

developing countries only detect the imminent danger when it has arrived at their doorsteps and when it is too late to take any preventive or remedial action, let alone to give early warning and prior notice.

55. Few States possess remote sensing capabilities to detect any water-related dangers or hazards in advance. Thus it would seem desirable if States who have the capacity to detect the danger should have the obligation to forewarn the potentially affected State in any given region. Such action and cooperation should be done as an extension of the principle of good neighbourly relations and international solidarity. While a legal obligation cannot be imposed on such States to inform other States, the matter should be treated as one of cooperation. Further, it is preferable if consideration is given in future to establish an international agency which would have the remote sensing capability or would act as the channel for sharing and transmitting data to all potentially affected States concerning any water-related emergencies.

56. The AALCC Secretariat, however, endorses the proposal that the notification of any emergencies be notified not only to the watercourse States but also to all 'potentially affected States'.

#### Part - VI : Miscellaneous Provisions

##### Article 26

##### Management

57. Originally, the Sixth Report<sup>15</sup> of the Special Rapporteur, the Draft Article was numbered 26 with a different heading 'Joint Institutional Management'.

58. With respect to paragraph 1, the use of words '... at the request of any of them ...' may perhaps not be the most suitable for it may give the unintended impression that at the whim of any watercourse State, consultations shall and must be forthwith commenced.

##### Article 27

##### Regulation

59. This article is well balanced and takes into account the interest of all the States concerned. It should, therefore, be broadly acceptable.

##### Article 28

##### Installation;

and

##### Article 29

#### International watercourse and installations in time of armed conflict

60. These two articles in the Sixth Report<sup>16</sup> of the Special Rapporteur were numbered Articles 27 and 28. The protection of international watercourses and its installations is necessary and self-evident whether in peace time or in war time. In any belligerent activity they should be considered inviolable and immune. Article 28 deals with the peace time and Article 29 is applicable during the course of an armed conflict. Both articles should command broad support.

##### Article 30

#### Indirect procedures

61. There is a typographical mistake in the English text of this Draft Article. In the last line of the Draft Article which says 'through any direct procedure accepted by them' should read 'through any indirect procedure accepted by them'. The footnote to this article referring to Draft Article initially adopted as Article 21<sup>17</sup> makes this clear. Otherwise, the article makes good sense.

##### Article 31

#### Data and information vital to national defence or security

62. This provision is essential to provide for national security. The second paragraph, however, provides for the necessary safeguard to avoid possible abuse.

##### Article 32

#### Non-discrimination

63. This article may raise difficulties of procedural nature due to the existence of diverse legal systems. In many countries jurisdictional competence of courts is restricted to territorial jurisdiction. While this provision is

16 *Ibid.*

17 *Report of the International Law Commission on the work of its Forty-second Session. The UN General Assembly Official Records : Fourth-fifty Session, Supplement No. 10(A)45/10, p. 144.*

desirable and reasonable, it should be pointed out that it may raise a real problem in its implementation.

#### *Possible Work That Might Be Undertaken By The AALCC*

64. The programme of work of the ILC is directed towards adoption of a set of general principles applicable to all international watercourses in regard to the rights and obligations of the riparian States in the non-navigational uses of the waters and envisages the negotiation and conclusion of user agreements amongst the watercourse States taking into account the characteristics of the international watercourse in question. The ILC Draft Articles adopt the underlying theme to recognise the right of each watercourse State to a reasonable and equitable share in the use of the waters of an international watercourse and then to provide for cooperation and management among the riparian States in such matters as development of the watercourse; construction of works; collection, processing and dissemination of data; pollution control; control and prevention of water-related hazards; safety of international watercourse, installations and constructions as also modalities for settlement of disputes. A diplomatic conference will probably be convoked for adoption of a multilateral convention on the subject. The work of the ILC would provide useful guidelines in this regard. But it would be the conclusion of user agreements that will translate into reality the rights and obligations of watercourse States in the sharing of the waters of an international watercourse.

65. The work previously done by the AALCC during the years 1969 to 1973 including the Secretariat studies and the draft propositions prepared by the AALCC Rapporteur, Dr. Shihata, were brought to the notice of the successive Rapporteurs of the ILC, Mr. Kearney, Mr. Schwebel and Mr. Evensen. Indeed, the Special Rapporteurs have taken the AALCC's work into consideration while formulating the Draft Articles as expressly stated in the reports.

