

**DRAFT ARTICLES ON THE LAW OF
INTERNATIONAL RIVERS PROPOSED
BY PAKISTAN**

Article 1

An international river is one that traverses the boundary of or separates two or more States, or which flows into the said river making a material contribution to its flow.

Article 2

"A riparian State may not take any action in its territory with respect to the flow of an international river which would be against the sovereignty and territorial integrity of a co-riparian State. In particular :—

- (a) A riparian State may not utilize the waters of an international river in a manner which would cause grave and permanent damage to the territory of a co-riparian State.
- (b) A riparian State may not utilise the waters of an international river in a way which would cause wide-scale environmental, ecological and physical changes in the territory of a co-riparian State".

Article 3

In cases in which the utilization of an international river by a riparian State may result in damage or injury to a co-riparian State, the prior consent of that State is required. Where any damage or injury results, the aggrieved State is entitled to indemnification.

Article 4

Every riparian State must act in good faith in the exercise of its rights in relation to the waters of an international river. Where a particular right can be exercised by more than one method, it is an abuse of rights for a riparian State to adopt the method which would cause injury to a co-riparian State. In particular :—

- (a) A lower riparian State may not dam the waters of an international river at a particular site, flooding the territory of an upper riparian State, if an alternative site is available which would avoid such flooding.
- (b) An upper riparian State may not divert the waters of an international river without constructing reservoirs for storage of water, where this is possible and which would have the effect of avoiding damage to the lower riparian State.

Article 5

A riparian State may not divert waters of an international river in such a manner that the unconsumed water flows into a channel which is different from the natural course of the river.

Article 6

Each riparian State is entitled, within its territory, to a reasonable and equitable share in the beneficial use of the waters of an international river. What is a reasonable and equitable share is to be determined by considering all the relevant factors in each particular case.

Article 7

A use or category of uses is not entitled to any inherent preference over any other use or category of uses. An international river must be examined on an individual basis and a

determination made as to which uses are more important, giving special weight to uses which are the bases of life.

Article 8

1. An existing reasonable use is to be respected unless the factors justifying its continuance are out-weighted by other factors leading to the conclusion that it would be equitable to modify or terminate it so as to accommodate a competing incompatible use.

2. An existing use is not a reasonable use if :

- (a) it is established over the lawful objections of a co-riparian State that the use is contrary to the present article, and
- (b) at the time of becoming operational, it is incompatible with a pre-existing reasonable use.

Article 9

If due to human conduct any detrimental change is caused in the natural composition, content, or quality of the water of an international river in one State, which does substantial injury in another State, the former State is responsible for the damage done.

Article 10

States are under an obligation to settle international disputes as to their legal rights or other interests by peaceful means in such a manner that international peace and security, and justice are not endangered. In the case of disagreement between two or more States, it is not permissible for one of these States to act as judge in its own cause and take unilateral and arbitrary action.

OPENING STATEMENT OF THE IRAQI DELEGATE

Mr. Chairman,

I would like to associate myself with the Distinguished Delegates who spoke before me in extending our congratulations to you for occupying the Chair. We are certain that our deliberations would come to fruitful conclusion under your chairmanship and guidance.

The Iraqi Delegation has referred the subject of the Law of International Rivers to the Committee under Article 3 (b) of its Statutes for consideration together with the Delegation of Pakistan due to the importance of that subject.

The Iraqi Delegation is primarily interested in two questions :

- 1. definition of the term 'International Rivers' ; and
- 2. rules relating to utilisation of waters for agricultural and industrial purposes apart from navigation.

We wish to reiterate what we have already said in the Karachi Session that we are concerned with the rivers which run through the territories of two or several States or which separate two different States. Such rivers are owned and shared by more than one State.

Since a situation of a joint river raises many difficult problems, they are governed by certain rules which are already in existence. These rules have been derived from international customs practised among different nations, opinions of jurists, decisions of Federal Courts and project treaties.

We should like to emphasize here that these rules are in existence by virtue of the fact that territorial supremacy does

not give an unlimited liberty of action, since absolute liberty of action by a certain co-riparian State might result in an injurious action to the natural conditions of the territory of a neighbouring co-riparian State. The Delegation of Iraq had requested the Secretariat to prepare the necessary documents and reports for discussion. The Secretariat have placed before us a study which we find very valuable.

