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Summary record of the 2164th meeting

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

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

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.

the matter of navigation, where such obligations existed. Otherwise, in their consultations on the use of an international watercourse for navigational purposes, the parties should be required to take account of the provisions of the present articles, in particular paragraph 3 of article 4 as provisionally adopted by the Commission.[4]

3. It might indeed be useful to include a definition of the term "regulation" at the beginning of draft article 25 and the definition contained in article 1 of the articles on "Regulation of the flow of water of international watercourses" adopted by the International Law Association at Belgrade in 1980 (*ibid.*, para. 139) could be used. Paragraph 2 of article 25, which suggested that watercourse States would participate automatically in the construction, maintenance and, where appropriate, financing of regulation works, should perhaps also include a reference to the participation of such States in the operation of those works on a equitable basis. Furthermore, the Commission should perhaps be guided by ILA's draft, particularly article 3 thereof, and introduce between paragraphs 1 and 2 of article 25 a provision reading: "Where they engage in a joint regulation, watercourse States shall settle all matters concerning its management and administration." That would provide a link between paragraphs 1 and 2.

4. Turning to the articles submitted in the sixth report, he said that draft article 26 (Joint institutional management) was couched in sufficiently broad terms to cover very diversified international practice. It would seem implicit in the terms of the article that the proposed organization for the management of an international watercourse should comprise all the States concerned. He wondered, however, whether that should not be spelt out in the text itself to ensure that, during negotiations, a State was not excluded from the future organization. Another question which called for reflection was what the position would be if, once the organization was formed, one of the member States decided to withdraw. Was it conceivable to have an organization in which all the States concerned would not automatically participate? Possibly, therefore, a paragraph 1 *bis* could be envisaged stipulating that a joint organization should necessarily comprise all the States of the international watercourse system. The idea put forward in the report concerning the establishment of contacts between members of existing international river commissions (A/CN.4/427 and Add.1, para. 11) could also be dealt with in paragraphs 2 or 3 of article 26, possibly by a reference to the need for co-ordination between the various agencies or organizations concerned with a view to improved application of the future convention, and also for the purpose of deriving mutual benefit from the experience gained.

5. Draft article 27 (Protection of water resources and installations) posed problems as it dealt with subjects that differed too much and were dealt with in other parts of the draft, such as maintenance of works (dealt with in draft article 25) and protection of installations and works against risks of danger resulting from the forces of nature (dealt with in draft article 23). Was such a provision really useful, at least as drafted, or could it be dispensed with? Article 27 also covered the exchange of data and information concerning protection of water resources and installations and concerning security standards, a matter dealt with from a different angle in article 20 as provisionally adopted by the Commission, which provided that a watercourse State was not obliged to communicate information vital to its national security. His question to the Special Rapporteur, therefore, was whether the safety standards and security measures that had to be established under the terms of draft article 27 could be considered by the State as involving data vital to its national security.

6. The idea underlying draft article 28 (Status of international watercourses and water installations in time of armed conflict) was a good one, but the article was badly formulated. In his view, the principle of inviolability went beyond the terms of Additional Protocols I and II to the 1949 Geneva Conventions. It was therefore necessary, as the previous Special Rapporteur, Mr. Evensen, had recommended, to provide for the modalities of a relationship between the present articles and Protocols I and II. The Special Rapporteur had, however, remained silent on the question of the legal relationship between article 28 and the two Protocols, or at least had not tackled it head on. Possibly, therefore, some reference could be made to the need, in the context of international watercourses, for States to respect fully the obligations imposed by international humanitarian law, whether customary or conventional.

7. As to chapter III of the report, on the implementation of the articles, like Mr. Tomuschat (2162nd meeting) he wondered why the Special Rapporteur had chosen to place the articles in question in an annex rather than in the body of the draft. They were, after all, concerned not with the technical specifications that were generally set forth in an annex but with substantive norms that had the same value as the other articles.

8. He subscribed to the global approach underlying the draft articles in annex I, since individuals should be involved in the treaty system in one form or another, particularly in the case of rivers, where the environment was crucial, by putting emphasis on the exhaustion of domestic remedies. The main point, as the Special Rapporteur had said, was to avoid a multiplication of inter-State disputes, for if minor problems could be settled by the courts and through the action of individuals, it was not worth while bringing States into confrontation.

9. The title of draft article 2, "Non-discrimination", did not match the content of the article, for non-discrimination was, if anything, covered in draft article 4 (Equal right of access). The purpose of article 2 was in fact to assimilate extraterritorial adverse effects to territorial adverse effects; but that could have a perverse result, particularly where the link between article 2 and article 8 of the draft articles, concerning the obligation not to cause appreciable harm, was concerned. National laws might, for instance, be more lenient than the requirements under the draft. If so, should an activity be authorized on the ground that the effects were not adverse under the law of the country con-

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

cerned? Accordingly, to comply with the object of article 2 as explained in the Special Rapporteur's comments, the rule set forth in the article should be formulated to provide that a State, when authorizing a certain activity on an international watercourse, should take account both of the adverse effects that it might cause in its own territory and of those that might be caused in the territory of other watercourse States, with a view to ensuring that a foreigner had a remedy against a national administration.