66. The ILC draft formulations expressly exclude the navigational uses of waters but at the same time take into account the effect of navigational uses on the other uses of the waters of an international watercourse (see Article 1). What effect this has had on the formulations is not clear. During the Lagos Session of the AALCC held in 1972, views were expressed that it would be difficult to formulate principles concerning non-navigational uses of international watercourses without taking into account such matters as navigation or timber floating since navigation does affect the quantity or quality of the water available for other uses. Navigation may often pollute watercourses and require waters to be maintained at certain levels. Consequently, the AALCC may wish to consider whether to study the matter relating to navigation and timber floating so as to supplement the work of the ILC. Other specific matters which could also be studied in some detail may relate to development and management of fishery resources and flood control. Such a study might prove to be useful to member governments in the formulation of user agreements.

67. It may be stated that non-navigational uses that are within the purview of the ILC Draft Articles would include the following :

#### (A) Agricultural Uses

- (i) Irrigation;
- (ii) Drainage;
- (iii) Waste disposal;
- (iv) Aquatic Food Production;
- (v) Development of Fisheries.

#### (B) Economic and Commercial Uses

- (i) Energy production/power generation (Hydroelectric, mechanical and nuclear);
- (ii) Manufacturing;
- (iii) Construction;
- (iv) Transportation other than navigation;
- (v) Extractive (Mining oil etc.).

#### (C) Domestic and Social Uses

- (i) Consumptive (Drinking, cooking, washing, laundry, etc.);
- (ii) Waste disposal;
- (iii) Recreational (Swimming, sports, fishing, boating, etc.)

68. The Commission, however, does not contemplate formulation of any norms concerning such uses. It is expected that such consideration would be taken care of in the negotiation of user agreements. This is an area which could be studied by the AALCC.

69. At the AALCC's Session in Kathmandu (1985) the Delegate of Nepal suggested that the AALCC might prepare some guidelines for regional system agreements. This might be somewhat complicated to undertake in view of the fact that the geographical, hydrological and climatic conditions considerably vary within the Asian-African region leading to the diverse characteristics of various watercourses. Furthermore, the needs of riparian States in each sub-region are also different and consequently any formulation of general guidelines might not be very helpful.

70. 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 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 Commission Organisations.

## ANNEXURE

Text of the Draft Articles adopted by the International Law Commission at its Forty-third Session (1991) at its first reading<sup>18</sup>

### Part - I

#### INTRODUCTION

##### Article 1<sup>19</sup>

##### Scope of the present articles

1. The present articles apply to uses of international watercourses and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourses and their waters.

2. The use of international watercourses for navigation is not within the scope of the present articles except in so far as other uses affect navigation or are affected by navigation.

##### Article 2<sup>20</sup>

##### Use of terms

For the purposes of the present articles :

- (a) "International watercourse" means a watercourse, parts of which are situated in different States;
- (b) "Watercourse" means a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus;
- (c) "Watercourse State" means a State in whose territory part of an international watercourse is situated.

##### Article 3<sup>21</sup>

##### Watercourse agreements

1. Watercourse States may enter into one or more agreements, hereinafter referred to as "watercourse agreements", which apply and adjust the provisions

<sup>18</sup> See Doc. No. A/CN.4/L.463/Add.4.

<sup>19</sup> Initially adopted as Article 2.

<sup>20</sup> Subparagraph (c) was initially adopted as Article 3.

<sup>21</sup> Initially adopted as Article 4.

of the present articles to the characteristics and uses of a particular international watercourse or part thereof.

2. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or with respect to any part thereof or a particular project, programme or use, provided that the agreement does not adversely affect, to an appreciable extent, the use by one or more other watercourse States of the waters of the watercourse.

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

##### Article 4<sup>22</sup>

##### Parties to watercourse agreements

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as to participate in any relevant consultations.

2. A watercourse State whose use of an international watercourse may be affected to an appreciable extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations on, and in the negotiation of, such an agreement, to the extent that its use is thereby affected, and to become a party thereto.

### Part - II

#### GENERAL PRINCIPLES

##### Article 5<sup>23</sup>

##### Equitable and reasonable utilization and participation

1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse.

<sup>22</sup> Initially adopted as Article 5.

<sup>23</sup> Initially adopted as Article 6.

2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present articles.

#### Article 6<sup>24</sup>

##### Factors relevant to equitable and reasonable utilization

1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of Article 5 requires taking into account all relevant factors and circumstances, including :

- (a) geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
- (b) the social and economic needs of the watercourse States concerned;
- (c) the effects of the use or uses of the watercourse in one watercourse State on other watercourse States;
- (d) existing and potential uses of the watercourse;
- (e) conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
- (f) the availability of alternatives, of corresponding value, to a particular planned or existing use.

2. In the application of Article 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultation in a spirit of cooperation.

