

its subsequent session (1992). Consequently, the AALCC decided to include the topic as a separate agenda item in its following session (1992) to facilitate substantial discussion on the topic which would be helpful to the Member Governments. The Secretariat was directed to prepare a detailed analysis of the draft articles which may be adopted by the ILC in its first reading.

Discussions and Decisions taken at the Islamabad Session

16. The thirty-first session of the AALCC was held in Islamabad (Pakistan) from 25 January to 1 February 1992. At that session, the topic was taken up for further consideration on the basis of a study entitled "The Law of International Rivers"⁴ presented by the Secretariat.

The *Secretary-General* while introducing the Secretariat study stated that it was at the Tokyo Session (1983) of the AALCC that it had been decided to undertake a preliminary study on the topic with a view to :

- (i) identifying the areas which were not likely to be covered by the work of the ILC and where it was deemed desirable that the AALCC should undertake a study;
- (ii) to examine the provisions of the articles provisionally adopted by the ILC; and
- (iii) to submit a tentative programme of work for consideration of the AALCC.

Subsequently, pending a final decision on the future work to be undertaken by the AALCC, it had been decided to direct the Secretariat to continue to examine the draft articles prepared by the ILC and to furnish comments thereon. Consequently, the present Secretariat study not only commented on the seventh report of the Special Rapporteur on the topic but also on the draft articles adopted by the ILC at its first reading.

17. The *Delegate of India* stated that the needs of the States through which an international river flows should not be ignored. The cognisance of the needs of the riparian States did not vitiate the need for cooperation between the riparian States. A common shared interest rather than the legal obligation should be the basis of co-operation between the riparian States.

18. The *Delegate of Jordan* observed that the diversion of the waters of the River Jordan by Israel contravened the provisions of Article 6 of the draft articles on the non-navigational uses of international watercourses.

19. The *Observer for Sweden*, referring to the draft articles on the non-navigational uses of international watercourses, emphasized the importance of preventive measures and the provisions relating to notification.

⁴ See Doc. AALCC/XXXI/Islamabad/92/5.

20. The *Delegate of Turkey* dealt in his statement primarily with the concept of 'watercourse' as defined in the draft articles prepared by the ILC. He conveyed his delegation's apprehensions as regards the technical reasons which directed the eminent Rapporteur of the ILC, Prof. McCaffrey, to consider the concept of "watercourse" as a "system of inter-related hydrological components" on the basis of hydrological reality and he found such an enunciation of the concept of "watercourse" too broad, as it included glaciers, canals and particularly groundwaters. This, the Delegate pointed out, was in contradiction with the generally accepted principle of international law concerning the 'permanent sovereignty of States over their natural resources', thus interfering in each State's right to use its own resources in accordance with its national priorities and interests.

Referring to the Secretariat's study, he agreed that 'groundwater' could be categorised as 'free groundwaters' and 'confined groundwaters'. He noted that the ILC draft articles included in the definition only "free groundwaters".

According to the Delegate, this approach posed two types of problems : one, the international practice until now only dealt with surface waters and there were generally no such practices as regards the groundwaters. Therefore, he was of view that it would be very difficult, if not impossible, for sometime, to identify the new legal principles applicable to groundwaters as well. He found this approach unrealistic, complicating the already complex subject-matter that was before the ILC. Secondly, he dealt with the problem of 'verification of the necessary elements', specially among the Member States of the AALCC. Referring to the question of collecting scientific data concerning 'free' and 'confined' groundwater in the Asian-African region, he found that gathering of data and its subsequent utilization were both difficult and time-consuming. Consequently, he suggested the non-inclusion of 'groundwaters' in the draft articles of the ILC.

He pointed out that the concept of 'international watercourse system' which listed all components of a watercourse simply on the basis of the physical relation together with all branches and connected subsidiaries appeared too broad to his delegation. Further, he found that this framework served to bring the parts of the branches and subsidiaries of an international watercourse within the territory of a sovereign State under the will of other States. For these reasons, he clarified his delegation had doubts as to the acceptability of this concept.