10. While paragraph 1 of draft article 3 (Recourse under domestic law) did match the title of the article, paragraph 2 dealt with an entirely different matter, namely the application and development of the international law of responsibility. Domestic remedies would then be applied according to national procedure and would give rise to the application of the municipal law on responsibility, even though that law might incorporate certain international norms. There again, further consideration of the article was needed, with special reference to the link between the application of the rules of international responsibility and the domestic remedy that was available.

11. Draft article 4 (Equal right of access) pertained to the question of non-discrimination and called for closer attention at a later stage. In his view, however, to place nationals and foreigners on an equal footing, in the context of a universal convention, could give rise to certain problems. Further scrutiny was therefore required of the different systems of national law and of the possibilities afforded to foreigners, in particular for remedies against a State.

12. Draft article 6 (Jurisdictional immunity) was not in fact concerned with the question of immunity, which was something invoked by a State before the courts of another State. Rather, what the Special Rapporteur had in mind was the theory of acts of government, namely those acts that were not subject to proceedings brought by an individual and for which no judicial remedy was available. Accordingly, the wording of the article should be recast.

13. Lastly, the articles in the annex should in his opinion be redrafted by the Special Rapporteur before they were referred to the Drafting Committee, but he would not oppose the wish of the majority of the members of the Commission.

14. Mr. SEPÚLVEDA GUTIÉRREZ congratulated the Special Rapporteur on the calibre of his sixth report (A/CN.4/427 and Add.1), which provided the basis for a constructive discussion and would be of great help in codifying a difficult and vital topic. With its wealth of legal material, the report should enable the Commission to conclude the first reading of the draft articles before the end of the term of office of its current members.

15. The completion of a set of draft articles would also temper the concern of many countries, particularly in the third world, which had serious problems owing to the lack of any legal regulation of international watercourses, and it would constitute a very important addition to international legal doctrine. That explained the keen interest in rules and institutions capable of dealing with disputes in connection with international river basins. The Special Rapporteur deserved appreciation for his efforts, which would make it possible to propose norms and organizations to regulate the uses of the waters of international watercourses and to prevent abuse. Protection of such a valuable resource would also help to eliminate tension between States and contribute to the well-being of their peoples.

16. Commenting first on the articles submitted in the fifth report (A/CN.4/421 and Add.1 and 2), he said that draft article 24 did not specify what weight should be given to the various uses of international watercourses in different circumstances. Hence a reference should perhaps be included to establish the priority to be accorded to the various uses; the Special Rapporteur would no doubt offer a solution in that respect. The wording of paragraph 2, as other members had mentioned, also required improvement, as did the wording of draft article 25. For instance, the opening clause of paragraph 2, "In the absence of agreement to the contrary", was ambiguous: if there was agreement, there was no need for the paragraph. Moreover, the works in question were necessarily carried out on the basis of agreement and after lengthy negotiations. If the paragraph was retained, however, it should be subdivided into two parts for the sake of clarity, dealing separately with participation in the construction of regulation works and with maintenance. Also, the scope of the concept of equitable use, which was not very well defined, should be spelt out.

17. Turning to the sixth report, he said that draft article 26, as a key part of the system, had to be carefully worded. Paragraph 1 should be more categorical and should compel the parties to accept the consultations. The question of joint institutional management was extremely important, but it was also true that difficulties of a very delicate nature might arise in the absence of advance planning, since without an agreement the bodies in question could not operate. Thus their functions should be carefully specified from the outset. For example, a joint commission established between Mexico and the United States of America at the beginning of the century had resolved many differences but had also encountered problems for lack of proper planning. The overall results had none the less been positive, and he would have been happy to see that commission mentioned in the Special Rapporteur's comments as a useful example. He shared Mr. Njenga's view (2163rd meeting) that the phrase "at the request of any of them" in paragraph 1 was not satisfactory and that wording should be found which better reflected the goals sought. The term "multi-purpose" in paragraph 2 (*d*) was confusing and should either be deleted or be replaced by a more technical term. Paragraph 3 was fully acceptable.

18. The expression "best efforts" in paragraph 1 of draft article 27 was not very convincing and was inconsistent with the general tone of the draft. The expression "water resources" in paragraph 3 was unclear, since it could refer to many things. Furthermore, in his view the article should cover other related matters such as the protection of human beings and animals from water-borne diseases.