The Iraqi Delegation proposes to present formally a set of principles in regard to international rivers. These are placed before the Sub-Committee for its consideration and discussion. In presenting these draft principles I wish to say the following :

In dealing with the question of International Rivers there are several views in respect of the international law and principles relating to rivers forming frontiers or crossing them. Some have advocated the principle of absolute territorial sovereignty of the State to dispose of freely of the waters flowing in and through its territory. Others have advocated the principle of absolute territorial integrity by virtue of which a State may not for its part restrict the natural flow of waters flowing through its territory. However, the principle of restricted territorial sovereignty together with restricted territorial integrity seems to have the support of the vast number of jurists.

The view of the Iraqi Delegation supports the third principle, mentioned above, that of the restricted territorial sovereignty together with the restricted territorial integrity. It is our view that the territorial sovereignty of a contributing country or a country through which the water of an international joint river flows should not confer the right to use and dispose of the water within the territory to whatever extent and manner it is desired, if such action causes injury to the other States concerned. We are guided in this connection by the view of Professor Oppenheim who states (and I quote):

"No State is allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State. For this reason a State is not only forbidden to stop or divert the flow of a river which runs from its own to a neighbouring State, but likewise to make such use of the water of the river as either causes danger to a neighbouring State or prevents it from making proper use of the flow of the river on its part".

The rights of all riparian States must be fully respected since international rivers are rivers which run through several States and are owned by more than one and belong to territories of all the States concerned. Furthermore, such a river is an indivisible physical unit. Consequently, the utilization of the waters of an international river shall be effected in such a way as to bring a maximum benefit to all riparian States and that each one of them is in duty bound to co-operate with the other or others with a view to promote and develop such utilization.

An act which is injurious to the interests and rights of riparian States carried out by a co-riparian State is, therefore, not acceptable by jurists. The principles of absolute territorial sovereignty in this context does not seem to have ground in modern international jurisprudence which tends to restrict the principle of sovereignty resorted to by some States justifying their acts or utilizing waters according to their own wishes and by so doing discarding the interests of others. While it is true that there are no established rules of international law which are binding upon States in the matters of respect for the right to joint waters, this is, however, dealt with through agreements and treaties among the States concerned and have consequently become part of the customary international law.

In drawing up these principles we have to some extent made use of the decisions taken at the Conference of the International Law Association, held in New York in

September 1958, which enunciated agreed principles of international law establishing the idea that a system of rivers should be treated as an integrated unit.

The Conference further agreed on the principle that except as otherwise provided by treaty or other instruments or customs binding upon the parties, each co-riparian State is entitled to a reasonable and equitable share in the beneficial use of the waters of the international river. The co-riparian States are under a duty to respect the legal rights of each co-riparian State in the joint rivers. It could be clearly concluded, therefore, that the acquired rights of all riparian States should be completely recognised and adhered to.

We further maintain that co-riparian States are under a duty to respect the rights of each other and that no riparian State is justified in taking a unilateral action to deviate the waters of an international river in any manner from its natural bed for the use of its waters in other areas which do not belong to its natural locale. We maintain that each co-riparian State has the right to use waters of the river which flows into and through its territory on the condition that it takes into consideration the restrictions imposed by international law and international custom and the rights of other co-riparian States.

As to the economic use of international rivers we hold to the views of Prof. H.A. Smith. These views are embodied in draft Articles 9 and 10 of the principles presented to the Subcommittee. Articles 11 and 12 are natural corollaries of the previous ones. They also take into consideration the principle of goodwill among nations and the idea of the community of interest and equity.

May I at this juncture take the liberty of referring to the views of several jurists, among them, H.R. Farham who suggests that a river which flows through the territory of several States or nations is their common property. . . Neither

nation can do any act which will deprive the other of the benefits and its right to enjoy the advantages the river offers.

The inherent right of a nation to protect itself and its territory could justify the State lower down the stream in preventing the one further up from turning the river out of its course, or consuming so much of the water for purposes of its own as to deprive the former of its benefits. We, therefore, maintain that an upstream riparian State or the State where the source of the international river is located may not carry out an act for exploitation of the waters of the river that which may constitute an injury to the natural conditions of the co-riparian State or the acquired rights of the latter. In order to contain these valid ideas we have suggested in Article 12 a principle coherent with these views. We are also guided by these views when presenting the principles embodied in Articles 15 through 19.

