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First report on the law of the non-navigational uses of international watercourses, by
Mr. J. Evensen, Special Rapporteur

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by Mr. Jens Evensen, Special Rapporteur

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CHAPTER I
Work of previous Special Rapporteurs

1. Mr. Richard D. Kearney was the first Special Rapporteur appointed by the International Law Commission to study the topic "The law of the non-navigational uses of international watercourses". He filed his report to the Commission at its twenty-eighth session, in 1976.\(^1\) The report was of an introductory nature, dealing \textit{inter alia} with the questionnaire\(^2\) circulated to the Member States of the United Nations upon the recommendation made by the Commission at its twenty-sixth session, in 1974.\(^3\) The question of the definition of the term "international watercourse" was briefly discussed in the report, and the concept of non-navigational uses was likewise touched upon. In item D of its questionnaire, the Commission had submitted an outline of such uses under three main headings: (a) agricultural uses; (b) economic and commercial uses; (c) domestic and social uses. In that connection, the Special Rapporteur emphasized that

... The individual uses listed under each heading, ranging from irrigation to energy production to fishing and boating, are illustrative of the range of human activities for which water is required. ...\(^4\)

2. The questionnaire raised the question whether other uses should be included in the study, such as flood control and erosion problems, although neither flood control nor erosion can be considered as "use" of water as a natural resource. States replying to the questionnaire supported the inclusion of flood control and erosion problems in the study. Several States suggested that sedimentation problems should also be dealt with. Other countries favoured the approach that the Commission should begin its work by concentrating on pollution aspects.

3. The Special Rapporteur mentioned various international instruments to illustrate the complex problems involved in drawing up legal principles regarding the use of international watercourses. However, he proposed no draft articles in his report.

4. The second Special Rapporteur on the topic, Mr. Stephen Schwebel, now a judge at the International Court of Justice, filed his first report at the thirty-first session of the Commission, in 1979.\(^5\) In chapter I of that report he presented an interesting analysis of "some salient characteristics of water", emphasizing \textit{inter alia} that

... one of water's most extraordinary characteristics is its limited but forever renewable quantity ... [and that] the ... amount of fresh water in watercourse systems is unevenly distributed throughout the world. Therefore, even though the total supply of fresh water may well be sufficient for current human needs, there have always been large deficiencies of water in many regions and large excesses in others ... \(^6\)

5. Chapter I was summed up as follows:

It merits repeating that water is a unique substance. The characteristics described—constant in quantity, self-purifying, but varying in flow—contribute to water's singular nature in many ways ... it is a solvent of great efficacy, able to dissolve about half of all chemical elements. It has enormous capacity to absorb heat and is consequently an immense source of energy when it releases heat. ...\(^7\)

6. In chapter II, entitled "Use of international watercourses", the Special Rapporteur dealt with the concept of international drainage basin, as well as with the question of a definition of the term "international watercourse". He pointed out that a consensus had emerged in the Commission's debate to the effect that "the question of determining the meaning of the term 'international watercourses' need not be pursued at the outset of the Commission's work". ... Instead, the Commission had recommended that

... attention should be devoted to beginning the formulation of general principles applicable to legal aspects of the uses\(^8\) of these watercourses. In so doing, every effort should be made to devise rules which would maintain a delicate balance\(^9\) between those which were too detailed\(^8\) to be generally applicable and those which were so general\(^9\) that they would not be effective. ...\(^7\)

7. The discussions in the Sixth Committee of the General Assembly prove that these guidelines are still generally valid. The present Special Rapporteur will bear them in mind in his work on the topic. In its resolution 2669 (XXV) of 8 December 1970, the General Assembly recommended that the study should be aimed at the progressive development of the topic as well as at its codification, a recommendation which the present Special Rapporteur will likewise adhere to.

8. In chapter II, the Special Rapporteur also dealt with the scope of a draft on international watercourses.\(^9\) He considered that for a number of reasons "an article of limited substance on scope of application is desirable, despite the large measure of ambiguity it will carry". In that context, he briefly developed his views on the term "use". On the basis of his examination in chapter II, he proposed an article I on "Scope of the present articles".