19. In the Spanish text of draft article 28, the term *incorporados*, in reference to the principles enshrined in the Charter of the United Nations, was weak and should be replaced by *consagrados* or an equivalent expression. Again, to speak of inviolability in connection with international watercourses and related installations was technically unacceptable, since there was no basis for doing so in the legal texts, and the Special Rapporteur himself expressed doubts in that connection in paragraph (2) of his comments on the article. Another term should be found. Like Mr. Al-Baharna (2162nd meeting), he could not accept the views referred to in footnotes 75 to 77 of the sixth report (A/CN.4/427 and Add.1), both because they were outdated and because they might lead to undesirable conditions in certain sectors. He therefore shared the view that the article should be more appropriately formulated.

20. As his brief comments on draft articles 24 to 28 did not call for extensive changes to the texts, he was in favour of referring those five articles to the Drafting Committee.

21. Chapter III of the report, on implementation, represented a very progressive step, since the provisions submitted therein virtually signified access for individuals to treaty régimes as subjects of international law. The proposed articles might be a useful addition to the draft, provided it was first determined whether they were to be considered as an optional protocol, an annex, a list for eliciting reactions by States or as a basis for making recommendations to States. Adding the eight articles to the draft in the form of an annex would not be acceptable and would raise several problems. For example, some of the provisions proposed by the Special Rapporteur affected the domestic legislation of States, such as draft article 2, on equating the adverse effects of activities in another State with adverse effects in a watercourse State, and draft article 3, relating to compensation for harm and to co-operation in the development of international law in that field. Other provisions affected the internal jurisdictional immunity of States, which varied extensively from country to country, for most States did not provide for it in their domestic law. Draft article 5 obliged States to inform the nationals of other States that they were exposed to risk of harm and to establish special authorities to do so. Draft article 6 laid down the obligation for watercourse States to ensure that their agencies and instrumentalities acted in a manner consistent with articles 2 to 5. Some of the provisions would be acceptable for contiguous or near-neighbouring countries with the same degree of development and cultural background, but the system would not function for neighbouring or riparian States that were not equally advanced.

22. Draft article 7 involved a very ambitious process and would not make for acceptance of the draft. Complications would arise in bringing together the parties so close to the adoption of the draft articles, and it was not for the Commission to deal with arrangements subsequent to the entry into force of the draft articles. He therefore regretted having to disagree with the Special Rapporteur's proposal. The same was true of draft article 8: the temptation to amend the articles would act against the permanent nature of an instrument arrived at with great difficulty. He would, however, express his views more categorically when the articles were examined in depth. For the time being, he would come to no final decisions regarding the Special Rapporteur's proposals for annex I.

23. Mr. ILLUECA said that draft article 24 reflected the fact that the priority traditionally assigned to navigation was no longer justified in view of the many different uses of international watercourses in the modern world. The principle that no automatic priority was to be accorded to one use over others, contained in paragraph 1, was based on the third report of the former Special Rapporteur, Mr. Schwebel, submitted in 1982, and on article VI of the Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the International Law Association in 1966 (see A/CN.4/421 and Add.1 and 2, para. 124). However, article VI referred explicitly to a "use or category of uses", while draft article 24 simply referred to "use". Therefore, although paragraph 1 was generally acceptable, the Special Rapporteur should be asked about the scope of the expression "category of uses", used twice in article VI of the Helsinki Rules, and whether or not failure to include it would affect the scope of article 24.

24. The opening phrase of paragraph 1, "In the absence of agreement to the contrary", did not seem necessary and should be deleted. Admittedly, the Special Rapporteur had included it in recognition of the consideration granted to navigation by certain treaties, but it weakened the goal of paragraph 1. Deleting it would not nullify existing treaties, and it was preferable for the issue to be dealt with in the commentary to the article or in the preamble to the draft.

25. Fortunately, paragraph 2 did not mention or single out navigation. Thus not only did it highlight the fact that there were no specific uses involving the right to an inherent priority, but it also stipulated that any conflict between the uses of an international watercourse should be weighed along with other relevant factors in accordance with articles 6 and 7. Nevertheless, greater weight should be given to certain factors, such as the health of the population and maintaining suitable water quality for domestic and agricultural uses, as well as the adverse effect of certain uses on the environment. He agreed with the representatives in the Sixth Committee of the General Assembly who had contended that any use that was not harmful to the waters of an international watercourse over the long term should be given priority over a use that could lead to harmful effects for future uses.

26. Since parts VII and VIII of the draft contained only one article each, the titles of the part and of the article should be the same in both cases. The title of article 24 was clearer than the title of part VII and should be the one used. In the Spanish version of the title of article 24, the words *de la navegación* should be replaced by *para la navegación*, for obvious reasons.