Article 20 deals with the shares to be enjoyed by co-riparian States. The factors enumerated in that Article are of common interest to all. While the principle in Article 21 discusses resolving of differences by reference to international law, agreements, court judgments and views of international jurists which are the regular and acceptable channels in international conduct.

I place these draft principles at the disposal of the Subcommittee.

DRAFT PRINCIPLES PRESENTED BY THE IRAQI DELEGATION

1. The topic of discussion is the question of joint rivers shared by several States, the utilization of their waters, their exploitation for agricultural and industrial purposes.

2. International rivers in this context mean joint rivers which flow through several States and are considered to be a part of the common property of those riparian States. The river itself is an indivisible and natural geographic physical unit.

3. Complete recognition of the acquired rights of all riparian States and full adherence to those rights.

4. A system of rivers and lakes located at the delta and river basin is an integrated indivisible unit.

5. Except as otherwise provided by treaty or other instrument or customs binding upon the parties, each co-riparian State is entitled to a reasonable and equitable share in the beneficial uses of the waters of the international river.

6. A riparian State is under a duty to respect the legal rights of other co-riparian States in the international river.

7. No riparian State may take a unilateral action to deviate the flow of waters of an international river in any manner from its natural bed for use of its waters in other areas which do not belong to its natural locale.

8. Each State has the right to use waters of the joint river which flows into and through its territory on condition that it takes into consideration the restrictions imposed by international law and international custom, and the rights of other co-riparian States.

9. No riparian State may undertake a project on an international river within its territory in a manner that would cause or threaten to cause an injury to the lawful interests for the use of those waters by any other co-riparian State; or constitutes an infringement of the acquired rights of those States unless the former co-riparian State gives guarantee to the other concerned co-riparians to enjoy specific benefits; or be compensated fully for the loss or injury that might occur as a result of such an undertaking, providing adequate provision for future security.

10. No State is to undertake a project on an international river without the prior consent of other co-riparian States concerned. In case of disagreement the said State should enter into negotiations to come to an agreement within a reasonable period of time. It is advisable in such a case to refer the matter to a technical commission or to a specialised establishment in an effort to reach a solution which would guarantee maximum benefit to all parties concerned, or to refer the matter for arbitration.

11. In coherence with the principle of goodwill among nations, no riparian State may begin work during the negotiations on the undertakings or projects which are subjects of dispute, and refrain from taking up any measure which might result in making the differences sharper between the negotiating States.

12. An upstream riparian State or the State where the source of a joint river is located may not carry out an act for exploitation of the waters of the river, that which may constitute an injury to the natural conditions of the other co-riparian States, or the acquired rights of the latter.

13. If the waters of the river are not being utilised by the upstream riparian State, the downstream State has the right to exploit these waters.

14. If the upstream State is not utilising the waters of a joint river, the downstream State has the right to exploit the waters; and in case the upstream State decides thereafter to exploit or make use of waters which flow into and through its territory, the latter should in that event respect and take into consideration the rights of the downstream State.

15. The upstream co-riparian State may not exploit or utilise the waters of an international river in a manner which would bring about a basic change in the nature of the river.

16. A riparian State may not change the course of an international river at the point where it enters the territories of the other co-riparian States.

17. No riparian State may make alterations or change the course of an international river which would decrease the amount of its waters in the downstream co-riparian State.

18. No co-riparian State may undertake projects or construct dams on the river within her territory, if these undertakings would result, or would amount to an injurious act to the rights of the downstream co-riparian State.

19. No co-riparian State may carry out an act or construction on a joint river in her territory that might cause drought in the other co-riparian States or which would prevent the entry of water into the territory of the latter.

20. When deciding the shares of riparian States of the waters of international rivers, emphasis should be laid on the acquired rights of the States concerned, the areas of the agricultural lands which are actually under cultivation and other cultivable areas, and other relevant factors.

The following principles should be taken into consideration when deciding the shares of the riparian States in the

waters of an international river; these are according to priority :

- (a) Local municipal consumption.
- (b) Agricultural consumption and consumption by livestock.
- (c) Power production.
- (d) Other industrial uses.
- (e) Navigational purposes.
- (f) Fishing.
- (g) Other uses that might be decided by specialised technical authorities.

21. In case of a conflict or disagreement regarding joint international rivers, the above principles should be taken into consideration. Reference to international law, bilateral and multilateral treaties, court judgments, and views of international jurists are also reliable sources for resolving such conflicts and disagreements.

