mere recommendation to that effect, which might simply be seen as a standard clause. The Special Rapporteur had thus proposed that watercourse States should enter into consultations concerning the establishment of a joint organization, while asking whether the Commission should not go further and perhaps consider an obligation to negotiate, such as that envisaged in other provisions of the draft articles. In his view, the course of events should not be forced. If, following consultations, the States of an international watercourse considered that it was in their common interest to do so, they would enter into negotiations with a view to estab-

lishing a joint body. The Commission should leave the States concerned some flexibility and avoid carrying the obligation to negotiate too far.

22. He endorsed both the principle and the wording of draft article 27 (Protection of water resources and installations).

23. Referring to draft article 28 (Status of international watercourses and water installations in time of armed conflict), he said that the Commission was faced with a delicate problem: whether such a provision was advisable. As the Special Rapporteur indicated in his report (*ibid.*, para. 21) and as Mr. Calero Rodrigues had pointed out, it had to be decided whether such a provision might not undermine the 1977 Additional Protocols to the 1949 Geneva Conventions. In fact, the answer depended on its wording. He believed that a provision on the status of international watercourses and water installations in time of armed conflict might be useful and even necessary, but it must be fully in keeping with the rules of international law governing armed conflicts. It was true that the Commission could neither add to nor change the rules of customary international law relating to armed conflicts. The provision would certainly not be easy to draft, but it did have a place in the draft articles.

24. Turning to annex I (Implementation of the articles), he said that he would merely state his position in principle without going into the details of the draft articles submitted, although he had a great deal to say on each one. He wondered whether the content of the annex was not in the final analysis linked to its status. If the annex was to be optional, it was possible to envisage an ambitious text that would define clearly and in detail the rules and mechanisms for implementation, including those relating to institutional management—the principle of which was stated in draft article 26—and protection of water resources and installations—the principle of which was stated in draft article 27. He agreed that watercourse States should be urged to co-operate as fully as possible, as was already the case in various parts of the world under agreements in force. Precise and binding obligations could be set out in the annex. On the other hand, if the annex was to be an integral part of the future instrument and had to be ratified together with it, it would not be wise to be so ambitious. The Commission should be satisfied with the least common denominator and lay down a number of minimum rules and guidelines for States. When the Commission had made its choice and indicated its inclinations in the course of the debate, the Special Rapporteur would be in a better position to review the provisions of the annex.

25. Mr. NJENGA said that, before analysing the sixth report (A/CN.4/427 and Add.1), he would make a few brief comments on draft articles 24 (Relationship between navigational and non-navigational uses; absence of priority among uses) and 25 (Regulation of international watercourses) submitted at the previous session in the fifth report (A/CN.4/421 and Add.1 and 2).

26. In view of the many uses besides navigational ones to which international watercourses were put, it was essential to include a provision in the draft articles on the interrelationships between their various uses. Given the increasing demands on the limited resources of international watercourses because of technological advances and the population explosion, in particular in the developing countries, navigational uses no longer had the priority they had enjoyed at the beginning of the century. In fact, it was the use of international watercourses for water consumption and irrigation that now had pride of place, particularly in the developing countries and especially Africa, where more than 70 per cent of the population living in rural areas often consumed untreated water. Consequently, the Commission should de-emphasize the navigational uses of international watercourses, which, moreover, contributed significantly to the pollution of those watercourses, as could be seen in rivers that were used heavily for navigation in Europe and North America.

27. Draft article 24 was well balanced in that it categorically removed the assumption of priority for navigational uses. The opening phrase, "In the absence of agreement to the contrary", was very apt, for it allowed the allocation of priority to a given use, such as water consumption, through specific agreements. He also agreed with paragraph 2, which provided that, in the event of a conflict of uses, all relevant factors would be taken into account to establish equitable utilization of the watercourse in accordance with articles 6 and 7. He would, however, also like to see a reference to article 8, which established the obligation not to cause appreciable harm, for that was, after all, the goal behind the balancing of interests. He would appreciate the Special Rapporteur's comments on that suggestion.

28. With regard to draft article 25, he stressed the importance of the definition of "regulation" of an international watercourse given by the Special Rapporteur in his fifth report (*ibid.*, para. 129). In his view, that definition should feature in the article on the use of terms. As the Special Rapporteur had pointed out, the regulation of international watercourses might have both positive and adverse effects on other watercourse States. It was therefore important to deal with it in a specific provision, to assist States in their efforts to develop international watercourse systems in a manner beneficial to all, achieve optimum utilization of the watercourse and diminish any adverse effects. The thrust of article 25, submitted by the Special Rapporteur on the basis of a thorough analysis of State practice, was therefore acceptable, although he had some reservations concerning the expression "In the absence of agreement to the contrary" in paragraph 2. Even where there was agreement, its objective was the equitable sharing of the burden and the benefits. He therefore suggested deleting that expression and perhaps adding another sentence to paragraph 2, reading: "The States concerned shall endeavour to conclude specific agreements to implement this obligation."