27. Both paragraphs of draft article 25 were acceptable and he endorsed the Special Rapporteur's suggestion that a definition of the term "regulation" should

eventually be included in article 1 of the draft. The definition should make it clear that the purpose of any hydraulic works or other measures of regulation was to achieve beneficial results, avoid harmful effects and obtain the best possible use of the watercourse. The definition proposed by Mr. Schwebel in his third report and the one contained in article 1 of the articles on "Regulation of the flow of water of international watercourses" adopted by ILA at Belgrade in 1980, both referred to in paragraph (3) of the Special Rapporteur's comments on article 25 in his fifth report, embodied the necessary elements for formulating a generally acceptable definition.

28. Draft article 26, on joint institutional management, was based on articles 2 and 3 of the articles adopted by ILA at Belgrade in 1980 and on the corresponding draft articles submitted by Mr. Schwebel in his third report and Mr. Evensen in his second report and reproduced in paragraph (2) of the Special Rapporteur's comments on article 26 in his sixth report (A/CN.4/427 and Add.1). The article was properly consistent with parts II and III of the draft.

29. With regard to paragraph (1) of the Special Rapporteur's comments on article 26, the subtopics covered in parts IX and X of the draft should be dealt with in the draft articles themselves rather than in an annex.

30. Article 26 was technically applicable to both contiguous and successive rivers, which took on an international character as a result of the legal obligations imposed on the riparian States by international custom, chiefly with regard to navigation. It should be pointed out that, although navigation rights were contained in treaties on specific rivers, the PCIJ had ruled in the *River Oder* case that riparian States shared a natural "community of interest" in the use of both contiguous and successive rivers.[5] The extraordinary development of the different uses of navigation in the past 50 years would indicate that the Court's conclusion in that case had become applicable with regard to equality of rights and community of interests in the entire field of the use of international watercourses. In that connection, it should be noted that State responsibility regarding management of water resources was no longer confined to watercourses that divided or crossed two or more States, for the physical link with bodies of water that flowed into international watercourses could not be ignored.

31. Paragraph 2 of article 26, while not restrictive, was drafted appropriately for a framework agreement, since it served as guidelines for the functions that might be assigned to any joint institutions the watercourse States might decide to establish. Paragraph 3 (*b*), which provided that one of the functions of the joint organization might be to serve as a forum for consultations, negotiations and procedures for peaceful settlement of disputes, was extremely important and consistent with the decision of the international arbitral tribunal in the *Lake Lanoux* case.

32. He endorsed the Special Rapporteur's treatment of the protection of water resources and installations in draft article 27. The title of the article was useful because of both its technical meaning and its psychological effect. The article provided a good basis for preventing and confronting hazards and dangers due to the forces of nature or to wilful or negligent acts. The exchange of data and information provided for in paragraph 3 was essential to the goals sought.

33. Draft article 28, which, as the Special Rapporteur pointed out in paragraph (1) of his comments on the article, was based on the corresponding provision submitted by Mr. Evensen in his second report, was an excellent contribution. It in no way undermined the 1949 Geneva Conventions or the 1977 Additional Protocols thereto, and in any case fell within the purview of international humanitarian law, since there was not the slightest doubt that poisoning a water supply was even worse than the use of chemical weapons and should be universally repudiated.

34. Mr. SOLARI TUDELA, referring to draft article 24, said that the Special Rapporteur had given a clear account of the manner in which navigational uses of international watercourses had begun to be outstripped in importance by other uses, rightly pointing out in his fifth report that, as a result, "a general assignment of absolute priority to any one use frustrated the achievement of optimum utilization of the watercourse" (A/CN.4/421 and Add.1 and 2, para. 123). That new situation was reflected in the adoption by the International Law Association in 1966 of article VI of the Helsinki Rules on the Uses of the Waters of International Rivers (*ibid.*, para. 124).

35. Clearly, navigation today was deprived of the preferential status it had still possessed in 1921, on the adoption of the Barcelona Convention and Statute on the Régime of Navigable Waterways of International Concern (*ibid.*, para. 122 and annex). In that connection, however, he wished to add two further considerations. The first was the enormous growth in importance of alternative means of communication, in particular road traffic and civil aviation, which had relegated inland waterway navigation to a very secondary role, except in rare instances. The second consideration was the increasing scarcity of water, which had become a matter of world-wide concern. Domestic and agricultural utilization of water would thus have to be given priority over other uses. He felt certain that, if article 24 were to be formulated 10 years hence, it would incorporate that priority. Draft article 24 did reflect the present position, yet it failed to look sufficiently to the problems of the future.

36. He had no objection to the formulation of draft article 25. In paragraph (2) of his comments on the article in his fifth report, the Special Rapporteur explained the meaning attached to the term "equitable", and participation on an equitable basis was taken to mean that watercourse States receiving benefits from a particular project should contribute proportionately to its construction and maintenance. The Special Rapporteur added that the term also meant that such contributions would be required only to the

[5] *Territorial Jurisdiction of the International Commission of the River Oder*, Judgment No. 16 of 10 September 1929, *P.C.I.J., Series A, No. 23*, at p. 27.

extent that the watercourse State in question was in a financial position to make them. A definition of the term "regulation", as used in article 25, should be included in article 1.