STATEMENT BY THE CEYLONESE REPRESENTATIVE

In terms of the mandate given by its Resolution X (6) adopted by the Asian-African Legal Consultative Committee at its Tenth Session in Karachi, the purpose of the Sub-Committee meeting is to prepare a set of draft Articles on the Law of International Rivers for consideration by the AALCC at its Eleventh Session in Accra.

The subject of international waters, as a whole, is one of considerable political significance for the countries of Asia and Africa. Much of this area is arid and consequently the ability of many of the States in this region to support their respective populations is governed to a large extent by the resources of water which each State possesses.

Since Ceylon does not have any international rivers and consequently possesses little legal expertise on the subject, what we propose to do at this stage is merely to indicate certain broad principles and concepts which we would like to see reflected in the draft Articles and leave the actual drafting of the articles to those countries more directly concerned with the subject. We could then study the draft Articles and make our detailed comments at the Accra Session.

The main points which we would like to see reflected in the draft Articles concern the following :

Scope of the subject,
Definition of 'International River',
Basic principles, and
Settlement of disputes

Scope of the subject

Although current legal thinking tends to the view that it should be the river basin as a whole which should be the subject of study and not merely the river itself, we feel that because of the difficulties inherent in the consideration of so wide a subject—e.g. the problem of underground waters, it would be advisable for the Sub-Committee to confine itself to the matter actually referred to it by the Asian-African Legal Consultative Committee, viz. the question of international rivers.

We also agree with the view expressed by the Delegate of Iraq at the Ninth Session and others during this meeting that the emphasis should be on the uses of the rivers for agricultural, industrial and domestic purposes. While international law has already developed extensive rules regarding navigation on international rivers culminating in the Barcelona Convention of 1921, the rules regarding the uses of international rivers for agricultural, industrial and domestic purposes are comparatively undeveloped. The formulation of such a set of rules is, therefore, a matter of the utmost importance and urgency, particularly to the countries of Asia and Africa which are more concerned with the uses of water for agricultural and domestic purposes than for navigation.

Definition of 'International River'

The definition of an international river as one which flows between or traverses two or more States, is so widely accepted that generally it should not be the subject of comment.

Basic Principles

(i) Assuming that the emphasis at this meeting will be on the uses of an international river for agricultural, industrial and domestic purposes, we are of the view that the basic rule should be such that each riparian State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses

of the waters of an international river. As to what constitutes a reasonable and equitable share should be determined in the light of all the relevant factors in each particular case.

Article V (2) of the "Helsinki Rules" prepared by the International Law Association in 1966 has listed such factors as follows :—

"Relevant factors which are to be considered to include, but are not limited to :

- (a) the geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;
- (b) the hydrology of the basin, including in particular the contribution of water by each basin State;
- (c) the climate affecting the basin;
- (d) the past utilisation of the waters of the basin, including in particular existing utilization;
- (e) the economic and social needs of each basin State;
- (f) the population dependent on the waters of the basin in each basin State;
- (g) the comparative costs of alternative means of satisfying the economic and social needs of each basin State;
- (h) the availability of other resources;
- (i) the avoidance of unnecessary waste in the utilization of waters of the basin;
- (j) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among users; and

- (k) the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State".

The Helsinki Rules go on to state that the weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable share, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.

While not all the factors listed in the Helsinki Rules would be of equal relevance to the countries of the Afro-Asian region, nevertheless (it is suggested that) its Article V (3) might usefully constitute a suitable basis for discussion on this aspect of the subject.

Connected with the concept that each riparian State is entitled to a reasonable and equitable share in the waters of an international river, is its corollary that 'one must so use his own as not to do injury to another'. Thus, while a State is entitled to a reasonable and equitable share of the waters of an international river, the effect of making use of this share should not be such as to cause injury to the other riparian State.

Settlement of Disputes

It is essential that there should be included in the draft articles provisions for the peaceful settlement of all disputes that may arise in connection with international rivers.

STATEMENT BY THE GHANA REPRESENTATIVE

The Government of Ghana after carefully studying the Aide-Memoire and draft Articles submitted by the Government of Pakistan agrees, in principle, with the draft Articles and proposes that the draft Articles should be accepted at the Inter-Sessional Sub-Committee Meeting in New Delhi as basis for discussion.