29. Turning to the sixth report (A/CN.4/427 and Add.1), which dealt with the final parts of the draft articles, namely management of international watercourses, protection of water resources and installations, and the implementation of the articles, he noted its

excellent supporting material and the exhaustive comments by the Special Rapporteur. Since the Commission now had practically all the necessary material before it, it would probably be able to complete the first reading of the draft articles before the end of the term of office of its current members in 1991.

30. Given the interdependence of the community of States sharing an international watercourse, the need for rational management and optimum utilization of the watercourse was self-evident. Such rational management and optimum utilization could be realized only through co-operation among the States concerned —for example, through consultations, regular exchanges of data, joint projects, bilateral arrangements and, where deemed appropriate, the establishment of permanent institutional machinery. In his report (*ibid.*, para. 6), the Special Rapporteur drew the Commission's attention to the impressive number of commissions and other administrative arrangements established by watercourse States. The recent droughts in Africa and devastating floods in Bangladesh and elsewhere bore witness to the need to establish such permanent mechanisms and also to involve the international community, in addition to the watercourse States concerned. He shared the Special Rapporteur's conviction that, while there was no obligation under general international law to form joint river and lake commissions, management of international watercourse systems through joint institutions "is not only an increasingly common phenomenon, but also a form of co-operation between watercourse States that is almost indispensable if anything approaching optimum utilization and protection of the system of waters is to be attained" (*ibid.*, para. 7).

31. He therefore welcomed draft article 26 (Joint institutional management), which encouraged the establishment of joint management organizations without making it mandatory. The wording of the article was, in general, acceptable, but he would like a function defined in the following terms to be added to those listed in paragraph 2: "(*g*) co-ordinating measures on the eradication of water-borne diseases". That problem, to which he had had occasion to refer at the previous session, was an important one and deserved specific mention. The reference to "water-related hazards and dangers" in subparagraph (*f*) of paragraph 2 was not sufficient, especially as the subparagraph dealt with warning and control systems relating to pollution, other environmental effects of the utilization of international watercourses and emergency situations. He would appreciate the Special Rapporteur's views on his suggestion. He also endorsed Mr. Mahiou's proposal that the principle of institutional co-operation should be set forth in the main body of the future instrument, the details of the proposed machinery being consigned to an annex.

32. As for paragraph 1, he noted that the formula "at the request of any of them" might not be the most suitable, as it could give the unintended impression that consultations had to commence forthwith at the whim of any watercourse State. It might be preferable to substitute the words "where it is deemed practical and advisable" appearing in the corresponding provision submitted by Mr. Evensen, which was reproduced by the Special Rapporteur in paragraph (2) of his comments on article 26, or simply the words "when necessary". The Special Rapporteur might wish to consider those suggestions.

33. Turning to chapter II of the sixth report, dealing with the security of hydraulic installations, he said that the need for provisions on the protection of water resources and installations, whether in peacetime or in wartime, was self-evident. The work of previous special rapporteurs had made it possible to identify a number of elements, which were set out in the report (*ibid.*, para. 20). All those obligations had become part of customary international law and the draft would be deficient if it failed to mention them. The Special Rapporteur had provided ample justification for the two draft articles he submitted under the general heading "Protection of water resources and installations" (part X), a title which he (Mr. Njenga) thought should read: "Security of water resources and hydraulic installations".

34. Paragraph 1 of draft article 27 (Protection of water resources and installations) should be recast, since it dealt not with the international watercourse as such, but with the danger it could represent in the event, for example, of a defect in the construction or maintenance of its "related installations, facilities and other works". That was brought out clearly in paragraph 2. As indicated by the title of part X, what were involved were the installations and other works.

35. With regard to draft article 28 (Status of international watercourses and water installations in time of armed conflict), he said that the reluctance of some members of the Commission to have an article relating to armed conflicts included in the draft was understandable. Such a provision could be construed as an attempt to revise or amend the delicate balance achieved in the 1977 Additional Protocols to the 1949 Geneva Conventions, the relevant provisions of which were cited by the Special Rapporteur in his report (*ibid.*, paras. 31-34). Nevertheless, article 28 was a fundamental provision and was not inconsistent with the humanitarian principles underlying the Protocols. The article proposed and the general approach adopted by the Special Rapporteur were therefore quite acceptable.