37. Turning to the Special Rapporteur's excellent sixth report (A/CN.4/427 and Add.1), he said that draft article 26 was a concrete application of the principle of co-operation established in article 9 of the draft. Article 26 laid down the duty to enter into consultations on the establishment of a joint organization for the management of an international watercourse, an approach that differed from the one adopted by the two previous Special Rapporteurs.[6] Mr. Schwebel had specified the duty to negotiate subject to the requirement that "the economic and social needs of the region are making substantial or conflicting demands on water resources, or... the international watercourse system requires protection or control measures". Mr. Evensen had specified the requirement: "where it is deemed practical and advisable for the rational administration, management, protection and control of the waters of an international watercourse", in laying down an actual obligation for watercourse States to establish permanent institutional machinery.

38. He agreed with the Special Rapporteur's formulation of paragraph 1 of article 26, establishing the duty of a watercourse State to enter into consultations at the request of any other watercourse State. However, there were instances in which that duty should go further. He was thinking of the circumstances mentioned in the text proposed by Mr. Schwebel, namely where the economic and social needs of the region were making substantial or conflicting demands on water resources. In that situation, there should be an obligation to negotiate, which implied the duty to arrive at some result.

39. He agreed with the texts proposed for article 27 and article 28. However, the term "inviolable", used in article 28, needed clarification. The underlying idea was acceptable, but he was not at all certain of the adequacy of the actual term.

40. Lastly, the provisions of annex I on the implementation of the articles were not an indispensable part of the draft and should be left out of the body of the future instrument. The draft articles should be confined to the rules on the non-navigational uses of international watercourses, framed so as to attract maximum acceptance from the international community. The annex should take the form of an optional instrument to be adopted by States at their choice and to serve in any case as guidance for the application of the main articles.

41. The CHAIRMAN, speaking as a member of the Commission, said that he could readily accept draft article 24, submitted in the Special Rapporteur's scholarly and well-documented fifth report (A/CN.4/421 and Add.1 and 2). The article was consistent with article 2, on the scope of the present articles, which recognized the interrelationship between navigational and non-navigational uses of international watercourses. A provision along the lines of article 24 was needed in view of technological developments, the increase in population and the relative scarcity of water resources. As a general rule, no inherent priority should be accorded to any use of an international watercourse, other than by specific agreement, of course. The Special Rapporteur had therefore been wise to include the words "In the absence of agreement to the contrary", in paragraph 1, a proviso that was not strictly necessary and was simply intended as a recognition of the preference given to navigation in certain treaties. He also subscribed to paragraph 2 of article 24, which provided for an equitable and reasonable resolution of any conflict between uses by weighing uses against one another in accordance with articles 6 and 7.

42. Paragraph 1 of draft article 25 was acceptable, since it did not make regulation an obligation for riparian States. A watercourse State had a right to regulate the part of an international watercourse within its own territory. As the Special Rapporteur had pointed out, however, the fact that river regulation was at once necessary for optimum utilization and potentially harmful made co-operation between watercourse States essential. Paragraph 1 was a concrete application of article 9, on the general obligation to co-operate, and co-operation under article 25 should therefore be based on general principles of international law such as sovereign equality and territorial integrity. Paragraph 2 contained a residual rule which could be considered superfluous. It was inconceivable that a watercourse agreement on regulation works would neglect to provide for a sharing of the burdens. Besides, the general rule of participation on an equitable basis had already been set out in article 6 of the draft. The word "regulation" itself must be defined in article 1, on the use of terms, because "regulation" had a specific meaning with a technical connotation.

43. As to draft article 26, the Special Rapporteur acknowledged in his sixth report (A/CN.4/427 and Add.1, para. 7) that there was no obligation under general international law to form a joint institution for the management of an international watercourse system. On the other hand, research had shown that management of international watercourse systems through joint institutions was becoming more common and also an indispensable form of co-operation between watercourse States. To try to resolve that dilemma, the Special Rapporteur had devised the obligation of consultation at the request of any riparian State. His own understanding was that an obligation of consultation was not the same as an obligation of negotiation and might not necessarily result in negotiation. The question whether consultations would ultimately lead to negotiations for an agreement on joint institutional management was a matter entirely for the States concerned. On that understanding, paragraph 1 of article 26 stood a chance of general acceptance by States.