STATEMENT BY THE INDIAN REPRESENTATIVE

Mr. Chairman,

The Sub-Committee on International Rivers is to prepare a draft of Articles on the subject for consideration by the Asian-African Legal Consultative Committee. The Government of Pakistan had addressed an Aide-Memoire to our Government, and we understand to the other Member Governments of this Committee also, suggesting the approach which the Sub-Committee may adopt in preparing the draft Articles. At the previous meeting held on the 16th of December, 1969, the Distinguished Delegate of Pakistan circulated a set of draft Articles for consideration of the Sub-Committee. Another set of draft formulations was also proposed by the Distinguished Delegate of Iraq at the same meeting. In his statement, he also referred to the note so ably prepared by their Legal Adviser, Dr. Hasan Al-Rawi, which was circulated at the close of the Karachi Session in January 1969 and which has been included in the Brief of Documents prepared by the Committee's Secretariat. We are grateful to both the Delegations for the suggestions they have made in regard to the consideration of this subject. We are also grateful to the Distinguished Delegate of Japan for his contribution at that meeting, to which I shall refer again in the course of our statement. We are also grateful to the Distinguished Delegates from Ceylon, Ghana, and Jordan for their statements.

2. We are also grateful to the Secretariat for assembling the voluminous data on the subject, both at their own initiative as well as at the request of the Governments of Pakistan and the U.A.R. The volumes reached us only a few weeks ago, one of them only a few days ago. As we proceed in our considera-

conduct of nations within an international drainage basin".

5. As the distinguished Delegates are aware, the Helsinki Rules were the culmination of intensive and extensive studies of the entire legal literature on the subject as well as on State practice. They also took into account the reservoir of technical knowledge on the uses of waters, not only from the navigational point of view which occupied a place of great importance so far in the world, but also the multiplicity of other uses which have been made possible by the technological advances of this country. A perusal of these rules will indicate that they are not such as to favour any particular riparian interests but, in the context of the importance of the optimum development of water resources on which millions of people depend, they emphasise that each State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters. The basis of an optimum development of water resources lies in the consideration of the various sources of water—surface water, ground water, springs, etc.—as an integrated unit, a point which was also emphasised by the distinguished Delegates from Pakistan and Iraq. It was in realisation of this important consideration that the concept of an international drainage basin took shape taking the place of the concept of international river which had been developed in the past with special reference to navigational use only.

6. Mr. Chairman, you are fully aware on a personal basis of the work of ILA Committee. You have been associated with it at least since 1962 and both of us have participated in its deliberations. Other distinguished lawyers and engineers in Pakistan have also participated in its deliberations. Indian Members of the ILA have also been attending the meetings of this Committee. In addition, the U.A.R. and Sudan have also contributed to its work. You are also aware that, since 1966, the ILA has established a new Committee on the International Water Resources Law, which has appointed six working groups to further study the various uses of waters e.g. Navigation,

Underground Waters, Pollution, General Uses of Waters, Relationship of Waters to other Natural Resources and so forth. In the work of this Committee and the working groups also, members from India and Pakistan, among others have been participating.

7. In view of this, it appears to my Delegation that the proposal put forward by the distinguished Delegate of Japan would be the proper course to be adopted for a study of the law on the subject of the uses of waters of international rivers, namely that the questions relating to the uses of waters should be resolved on a bilateral or, where appropriate, on a regional basis. Subject to such agreements or regional custom, the legal position regarding the uses of waters should be examined on the basis of the Helsinki Rules. The Helsinki Rules represent an element of agreement which could be reviewed by the Members of this Committee from the Asian-African viewpoint. If, on the other hand, we make an altogether separate effort, by starting afresh with controversial propositions, we would, I am afraid, be indulging in an exercise which will be time consuming and would have to cover the entire ground again. I am not sure whether that would be the best way of building up areas of agreement.

8. We, therefore, support the proposition that the Sub-Committee may take up the Helsinki Rules as the basis of its study. These rules may be circulated among the Member Governments of this Committee and they may be requested to offer their comments relating thereto. To begin with, we may restrict our study to Articles I to VIII of the Helsinki Rules which contain general provisions and relate to the equitable distribution of waters of an international drainage basin. The Member Governments may be invited, while commenting on these Rules, to supply the Committee with such material as they would like the Committee to consider in its study of the subject.