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\(^{6}\) \textit{Ibid.}, p. 149, para. 24.
\(^{7}\) \textit{Ibid.}, p. 150, para. 31.
\(^{8}\) \textit{Ibid.}, p. 151, para. 35.
\(^{9}\) \textit{Ibid.}, pp. 157-158, paras. 56-60.
9. In chapter III, on “User agreements”, the Special Rapporteur examined in detail the immense diversity of international river systems. He pointed out that:

... In size, they range from such enormous systems as the Congo, the Amazon, the Mississippi and the Ganges, all of which drain more than 1 million square kilometers, to the smallest of streams. Many are located in arid parts of the earth, so that they flow on the surface only intermittently, and disappear in the dry season. Many others are in water surplus areas, so that a major concern is not too little water but too much, in the form of floods. In short, there are international watercourses in almost every part of the world, and this means that their physical characteristics and the human needs they serve are subject to the same extreme variations as are found in other respects throughout the world.

Each watercourse is unique. Each has a special congeries of uses which differ from that of any other system. ...  

10. After examining in some detail the Helsinki Rules on the Uses of the Waters of International Rivers 13 and the Convention relating to the development of hydraulic power affecting more than one State, 12 the Special Rapporteur proposed six draft articles on user agreements: article 2, “User States”; article 3, “User agreements”; article 4, “Definitions”; article 5, “Parties to user agreements”; article 6, “Relation of these articles to user agreements”; and article 7, “Entry into force for an international watercourse”.

11. In chapter IV, the Special Rapporteur dealt with the questions of data collection and exchange of data pertaining to international watercourses by co-riparian States. He emphasized, on the basis of an examination of State practice, that agreements varied in degree of specificity with regard to the collection, analysis and exchange of data, and then tentatively submitted three draft articles dealing with these important issues: article 8, “Data collection”; article 9, “Exchange of data”; and article 10, “Costs of data collection and exchange”.

12. The Special Rapporteur filed his second report on the law of the non-navigational uses of international watercourses at the thirty-second session of the Commission, in 1980. 13 In chapter I of that report, he expressed the opinion that “in order to ensure harmony between the physical laws governing water and the legal rules governing the use of fresh water, the drainage basin must be taken as the unit for the formulation of such rules”. 14 He noted, however, that, in the discussions in the Commission and in the Sixth Committee of the General Assembly regarding international watercourses, divergent views had been advanced, and that some States had held that earlier concepts, such as the definition in the Final Act of the Congress of Vienna (1815) of international rivers for the purpose of navigation only should be preserved and generally applied. 15

Accordingly, the Special Rapporteur considered that it was advisable to move ahead with “the preparation of articles, to the extent possible, without an initial definition of an international watercourse”. 16

13. The present Special Rapporteur shares the view that a definition of an international watercourse based on the concept of the drainage basin would not command sufficient agreement within the General Assembly to recommend itself as the starting-point for a draft convention on this topic. The second Special Rapporteur recognized the great diversity of watercourses. The geographical and hydrological diversities of the various watercourses are apparent. So are the political issues involved as well as the factual and legal problem areas that differ from watercourse to watercourse. Thus the second Special Rapporteur recognized that there was a need for a method of dealing with watercourse problems that would permit the development of principles of general applicability within a framework sufficiently flexible to allow adaptation to the unique aspects* of individual watercourses 17

The Special Rapporteur reverted to the question of definition in chapter II of his second report. 18

14. The present Special Rapporteur holds the view that a definition of international watercourses based on a doctrinal approach to the topic would be counterproductive, whether the definition is based on the drainage basin concept or on other concepts of a doctrinal nature. The definition of the term “international watercourse” should not have as its purpose to create a superstructure from which to distil or extract legal principles. Such an approach would defy the purpose of drafting principles of general applicability that were sufficiently flexible “to allow adaptation to the unique aspects” of each individual international watercourse.

15. On the other hand, it may be useful to attempt to formulate a definition of an international watercourse for the purposes of the draft convention. The present Special Rapporteur will revert to the question in chapter III of this report.

16. In chapter I of his second report, the Special Rapporteur also dealt with the discussions in the Commission at its thirty-first session, in 1979, and likewise with the discussions in the Sixth Committee of the General Assembly in the course of its review of the report of the Commission on its 1979 session. 19

17. In chapter II of the same report, the Special Rapporteur reconsidered the draft articles submitted in his first report on the basis of the discussions which had taken place in the Commission and in the Sixth Committee in 1979. In spite of some divergences of views,

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12. Ibid., p. 159, paras. 63-64.
16. Ibid.
21. In section B of chapter II, the Special Rapporteur was justified in drawing the following conclusions from these discussions:

... there was general agreement on the need for provisions that would set forth the scope of the draft articles, define the relationship of the Commission’s work to agreements on individual watercourses and deal with the collection and exchange of essential information. 26

18. The report emphasized that a new element had appeared in those discussions. In a number of interventions attention had been drawn to the need for a definition of the term “international watercourses” at an early stage. As a matter of fact, such views were also expressed in subsequent discussions in the Sixth Committee, for example at the thirty-seventh session of the General Assembly, in 1982, although the topic was not extensively dealt with during that session.