#### Article 7<sup>25</sup>

##### Obligation not to cause appreciable harm

Watercourse States shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States.

<sup>24</sup> Initially adopted as Article 7.

<sup>25</sup> Initially adopted as Article 8.

#### Article 8<sup>26</sup>

##### General obligation to cooperate

Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimal utilization and adequate protection of an international watercourse.

#### Article 9<sup>27</sup>

##### Regular exchange of data and information

1. Pursuant to Article 8, watercourse States shall on a regular basis exchange reasonably available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

2. If a watercourse State is requested by another watercourse State to provide data or information that is not reasonably available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

#### Article 10

##### Relationship between uses

1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.

2. In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to the principles and factors set out in Articles 5 to 7, with special regard being given to the requirements of vital human needs.

<sup>26</sup> Initially adopted as Article 9.

<sup>27</sup> Initially adopted as Article 10.

**Part - III**  
**PLANNED MEASURES**

*Article 11*

**Information concerning planned measures**

Watercourse States shall exchange information and consult each other on the possible effects of planned measures on the condition of an international watercourse.

*Article 12*

**Notification concerning planned measures with possible adverse effects**

Before a watercourse State implements or permits the implementation of planned measures which may have an appreciable adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information in order to enable the notified States to evaluate the possible effects of the planned measures.

*Article 13*

**Period for reply to notification**

Unless otherwise agreed, a watercourse State providing a notification under Article 12 shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate their findings to it.

*Article 14*

**Obligation of the notifying State during the period for reply**

During the period referred to in Article 13, the notifying State shall cooperate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation, and shall not implement or permit the implementation of the planned measures without the consent of the notified States.

*Article 15*

**Reply to notification**

1. The notified States shall communicate their findings to the notifying State as early as possible.

2. If a notified State finds that implementation of the planned measures would be inconsistent with the provisions of Articles 5 or 7, it shall communicate this finding to the notifying State within the period referred to in Article 13, together with a documented explanation setting forth the reasons for the finding.

*Article 16*

**Absence of reply to notification**

If, within the period referred to in Article 13, the notifying State receives no communication under paragraph 2 of Article 15, it may, subject to its obligations under Articles 5 and 7, proceed with the implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified States.

*Article 17*

**Consultations and negotiations concerning planned measures**

1. If a communication is made under paragraph 2 of Article 15, the notifying State and the State making the communication shall enter into consultations and negotiations with a view to arriving at an equitable resolution of the situation.

2. The consultations and negotiations shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State.

3. During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified State at the time it makes the communication, refrain from implementing or permitting the implementation of the planned measures for a period not exceeding six months.

*Article 18*

**Procedures in the absence of notification**

1. If a watercourse State has serious reasons to believe that another watercourse State is planning measures that may have an appreciable adverse effect upon it, the former State may request the latter to apply the provisions of Article 12. The request shall be accompanied by a documented explanation setting forth the reasons for such belief.

2. In the event that the State planning the measures nevertheless finds that it is not under an obligation to provide a notification under Article 12, it shall so inform the other State, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that

other State, promptly enter into consultations and negotiations in the manner indicated in paragraphs 1 and 2 of Article 17.

3. During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it requests the initiation of consultations and negotiations, refrain from implementing or permitting the implementation of those measures for a period not exceeding six months.

#### *Article 19*

##### **Urgent implementation of planned measures**

1. In the event that the implementation of planned measures is of the utmost urgency in order to protect public health, public safety or other equally important interests, the State planning the measures may, subject to Articles 5 and 7, immediately proceed to implementation, notwithstanding the provisions of Article 14 and paragraph 3 of Article 17.

2. In such cases, a formal declaration of the urgency of the measures shall be communicated to the other watercourse States referred to in Article 12 together with the relevant data and information.

3. The State planning the measures shall, at the request of any of the States referred to in paragraph 2, promptly enter into consultations and negotiations with it in the manner indicated in paragraphs 1 and 2 of Article 17.

#### **Part - IV**

### **PROTECTION AND PRESERVATION**

#### *Article 20<sup>28</sup>*

##### **Protection and preservation of ecosystems**

Watercourse States shall, individually or jointly, protect and preserve the ecosystems of international watercourses.

#### *Article 21<sup>29</sup>*

##### **Prevention, reduction and control of pollution**

1. For the purposes of this article, "pollution of an international watercourse" means any detrimental alteration in the composition or quality of

<sup>28</sup> Initially adopted as Article 22.

<sup>29</sup> Initially adopted as Article 23.

the water of an international watercourse which results directly or indirectly from human conduct.