21. The *Delegate of Jordan* underlined the crucial needs of the people of the Middle East in relation to underground waters. He pointed out that the information regarding the underground waters was not unorganised and in fact it was identified in clear terms. By utilizing more water indiscriminately, material harm was inflicted on the underground water sources. This, the Delegate noted, had been taking place in the occupied Arab territories, water had become a major cause of differences. Keeping these developments in mind, the Delegate emphasized on an appropriate definition of 'underground watercourses' to be taken up by the AALCC in its future deliberations in

anticipation of the diplomatic conference whose idea was proposed by the AALCC.

22. The *Delegate of Syria* stated that his delegation wished to affirm what it had presented during the discussion on the work of the ILC. During the discussion his delegation had put forward certain suggestions to be incorporated in the ILC draft, specially in matters of cooperation and the definition of 'watercourse'. He requested the Commission to take into account these suggestions in the interest of all countries, specially countries in the Middle East. Further, he wished to second the opinion of the Delegate of Jordan as regards the utilization of groundwater resources in the Middle East. This aspect he found particularly important as 71 per cent of the rivers had 'underground' water sources in the Middle East.

23. The *Delegate of Sierra Leone* thanked the AALCC Secretariat for its study. Referring to the importance of fresh water for the Asian and African countries, he noted that there was only 2 per cent of fresh water resources for utilization and out of this only 1 per cent was really harnessable for the utilization of the whole humanity. Forty per cent of the global population, the Delegate mentioned, was in dire need of fresh water. According to him, non-availability of fresh water in sufficient quantities was one of the main reasons for the increasing infant mortality in Africa. To mitigate these problems, he suggested that more emphasis should be placed on cooperation in harnessing and effective utilization. He felt that there was an increasing necessity to find ways and means not to pollute these fresh waters, even while it was used for agriculture. Referring to underground water resources in Africa, he pointed out that scientific data was sufficiently available as regards its course and flow; only a small area was to be charted out. Finally, he emphasized that the countries should view this whole subject from the utilization perspective, at the same time taking into account the provision of maintaining it 'clean'.

24. Subsequently there was a discussion with regard to the question, whether this matter should be placed on the agenda of the next session. Arguing against its inclusion, the *Delegate of India* suggested that since this subject was being considered by the ILC, there was no necessity of putting it on the agenda of the AALCC as a separate item.

25. The *Delegate of Pakistan* did not agree with the viewpoint presented by the Delegation of India. According to him, there were areas which needed consideration, especially regarding the 'uses' and early notification of changes made in the course of the river, so that the study might be continued further.

26. Supporting the contention of the Delegation of Pakistan, the *Delegate of Syria* insisted that this item was very necessary as it would include certain crucial suggestions made by them and more importantly, these suggestions could be made use of during the second reading by the Commission. The Delegate pointed out that these suggestions were very crucial and important for Arab countries.

27. The *President* in his intervention drew the attention of the Indian Delegation to page 34 of the study (paragraphs 83 and 85) which mentioned, *inter alia*, about the user agreements and its further study. The President read paragraph 85 of the study which stated, "Nevertheless, with a view to assist Member Governments in the negotiation of user agreements in the future, the AALCC could take up the study of State practice in the region of user agreements and examine the modalities employed in the sharing of waters of international watercourses such as the Niger, the Nile, the Gambia, the Mekong and the Indus. It would be expected that the Member Governments would place at the disposal of the AALCC material concerning the working of the existing River Commissions Organizations."

28. The *Delegate of India* did not agree with the scope of the study and insisted that it never accepted to submit to any such study.

29. The *Secretary-General* in his brief intervention defended the inclusion of this study on the agenda. He pointed out that there were many uses which fell beyond the existing scope of "non-navigational uses" and these could be studied. At the Tokyo Session, he said, the Delegate of Nepal had suggested that the AALCC could prepare some guidelines for regional system agreements. Pursuant to those suggestions, the Secretary-General mentioned that the AALCC could prepare 'regional model agreements' on the uses of the river water systems.

30. The *Delegate of India*, maintaining his earlier viewpoint on this issue, thanked the President and the Secretary-General for their clarifications. India, the Delegate said, had no objection as regards the assistance rendered on this count provided all States concerned consented to it but he wanted to maintain an independent position and his country's own view on the subject.