36. In chapter III of the sixth report, the Special Rapporteur proposed an annex on implementation of the articles which contained provisions enabling individuals to obtain redress in the "watercourse State of origin" for activities causing appreciable extraterritorial harm. Annex I contained eight draft articles. Summarizing their content, he said that the task was very ambitious and, although it was interesting and relevant, the Commission had not expected to embark on it, since the Special Rapporteur had not referred to it in the outline of the topic presented in his fourth report. The entire question of recourse for extraterritorial harm was an uncharted field in which virtually no State practice existed, as could be seen from a study of numerous international instruments, including those cited by the Special Rapporteur. The few authorities the Special

Rapporteur had referred to related primarily to the environmental field and then only within relatively integrated communities such as OECD (OECD Council recommendation of 1977 (*ibid.*, footnote 85)) and the Nordic countries (1974 Nordic Convention on the protection of the environment (*ibid.*, annex)). Trends among those groups of countries might be setting the pace for future developments in the law in that field, but that was far from true in the case of international watercourses.

37. In any event, the articles proposed in annex I were likely to be rejected out of hand by many States because, contrary to what happened in the general environmental field, they created—except in very few cases—one-sided obligations for upper riparian States. Apart from the possible existence of a dam near the border which flooded lands in the upper riparian State, a situation which was almost invariably covered by agreements between the States concerned, he could not envisage any situation in which citizens of the upper riparian State would benefit from the rather generous provisions of the proposed annex.

38. Despite his excellent efforts to draft implementation proposals, the Special Rapporteur would do well to reconsider the advisability of embarking upon a course which would inevitably delay the Commission's work and for which, in any case, there was no need in the context of a framework agreement. At most, the proposed provisions might be offered in the form of optional recommendations.

39. Those comments did not, of course, detract in any way from the value he attached to the sixth report, which would no doubt enable the Commission to complete the first reading of the draft articles at its next session. He had no hesitation in recommending that draft articles 24, 25, 26 and 27 be referred to the Drafting Committee.

40. Mr. PAWLAK said that the Special Rapporteur's idea of including in the draft articles an annex dealing with their implementation was a most interesting one.

41. Draft article 26 (Joint institutional management) was one of the most important provisions of the draft. The need for such an article derived from State practice and from the full logic of the draft prepared by the Special Rapporteur and his predecessors. A modern system of watercourse management was needed because of the growing diversity of watercourse uses. While in the nineteenth century regulation and co-operation between watercourse States had been concerned principally with navigation and fishing, there was now a wide variety of problems relating to irrigation, hydroelectric power generation, flood control and, most of all, pollution.

42. Paragraph 1 of article 26 provided a "soft" obligation of consultation on the subject of joint management, paragraph 2 provided a broad definition of management functions and paragraph 3 indicated certain other functions which might be undertaken by a joint management system. While he had no doubt as to the usefulness of article 26, he wondered whether it met all the present and future requirements for co-operation among watercourse States. He agreed with the statement by the Special Rapporteur in his sixth report (A/CN.4/427 and Add.1, para. 19) that the article provided for a practical context within which watercourse States could work together in planning and monitoring the utilization, protection and development of their joint water resources; it should not be overlooked, however, that there were nearly as many joint bodies as there were international watercourses and that they might be *ad hoc* or permanent and might possess a wide variety of functions and powers (*ibid.*, para. 4). In the circumstances, he wondered whether the joint organizations proposed by the Special Rapporteur should duplicate existing institutions, supplement or replace those institutions or be established only in situations where such institutions did not exist. He looked forward to hearing the Special Rapporteur's views on that point at the end of the debate.

43. The main argument in favour of provisions such as those of article 26 lay in the duty of co-operation set forth in articles 5, 9 and 11 to 21 of the draft and, more especially, in the major obligation of equitable and reasonable utilization and participation formulated in article 6. Generally speaking, he supported article 26, but thought that it needed some drafting changes; in particular, it should be brought more closely into line with other articles already adopted on first reading.

44. Paragraph 1, in particular, should be reformulated in such a way as to indicate clearly the obligation to enter into consultations in order to explore the need for the establishment of a joint organization. In that respect, he tended to agree with Mr. Tomuschat rather than with Mr. Al-Baharna (2162nd meeting). As for paragraphs 2 and 3, he thought that they should be combined; in that connection, he supported the idea put forward by Mr. Mahiou and supported by Mr. Njenga of an annex containing a list of activities. With regard to the language used in the article, he had doubts about the expression "joint organization for the management . . .", the customary expression being "international joint commission".