44. By and large he agreed with the Special Rapporteur on the protection of water resources and installations, dealt with in part X of the draft. In particular, draft article 28, on the protection of water resources

[6] For the corresponding draft articles submitted by Mr. Schwebel in his third report and by Mr. Evensen in his second report, see para. (2) of the Special Rapporteur's comments on draft article 26 in his sixth report (A/CN.4/427 and Add.1).

and installations in time of armed conflict, was necessary. Admittedly, the article went beyond the requirements of general international law and the relevant international instruments. Neither general international law nor the 1977 Additional Protocols to the 1949 Geneva Conventions required that international watercourses and their installations and facilities be used exclusively for peaceful purposes; nor were they granted inviolability in time of armed conflict. Nevertheless, the notion of inviolability set out in article 28 was a matter of progressive development of the law, in view of the scarcity of fresh water in the modern world and the humanitarian principles underlying the two Additional Protocols. The exclusively peaceful use of watercourses and related installations and works constituted a pre-condition for such inviolability. Naturally, the poisoning of watercourses could not be permitted under any circumstances, since such an act was a serious war crime as well as a crime against humanity.

45. With regard to annex I, on the implementation of the articles, the Special Rapporteur was to be commended for his efforts to devise provisions intended to make redress for injury more readily available. However, taking into account the present stage of international relations and the sensitive nature of some of the issues involved, he felt that the inclusion of the articles in question, even as an annex, could make the future framework agreement less attractive to a number of States. Two solutions were possible, one being to provide for optional acceptance of the annex by means of a formal declaration by States, another being for the articles on implementation to take the form of a separate optional protocol.

46. Lastly, he had some difficulty in reaching a position on all of the articles under consideration because they made no distinction between contiguous and successive international watercourses, through no fault of the Special Rapporteur. For instance, in the case of joint institutional management, the situations of contiguous and non-contiguous watercourse States were not the same; hence the needs of those two categories of States might not be the same. In formulating the draft articles, the obligations of those two categories of States should not be the same either.

47. Mr. KOROMA said that, traditionally, States had regarded freedom of navigation of a watercourse as a specially protected right. For example, the principal reason for convening the Berlin Conference of 1884 had been the desire to resolve what had become known as the "Congo question", i.e. whether to extend the principle of freedom of navigation, as stipulated at the Congress of Vienna in 1815, to the Congo and Niger rivers. Freedom of navigation could be said to have been a universal principle. On the other hand, one was bound to agree with the Special Rapporteur that, as a result of technological developments and of other increasing uses made of watercourses, it was no longer tenable to give pre-eminence to navigation over other uses as a general rule.

48. Nevertheless, the two kinds of use could not be separated. Just as navigational requirements could affect the quality and quantity of the water, harm could also be caused to navigation by construction works on a river or by utilization of the watercourse for some other purpose which temporarily or permanently obstructed navigation. The Senegal River, for example, was used not only for navigation, but also for other purposes. In Africa, riparian States utilized rivers from the triple standpoint of agriculture, navigation and hydroelectric power.

49. Two issues might arise. The first was that the absence of pre-eminence of any of the uses of the watercourse could lead to a conflict of interests, and the second was that the watercourse States could agree among themselves to accord priority to one category of use. With regard to the first situation, the Special Rapporteur was right to state that the general principles already adopted by the Commission on equitable utilization, the obligation not to cause appreciable harm and the duty to co-operate would apply in resolving such conflicts. In the second situation, as correctly noted by the Special Rapporteur, the watercourse States concerned could reach agreement on any particular priorities. The importance and significance of navigation for some watercourse States could not be underestimated or fail to have a substantial impact on the exploitation of natural resources, including food production, and on road and railway construction. He agreed with Mr. Solari Tudela that it was necessary to have in mind not only the present situation, but also future possibilities. From that standpoint, it was essential for the Commission not to imply that it was underrating navigational uses.

50. The title of draft article 24 might be amended to read: "Relationship to navigational uses and non-priority among uses" or simply "Relationship to navigation and non-priority among uses", thus avoiding the word "absence", which might prove confusing in view of the reference to "absence of agreement" in paragraph 1. Paragraph 2 should be amended to read: "In the event of a conflict regarding the uses of an international watercourse [system], the relevant principles of this Convention shall apply in establishing equitable utilization." Moreover, the Commission would be remiss if it failed to state that navigation was indeed different from other watercourse uses, and therefore, in the commentary, it should reformulate accordingly the third sentence of paragraph (1) of the Special Rapporteur's comments on the article in his fifth report (A/CN.4/421 and Add.1 and 2).

51. Expressing agreement with the intent and thrust of draft article 25, he said that diverting a watercourse, operating a hydroelectric power station or carrying out irrigation work could have both positive and harmful consequences. Such uses could help to increase agricultural production, serve to prevent floods or mitigate their effects, or even affect the freedom of navigation. Regulation was essential for the manifold uses made of watercourses today. Hence the Special Rapporteur was right to propose a provision on regulation of international watercourses with a view not only to attaining the twin objectives of optimum and equitable utilization, but also to preventing serious or appreciable harm being caused to other States.