At the end of the deliberations, the following decision was adopted :

"THE LAW OF INTERNATIONAL RIVERS

The Asian-African Legal Consultative Committee

Taking note of the study prepared by the Secretariat on the item "The Law of International Rivers" contained in document No. AALCC/XXXI/Islamabad/92/5;

Decides to inscribe the item on the agenda of its next session to facilitate substantive discussions on the topic; and

Recommends to the Member States to utilize the study on the draft articles adopted by the International Law Commission on first reading contained in document No. AALCC/XXXI/Islamabad/92/5 in the preparation of their comments and observations for the second reading of the draft articles by the International Law Commission at its next session."

*PROGRESS OF WORK IN THE INTERNATIONAL LAW COMMISSION
DURING ITS FORTY-THIRD SESSION*

1. At its twenty-third session in 1971, the International Law Commission (ILC) included the topic "Non-navigational Uses of International Watercourses" in its general programme of work pursuant to the General Assembly resolution 2669(XXV) of 8 December 1970 with a view to progressive development and codification of the international law on the topic on a universal basis.

2. The Commission has taken a long time in completing its work on the topic, partly because of frequent changes of the Special Rapporteurs. So far, the Commission has appointed four Special Rapporteurs, namely Mr. Richard D. Kearney, Mr. Stephen M. Schwebel, Mr. Jens Evensen and the present one, Mr. Stephen C. McCaffrey who was appointed at the thirty-seventh session of the Commission in 1985.

3. At its thirty-seventh, thirty-eight, thirty-ninth, fortieth and forty-first sessions, the Commission considered the first¹, second², third³, fourth⁴ and fifth⁵ reports prepared by the Special Rapporteur, Mr. McCaffrey.

4. At its forty-second session in 1990, the Special Rapporteur presented to the Commission the second part of the fifth report⁶ and the sixth report⁷ for consideration. During that session, the Commission provisionally adopted Articles 22 and 27. On the recommendation of the Special Rapporteur, it also referred to the Drafting Committee Articles 24 to 28 together with paragraphs 1 of Articles 3 and Article 4 of Annex I. The apparent confusion of numbering is due to redesignation of articles earlier adopted by the Commission⁸.

1 A/CN.4/393.

2 A/CN.4/399 and Adds. 1 and 2.

3 A/CN.4/406 and Adds. 1 and 2.

4 A/CN.4/412 and Adds. 1 and 2.

5 A/CN.4/421 and Adds. 1 and 2.

6 A/CN.4/421, Add. 2.

7 A/CN.4/427 and Adds. 1 and 2.

8 Doc. No. A/CN.4/L.436, page 3, footnote 6.

5. At its forty-third session in 1991 the Commission had before it the second part of the Sixth Report⁹ and the Seventh Report¹⁰. The second part of the Sixth Report contained a chapter on settlement of disputes which had been introduced at the forty-second session but was not discussed due to lack of time. In order to enable the Commission to make the best use of its time, the Special Rapporteur proposed not to take up that part of the Sixth Report. He recommended that the debate focus on his Seventh Report and, in particular, on the question of the use of terms.

6. The Seventh Report submitted by the Special Rapporteur contained chapters on the structure of Part I of the draft articles and on the use of terms. It also contained a proposal for Article (1) (2) on the use of terms which comprised two alternatives, namely A and B.

7. The Seventh Report of the Special Rapporteur dealt primarily with the question of the definition of the term 'International Watercourses' and the concept of a watercourse as a 'system of waters'. The Special Rapporteur considered that it was important that the draft articles under preparation be based on hydrologic reality, namely that a watercourse is a system of inter-related hydrological components. An international watercourse could then be defined as a watercourse, parts of which are situated in two or more States. He proposed two alternative versions A and B for Articles (1) (2) on the use of terms as follows :

Articles (1) (2)

Use of Terms

ALTERNATIVE (A)

For the purposes of the present article :

- (a) A watercourse system is a system of waters composed of hydrographic components including rivers, lakes, groundwater and canals, constituting by virtue of their physical relationship a unitary whole.
- (b) An international watercourse system is a watercourse, parts of which are situated in different States.
- (c) A (watercourse) (system) State is a State in whose territory parts of an international watercourse system is situated.

⁹ A/CN.4/427/A.64.1.

¹⁰ A/CN.4/436 & Corr. 1 to 3.