45. The scope of draft article 27 (Protection of water resources and installations) needed further clarification; in the existing formulation, it seemed too broad. The article should provide for the physical protection of the very existence and operation of the international watercourse system. In that light, the expression "employ their best efforts to maintain and protect international watercourses" in paragraph 1 was perhaps not entirely adequate. He would have preferred to speak of undertaking the necessary steps or arrangements in order to maintain, protect and improve international watercourse systems. The article should define what was meant by the physical protection of international watercourse systems; paragraphs 2 (*b*) and 3, in particular, should be reformulated with that purpose in mind. Furthermore, the article should not only create the obligation to prohibit the poisoning of water resources, but also eliminate outdated nineteenth-century concepts according to which it was permissible to cut the enemy's water supply, to dry up springs or to divert rivers from their courses. In short, the Commission should seek ways of protecting international watercourses in time of armed conflict.

46. Turning to the proposed annex I, he said that the importance of its provisions, intended to assist the implementation of the principles set forth in the draft, was self-evident. The remarks he wished to make were of a preliminary nature. Since the only purpose of draft article 1 was to define the expression "watercourse State of origin", the words "and that give rise or may give rise to appreciable harm in another watercourse State" at the end of the article might not be necessary; in his view, they should be deleted.

47. The purpose of draft article 2 was to implement the general principle of non-discrimination and to provide a legal basis for administrative consideration of the extraterritorial effects of planned activities. He agreed in principle that such a provision was needed in a framework agreement, but wondered whether, in view of its importance, it should not be moved to the main body of the draft. Moreover, the title of the article should be changed so as to reflect its substance more adequately; for example, it could read: "Regulation of existing or prospective activities".

48. The text of draft article 3, and especially the English version, should follow more closely the wording of article 235, paragraph 2, of the 1982 United Nations Convention on the Law of the Sea; the words "appreciable harm caused or threatened" in paragraph 1 should be replaced by "appreciable damage caused". He saw no point in extending the obligation of States beyond the provisions of that Convention.

49. He endorsed draft article 4, which protected not only the interests of States, but also the rights of any person who had suffered appreciable harm or was exposed to significant risks. However, he wondered whether draft articles 4 and 5 could not be merged.

50. Lastly, draft article 6 seemed to go beyond the scope of the articles adopted thus far and to encroach on the topic of jurisdictional immunities of States; it should therefore be deleted.

The meeting rose at 11.40 a.m. to enable the Drafting Committee to meet.

2164th MEETING

Tuesday, 29 May 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/421 and Add.1 and 2,[1] A/CN.4/427 and Add.1,[2] A/CN.4/L.443, sect. F, ILC (XLII)/Conf.Room Doc.3)

[Agenda item 6]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

PARTS VII TO X OF THE DRAFT ARTICLES:

ARTICLE 24 (Relationship between navigational and non-navigational uses; absence of priority among uses)

ARTICLE 25 (Regulation of international watercourses)

ARTICLE 26 (Joint institutional management)

ARTICLE 27 (Protection of water resources and installations) *and*

ARTICLE 28 (Status of international watercourses and water installations in time of armed conflict) (*continued*)

ANNEX I (Implementation of the articles)[3] (*continued*)

1. Mr. BENNOUNA said that, in his sixth report (A/CN.4/427 and Add.1), the Special Rapporteur had drawn on doctrine, practice and case-law in supplying the elements for a detailed analysis of the topic. His consistent efforts augured well for the adoption of the draft articles on first reading during the term of office of the Commission's current members.

2. Referring first to draft articles 24 (Relationship between navigational and non-navigational uses; absence of priority among uses) and 25 (Regulation of international watercourses) submitted in the fifth report (A/CN.4/421 and Add.1 and 2), he said he agreed with the Special Rapporteur that developments in the twentieth century, and in particular the growing need for water for consumption and irrigation, meant that the use of international watercourses for navigational purposes could no longer be regarded as a priority. Article 24 should, however, more narrowly pin-point the question of the conflict between the different uses and the possibilities for a solution. Paragraph 1, for instance, simply provided that neither navigation nor any other use enjoyed an inherent priority over other uses, without specifying what those other uses were. The paragraph should therefore be more clearly drafted to contrast the navigational and non-navigational uses of international watercourses. Again, paragraph 2, which dealt with conflicts that might arise between several uses of an international watercourse, did not make it clear that such conflicts would be between navigational and non-navigational uses. That paragraph therefore called for further consideration, so as to arrive at more concise wording. A reference to articles 6 and 7 of the draft was not sufficient. Rather, reference should be made to the obligations of States in

[1] Reproduced in *Yearbook ... 1989*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1990*, vol. II (Part One).

[3] For the texts, see 2162nd meeting, para. 26.