However, the text of article 25 should be recast. He agreed with the Special Rapporteur that the article incorporated the principles of the duty to co-operate and not cause serious harm, equitable utilization and the duty to exchange information or to consult, and he endorsed the spirit underlying the article. But its provisions should not be couched in mandatory terms, first, because watercourse States might have different priorities with regard to the regulation of a watercourse, and secondly, because some States still considered that projects being carried out within their boundaries were a matter exclusively for them and not for other States. Without sharing that view, he none the less considered that an article forming part of a framework agreement should be made more flexible so as to command general acceptance. It might also be desirable to indicate that the co-operation referred to in paragraph 1 should be on an equitable basis. Paragraph 2 could be amended to read:

> "In the absence of agreement regarding the sharing of the costs of a project, watercourse States shall participate on an equitable basis in the construction and maintenance or, as the case may be, defrayal of costs of such regulation works as they may have agreed to undertake, individually or jointly."

The present wording could be construed to mean that, even in the absence of an agreement, watercourse States would be expected to pay towards a project simply because they happened to derive benefits from it. The suggestion made by Mr. Njenga (2163rd meeting, para. 28) was constructive and would help to clarify the article. As to the point raised by the Special Rapporteur in paragraph (3) of his comments on the article, the term "regulation" should be defined in article 25 itself, where it had a specific meaning different from the one it had elsewhere in the draft.

52. He was grateful to the Special Rapporteur and the Secretariat for circulating the first part of the sixth report (A/CN.4/427 and Add.1) before the beginning of the session. Draft article 26 was very important in several particulars. First, the article took up the fundamental issue of the hydrological régime of rivers and the physical factors which governed them and on which the contemporary rules were based. As the Special Rapporteur had pointed out in his oral introduction (2162nd meeting), citing the former Special Rapporteur, Mr. Schwebel, the natural sciences now regarded international watercourses as part of a natural unity composed of the aggregate of all surface and underground waters flowing into a common watercourse. A number of watercourse agreements and arbitral decisions had been based on that concept. Secondly, article 26 attempted to implement the various rules already adopted in relation to the present topic. By inviting watercourse States to enter into consultations concerning the possible establishment of a joint organization for the management of the watercourse, the article implied that a watercourse was indivisible. Through the proposed organization, serious problems or consequences which might result from different or competing uses could be resolved. The approach was universally appealing, and for developing countries in general and African countries in particular it could be said to be indispensable. For most of those countries, uses such as irrigation, flood control and hydroelectric development, and the prevention of pollution, could be effectively tackled only through joint institutional mechanisms. In paragraph (3) of his comments on article 26, the Special Rapporteur was therefore right to conceive the article as providing guidance to watercourse States with regard to the powers and functions that could be entrusted to such joint institutions as they might decide to establish.

53. Although article 26 was based on various legal rules which were now accepted in relation to the present topic, he considered that, in view of its intended role as part of a framework agreement, and given the position taken by some States that they were not bound to furnish information on all projects, it could be modified, at least to some extent, along the lines of the corresponding draft article submitted by Mr. Schwebel, reproduced in paragraph (2) of the Special Rapporteur's comments. He would favour retaining the list of functions contained in paragraph 2, or even, where necessary, adding to it, but the list would be more appropriately placed in an annex rather than in the main body of the draft. He wished to endorse the comments on article 26 made by Mr. Solari Tudela earlier in the meeting.

54. Draft article 27 was predicated on the principles of equitable utilization, the duty to exchange information and data and the duty not to cause harm, and it thus had a place in the draft. However, the two issues of non-contamination of a watercourse and safety of hydraulic installations should be addressed separately.

55. As for draft article 28, it was consistent both with the spirit of the Charter of the United Nations and with the progressive development of international law, since the poisoning of watercourses was to be considered not only as a war crime, but also as a crime against humanity within the meaning of the draft Code of Crimes against the Peace and Security of Mankind. He none the less agreed with Mr. Sepúlveda Gutiérrez that it would have been helpful, particularly to students and others who studied the Commission's reports, if the reference to the views of Fauchille and Oppenheim in paragraph (2) of the Special Rapporteur's comments on the article had been accompanied by an appropriate rider making it clear that the Commission did not consider those views to be in accordance with contemporary international law. That objection notwithstanding, he wholeheartedly supported article 28.