2. Watercourse States shall, individually or jointly, prevent, reduce and control pollution of an international watercourse that may cause appreciable harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse. Watercourse States shall take steps to harmonize their policies in this connection.

3. Watercourse States shall, at the request of any of them, consult with a view to establishing lists of substances, the introduction of which into the waters of an international watercourse is to be prohibited, limited, investigated or monitored.

#### *Article 22<sup>30</sup>*

##### **Introduction of alien or new species**

Watercourse States shall take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse which may have effects detrimental to the ecosystem of the watercourse resulting in appreciable harm to other watercourse States.

#### *Article 23<sup>31</sup>*

##### **Protection and preservation of the marine environment**

Watercourse States shall, individually or jointly, take all measures with respect to an international watercourse that are necessary to protect and preserve the marine environment, including estuaries, taking into account generally accepted international rules and standards.

#### **Part - V**

### **HARMFUL CONDITIONS AND EMERGENCY SITUATIONS**

#### *Article 24<sup>32</sup>*

##### **Prevention and mitigation of harmful conditions**

Watercourse States shall, individually or jointly, take all appropriate measures to prevent or mitigate conditions that may be harmful to other watercourse States, whether resulting from natural causes or human conduct,

<sup>30</sup> Initially adopted as Article 24.

<sup>31</sup> Initially adopted as Article 25.

<sup>32</sup> Initially adopted as Article 26.

such as flood or ice conditions, water-borne diseases, siltation, erosion, salt-water intrusion, drought or desertification.

#### Article 25<sup>33</sup>

##### Emergency situations

1. For the purposes of this article, "emergency" means a situation that causes, or poses an imminent threat of causing, serious harm to watercourse States or other States and that results suddenly from natural causes, such as floods, the breaking up of ice, landslides or earthquakes, or from human conduct as for example in the case of industrial accidents.

2. A watercourse State shall, without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of any emergency originating within its territory.

3. A watercourse State within whose territory an emergency originates shall, in cooperation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency.

4. When necessary, watercourse States shall jointly develop contingency plans for responding to emergencies, in cooperation, where appropriate, with other potentially affected States and competent international organizations.

#### Part - VI

#### MISCELLANEOUS PROVISIONS

#### Article 26

##### Management

1. Watercourse States shall, at the request of any of them, enter into consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism.

2. For the purposes of this article, "management" refers, in particular, to :

- (a) planning the sustainable development of an international watercourse and providing for the implementation of any plans adopted; and
- (b) otherwise promoting rational and optimal utilization, protection and control of the watercourse.

<sup>33</sup> Initially adopted as Article 27.

#### Regulation

1. Watercourse States shall cooperate where appropriate to respond to needs or opportunities for regulation of the flow of the waters of an international watercourse.

2. Unless they have otherwise agreed, watercourse States shall participate on an equitable basis in the construction and maintenance or defrayal of the costs of such regulation works as they may have agreed to undertake.

3. For the purposes of this article, "regulation" means the use of hydraulic works or any other continuing measure to alter, vary or otherwise control the flow of the waters of an international watercourse.

#### Article 28

##### Installations

1. Watercourse States shall, within their respective territories, employ their best efforts to maintain and protect installations, facilities and other works related to an international watercourse.

2. Watercourse States shall, at the request of any of them which has serious reason to believe that it may suffer appreciable adverse effects, enter into consultations with regard to :

- (a) the safe operation or maintenance of installations, facilities or other works related to an international watercourse; or
- (b) the protection of installations, facilities or other works from wilful or negligent acts or the forces of nature.

#### Article 29

##### International watercourses and installations in time of armed conflict

International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and internal armed conflict and shall not be used in violation of those principles and rules.

*Article 30*<sup>34</sup>

**Indirect procedures**

In cases where there are serious obstacles to direct contacts between watercourse States, the States concerned shall fulfil their obligations of cooperation provided for in the present articles, including exchange of data and information, notification, communication, consultations and negotiations, through any direct procedure accepted by them.

*Article 31*<sup>35</sup>

**Data and information vital to national defence or security**

Nothing in the present articles obliges a watercourse State to provide data or information vital to its national defence or security. Nevertheless, that State shall cooperate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances.

*Article 32*

**Non-discrimination**

Watercourse States shall not discriminate on the basis of nationality or residence in granting access to judicial and other procedures, in accordance with their legal systems, to any natural or juridical person who has suffered appreciable harm as a result of an activity related to an international watercourse or is exposed to a threat thereof.

<sup>34</sup> Initially adopted as Article 21.

<sup>35</sup> Initially adopted as Article 20.

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