ALTERNATIVE (B)

For the purposes of the present articles :

- (a) A watercourse system is a system of waters composed of hydrographic components, including rivers, lakes, groundwater and canals, constituting by virtue of their physical relationship a unitary whole.
- (b) An international watercourse is a watercourse, parts of which are situated in different States.
- (c) A (watercourse) (system) State is a State in whose territory parts of an international watercourse is situated.

8. It may be observed from the above that alternative versions A and B for Articles (1) (2) on the use of terms are almost identical. However, the terms defined were slightly different; alternative (A) included the expression 'system' while alternative (B) confined itself to the expression 'watercourse'.

9. The Seventh Report of the Special Rapporteur also dealt with the question of groundwater which according to him formed one of the most important components of a watercourse system. In terms of quantity, the groundwater constitutes 97 per cent of fresh water on earth even excluding polar icecaps and glaciers. This contrasted with the water contained in lakes and rivers, which together amounted to less than 2 per cent. Based on this calculation, the Special Rapporteur, therefore, proposed the inclusion in its entirety of groundwater in the scope of the draft articles.

10. The Special Rapporteur in his Seventh Report also raised the issue of whether the notion that a watercourse could have a relative international character should be retained. Basically, the issues are simple — they are whether the draft articles should apply to all hydrographic components of international watercourses or whether for the purposes of the draft articles the watercourses should be treated as having a 'relative' international character as has been the understanding since 1980.

11. Consequently, the Special Rapporteur considered that the notion of relativity was incompatible with the unitary nature of a watercourse system. He pointed out that, in any event, the requirement of an actual or potential effect on other watercourse States had been built into the draft articles themselves. He, therefore, suggested that it was no longer necessary to include the notion of relative internationality in the definition of the term 'watercourse'.

12. The Seventh Report of the Special Rapporteur requested comments from the members of the Commission on the following substantive points :

- (a) Whether for purposes of the draft articles the term 'watercourse' should be defined as a 'system' of waters;
- (b) Whether groundwater should be included within the definition of 'watercourse' and, if so, whether the draft articles should apply both to groundwater related to surface water ('free' groundwater)

and to groundwater unrelated to surface water ('confined' groundwater), or whether they should apply only to 'free' groundwater; and

- (c) Whether for the purpose of the draft articles a watercourse should be regarded as having a 'relative international character'.

13. The Special Rapporteur also raised the question of restructuring Part I of the Draft Articles. He recommended reversing the order of Articles 1 and 2 so that the draft would begin with an article on "Scope" followed by that on the "Use of terms". He also proposed to transfer Article 3 on the definition of a watercourse State (or system State), as adopted by the Commission previously to the article on the use of terms since the definition was closely related to that of an "International Watercourse" or "International Watercourse System".

Comments on the Seventh Report of the Special Rapporteur

14. On the question of restructuring of Part I of the Draft Articles, many members were of the view that such restructuring would be logical and would seem to be more helpful to the reader than the previous organization.

15. Part II of the Seventh Report of the Special Rapporteur dealt with the "Use of terms" which raised a more difficult aspect. In 1976, the Commission had agreed that the question of determining the scope of the term 'international watercourse' should be taken up at the final stage of drafting. Concerning the question of whether the term 'watercourse' should be defined as a system of waters, some members of the Commission, in general, favoured the use of that concept in the definition. According to them, only an overall approach to an international watercourse as a system in constant motion and inter-relation could allow for the full implementation of the principles of equitable and reasonable utilization of a watercourse. Some of members who expressed support for the system concept also felt that the definition should include the idea contained in the Helsinki Rules whereby the waters of a system must flow into a common terminus.

16. Some members, however, expressed reservation regarding the use of the system concept in the definition of a watercourse. It was feared that such definition might embrace all the waters in a given territory which would thus fall under international regulation. In their view, such an approach might infringe on State sovereignty and would interfere with each State's right to use its own resources in accordance with its national priorities and interests.

17. After the explanations provided in paragraphs 53 to 74 of the Seventh Report on the use of 'system' or related concepts, the Special Rapporteur proposed that the 'system' approach should be endorsed. In paragraph 74 he had concluded :

"...The system is composed of a number of inter-related components which function as a unitary whole. It would seem to follow logically

from this scientific fact that legal rules governing the relations of States with regard to international watercourses should take this inter-relationship into account, so that the operation of the rules— and thus the protection of the fresh water as well as watercourse State — will not be frustrated. Such frustration would be bound to occur where the scope of the legal regime is not co-extensive with the scope of the regime's subject-matter."