56. With regard to annex I, the Special Rapporteur was to be commended for attempting to lay down principles designed to facilitate implementation of the articles, make redress more readily available to private parties and help to avoid disputes between watercourse States. He would agree with the proposition that actual and potential watercourse problems should be resolved on the private level, through courts and administrative bodies, in so far as possible, if the problems were those arising within the same jurisdiction or between countries in the same geographical region; but the Special Rapporteur was apparently referring to problems which might arise between watercourse States. While

the idea developed in the sixth report in that regard (A/CN.4/427 and Add.1, para. 39) was no doubt an interesting one, the issues it raised were so complex that separate meetings would have to be set aside to consider it properly and do it justice.

57. The call for private remedies would imply a lack of legal rules at the international level to decide problems that might arise between nationals of watercourse States. Such an attitude on the part of a body currently engaged in elaborating precisely such rules would surely be ironic. Even if no law on the non-navigational uses of international watercourses were available, States could resort to the law of State responsibility or to customary international law. In view of the complex nature of the rule on the exhaustion of local remedies, which could be used either as a shield or as a sword, he did not consider it a reliable basis for the proposal. Moreover, the proposal did not address the issue of procedure whereby a private litigant could sue in the courts of a foreign State for harm which might have been caused in another State. How did the proposal surmont the formidable obstacle of jurisdiction? There was also the question of the high cost of litigation to private individuals. While recognizing the positive aspects of the idea and acknowledging that, if only in a very limited number of cases, it had already been implemented, he considered that remedial measures for problems arising between two or more watercourse States would be best handled by States at the international level, thus providing the necessary uniformity of jurisprudence to ensure the durability of the law under consideration. Without wishing to detract in any way from the high calibre of the sixth report, he did not think that the draft articles in annex I were ready for referral to the Drafting Committee.

58. Mr. ROUCOUNAS, after congratulating the Special Rapporteur on the method adopted in the preparation of his sixth report (A/CN.4/427 and Add.1), said that the terms employed in draft article 26 were somewhat vague. He agreed with Mr. Sepúlveda Gutiérrez that a more firmly worded text along the lines of those proposed by the two previous special rapporteurs might be preferable. In particular, he would welcome the reinstatement of references to the permanence of the proposed joint organization and to the strengthening of existing organizations. He also wished to reiterate the point he had made at the previous session to the effect that a joint organization should be required to meet at specified intervals.

59. Draft article 27, too, was rather weakly worded and should be recast. Mr. Bennouna had referred to article 20 of the draft in connection with the requirement concerning the exchange of data and information in paragraph 3 of article 27, but article 10 also had a bearing on that issue. It might be preferable if all provisions relating to the exchange of information were grouped together.

60. With regard to draft article 28, he endorsed the reference in paragraph (2) of the Special Rapporteur's comments on the article to the 1977 Additional Protocols to the 1949 Geneva Conventions and suggested that, besides article 56 of Additional Protocol I, mention should also be made of article 54 of that Protocol and articles 14 and 15 of Additional Protocol II; a reference to article 85 of Protocol I might also be appropriate. In his opinion, article 28 should be divided into two paragraphs, the first relating to the use of international watercourses exclusively for peaceful purposes and based, in essence, on the relevant provisions of the 1982 United Nations Convention on the Law of the Sea, and the second referring to cases of international armed conflict. In that connection, he had no objection in principle to the concept of inviolability, but it would be better if the provision were based on concepts already embodied in international instruments, such as the Geneva Conventions and Additional Protocols, making it quite clear that the provision was proposed in application of existing international law rather than as part of the progressive development of international law.

61. As to annex I, on implementation of the articles, he had been greatly impressed by the arguments advanced by Mr. Koroma. Implementation was a matter not only of harmonization of domestic legal systems, but also of international procedures. Avoidance of recourse to traditional diplomatic procedures was possible only where an advanced level of integration already existed. In that regard, he noted the reference to reciprocity made by Mr. Tomuschat (2162nd meeting) and remarked that certain provisions of the General Agreement on Tariffs and Trade were interpreted differently depending on the degree of integration among groups of contracting parties.

62. The term "extraterritorial" employed in paragraph 38 of the sixth report was inappropriate: the correct term was "transfrontier". Draft article 2 of annex I should specify by whom the activities referred to were proposed or planned.

63. The wording of draft article 3 was slightly inconsistent with that of articles 14, 16 and 17 as provisionally adopted by the Commission.[7] With regard to paragraph 2, he would point out that, unlike that provision, article 235, paragraph 3, of the 1982 United Nations Convention on the Law of the Sea, on which the text was based, dealt with the international responsibility of States and not of private individuals.

64. The remarks he had made in connection with paragraph 3 of draft article 27 and other provisions dealing with the exchange of information were also applicable to draft article 5 of annex I. Lastly, he said that he would not comment on draft article 6, especially since article 13 (Personal injuries and damage to property) of the draft articles on jurisdictional immunities of States and their property was still before the Drafting Committee on second reading.

The meeting rose at 1.05 p.m.

[7] *Yearbook ... 1988*, vol. II (Part Two), pp. 50-51.