18. Despite the reservations previously expressed by members on the incorporation of the 'system concept', now that the Commission has fully delineated the scope of the Draft Articles, the AALCC Secretariat is of the view that the concept should be acceptable.

19. On the question of inclusion of groundwater as one of the components of international watercourse system, there was a general trend among the members of the Commission favouring the inclusion of 'free' groundwater in the definition. It was, however, the view of the majority that 'confined' groundwater should not be included since it lacked a physical relationship with surface water and, therefore, did not form part of the "unitary whole". It was, however, suggested by a few members that the scope of the articles should also incorporate groundwater which though not connected to a common terminus, is straddling the borders of two or more States. While this idea was not incorporated in the Draft Articles, it needs close re-examination during second reading, since most, if not all, of the principles incorporated in the Draft Articles as finally adopted by the Commission would seem to be equally applicable to such waters.

20. The 'free' groundwater has, however, been incorporated in the scope of the articles. Of course, it might be argued that the inclusion of groundwater in the scope of the Draft Articles might have the effect of making almost all of the waters in the territory of some States subject to international regulation. This fear is, however, somewhat exaggerated since the Draft Articles are restricted to 'free' groundwater and only to the extent that it becomes part of the watercourse in question.

21. Regarding the question whether for the purpose of the Draft Articles a watercourse should be regarded as having a "relative international character", it was argued by some members that any attempt to enlarge the scope of the Draft Articles at this stage would not only be counter-productive but possibly wreck the whole draft. The Commission had agreed on the assumption of relative character of international watercourse as the working hypothesis since 1980 when it provided as follows :

"A watercourse system is formed of hydrological components such as rivers, lakes, canals, glaciers and groundwater constituting by virtue of their physical relationship a unitary whole; thus any use affecting one part of the system may affect the waters in another";

"An international watercourse system is a watercourse system components of which are situated in two or more States";

"To the extent that part of the waters in one State are not affected by or do not affect uses of waters in another State, they shall not be treated as being included in the international watercourse system. (Thus to the extent that uses of the water system have the effect on another and only to that extent. Accordingly there is not an absolute, but a relative, international character of the watercourse.)"

22. The Special Rapporteur in his Seventh Report had explained the hydrological cycle, the close inter-connection of the various components and their inter-dependence which makes it necessary for States in a watercourse system to cooperate with one another to avoid adverse harm. In his view, which was shared by several members, the concept of the 'relative international character' of a watercourse might give rise to uncertainty. If the concept of the 'watercourse system' was adopted, it would be clear that the use of all components constituting that 'system' must be regulated in such a way that it would not adversely affect other watercourse States or the watercourse itself. If, however, there was no such adverse result, the Draft Articles made clear that the proposed Convention would be inapplicable. The Commission accepted this logic in its final version of the first reading which seems to be reasonable. However, this is one issue which the States need to consider carefully to establish whether or not these Draft Articles have been made too expansive.

23. The Commission after examining the report of the Drafting Committee, adopted on first reading the remaining articles :

Article 2 (*Use of terms*); Article 10 (*Relationship between uses*); Article 26 (*Management*); Article 27 (*Regulation*); Article 28 (*Installation*); Article 29 (*International Watercourses and Installations in time of armed conflict*); and Article 32 (*Non-discrimination*).

24. The Commission also adopted Article 30 (*Indirect Procedures*) and Article 31 (*Data and information vital to national defence or security*) which were amended and re-numbered as revisions of two previously adopted articles, namely Article 20 and Article 21. The other articles had been adopted earlier by the Commission and hence the first reading is now complete.

Comments on the Draft Articles Adopted by the Commission at its First Reading

25. Besides taking up the Seventh Report of the Special Rapporteur the Commission also adopted the whole text of Draft Articles on the Law of Non-Navigational Uses of International Watercourses and thus completed the first reading during the last session.

26. For ready reference, the text of the Draft Articles has been annexed to this study. The Draft Articles contain 32 articles which have been divided into six parts. The pattern of the Draft Articles is as follows :

Part - I : Introduction

Article 1 : Scope of the present articles

Article 2 : Use of terms

Article 3 : Watercourse agreements

Article 4 : Parties to watercourse agreements

Part - II : General Principles

Article 5 : Equitable and reasonable utilization and participation

Article 6 : Factors relevant to equitable and reasonable utilization

Article 7 : Obligation not to cause appreciable harm

Article 8 : General obligation to cooperate

Article 9 : Regular exchange of data and information

Article 10 : Relationship between uses

Part - III : Planned Measures

Article 11 : Information concerning planned measures

Article 12 : Notification concerning planned measures with possible adverse effects

Article 13 : Period for reply to notification

Article 14 : Obligation of the notifying State during the period for reply

Article 15 : Reply to notification

Article 16 : Absence of reply to notification

Article 17 : Consultations and negotiations concerning planned measures

Article 18 : Procedures in the absence of notification

Article 19 : Urgent implementation of planned measures

Part - IV : Protection and Preservation

Article 20 : Protection and preservation of ecosystems

Article 21 : Prevention, reduction and control of pollution

Article 22 : Introduction of alien or new species

Article 23 : Protection and preservation of the marine environment

Part - V : Harmful Conditions and Emergency Situations

Article 24 : Prevention and mitigation of harmful conditions

Part VI : Miscellaneous Provisions

Article 26 : Management

Article 27 : Regulation

Article 28 : Installations

Article 29 : International watercourses and installations in time of armed conflict

Article 30 : Indirect procedure

Article 31 : Data and information vital to national defence or security

Article 32 : Non-discrimination.

27. In general, the scheme of the Draft Articles as submitted by the Special Rapporteur during the thirty-seventh to forty-third sessions and its adoption by the Commission at its first reading during the forty-third session, is highly commendable and acceptable according to the Secretariat of the AALCC. Nevertheless, it is felt necessary to comment on a few specific Draft Articles which the Secretariat considers as of utmost importance.

Part - I : Introduction

Article 1

Scope of the present articles

28. Recommended for adoption.

Article 2

Use of terms

29. In paragraph (b), consideration should be given to the possibility of inclusion of groundwater straddling the borders of two or more States, even if such water does not flow into a common terminus. It is our view that the rules enunciated in the Draft Articles would equally apply to such groundwaters since similar rights and duties would apply. It is noted that ILC has suggested groundwaters as a subject for future study. If our suggestion is accepted, such a study would become redundant.

Article 3

Watercourse agreements

30. This provision allows the watercourse States to adjust the provisions of these articles to fit the special conditions of their particular watercourse. It should be noted that paragraph 2 provides that States may define the

water to which it applies. To that extent it provides for the relativity previously specified in the assumption accepted in the Commission in 1980.

Article 4

Parties to watercourse agreements

31. This article provides for each watercourse State to have a right to participate in the negotiations and to become a party to any international watercourse agreement affecting it. Consequently, it is a suitable article for adoption.

Part - II : General Principles

Article 5

Equitable and reasonable utilization and participation

32. Paragraph 1 of this Draft Article states that the principle of equitable utilization is cast in an obligatory term but expresses explicitly the correlative entitlement of a watercourse State within its territory to a reasonable and equitable share, or portion, of the uses and benefits of an international watercourse. Paragraph 1 clearly enunciates that a watercourse State has both the right to utilize an international watercourse in an equitable and reasonable fashion, and the obligation not to exceed its right to equitable utilization or to deprive other watercourse States of their right to equitable utilization.

33. Paragraph 2 enunciates the concept of equitable participation. In effect, this article provides for cooperation with other watercourse States through participation on an equitable and reasonable basis. Thus, the principle of equitable participation is based on the rule of equitable utilization and does not in any way prejudice the principle of sovereign right over natural resources.

Article 6

Factors relevant to equitable and reasonable utilization

34. This article is very important in the sense that it stipulates objective factors relevant for the concept of 'equitable and reasonable utilization'. The proper application of the rule requires that watercourse States take into account concrete factors pertaining to the international watercourse in question as well as the needs and uses of the watercourse States concerned. The list is, however, indicative and not exhaustive. The formulation of provisions also does not draw any hierarchy or attach any priority to the factors and circumstances listed therein.