19. In that context, the Special Rapporteur expressed the view that it was “difficult to see the utility of drawing a distinction between use of the watercourse and use of the water of the watercourse”. 27 The present Special Rapporteur shares the view that such a distinction would hardly be fruitful for the Commission’s work on the topic. Such a distinction would be elusive, even artificial. Should the Commission deal only with the “uses of the watercourse” and not with the uses of the water of watercourses, the work of the Commission would be so restrictive as to deprive the draft convention of its usefulness and urgency. Such a narrow definition would, as stated by the Special Rapporteur in his second report, “exclude all uses that depend upon the diversion or abstraction of water from the watercourse”. 28 The wider definition was adopted as a matter of course by the Special Rapporteur and by the Commission.

20. The present Special Rapporteur also shares the view expressed in the second report that lakes (and canals) form a natural part of a number of international watercourses. This approach has likewise been adopted in international agreements regulating international watercourses. 29

21. In section B of chapter II, the Special Rapporteur submitted revised texts, with comments, of the articles he had submitted earlier. In his first report (see para. 10 above), he had introduced the concept of “user States” and “user agreements” in his revised draft articles, 30 he introduced the new concept of “international watercourse systems” (art. 1) and of “system States” (art. 2). That revision was made, inter alia, to make it clear that an international watercourse was not to be regarded merely “as a pipe carrying water” but “to avoid being bogged down in recurring discussions over what uses of water are to be dealt with and whether lakes (and canals) are included”. 31 The Special Rapporteur produced documentation to the effect that the concept of “water-

course systems” or “river systems” had been widely adopted in international relations.

22. On the basis of the revised approach, the second Special Rapporteur submitted six draft articles to the Commission in his second report. 32 Article 1 (Scope of the present articles) introduced the concept of “international watercourse systems”. As a consequence of that change, the concept of “system States” was introduced in article 2. The Special Rapporteur suggested a geographic approach, describing a “system State” as a State “through whose territory water of an international watercourse system flows”. He emphasized that that approach differed from that of articles II and III of the Helsinki Rules, where the concept of “drainage basin”, in conjunction with a precise definition of that term, provided a hydrographic background for those rules. The Special Rapporteur also stressed that the definition of system States contained in his proposed article 2 was “not intended to determine the issue whether a State from whose territory ground water moves into an international watercourse system is or is not a ‘system State’”. That decision should be taken only as a corollary to the decision “whether (a) the drainage basin concept is to be ultimately agreed upon as the measure of the scope of the draft articles, or (b) if not, whether any provisions respecting groundwater should be included in the draft articles”. 33

23. The Special Rapporteur reserved article 3 for “meaning of terms”. He did not attempt to give definitions of relevant terms but raised certain issues to be dealt with at later stages depending on future decisions as to whether the doctrinal approach of river basins should be adopted as the basis for the draft articles or not.

24. Article 4 contained provisions regarding “system agreements”. Owing to the wide diversity of watercourses, the Special Rapporteur stressed the consequent difficulty of drafting general principles that would apply universally to the various watercourses throughout the world. He also felt that “a decision to employ the approach of a framework convention is important to the orderly development of a set of articles”. 34 In addition to changing the terminology from “user agreements” to “system agreements”, article 4 dealt with two issues that had been left open in the first report, namely, the extent to which there was an obligation upon system States to negotiate and conclude such specific agreements and, secondly, whether such system agreements should apply to the entire watercourse or could be concluded for subsystems or other special parts of the watercourse system. The proposed text left open the possibility of concluding such partial agreements. The Special Rapporteur found the basis for an obligation to conclude system agreements in the general obligation of States under international law to resolve outstanding issues by negotiating in good faith. As

26 Ibid., para. 32.
27 Ibid., para. 40.
28 Ibid., para. 41.
29 Ibid., para. 48.
30 Ibid., paras. 52 and 59.
31 Ibid., para. 52.
stated by the ICJ in the *North Sea Continental Shelf* cases,

... the Court would recall ... that the obligation to negotiate ... merely constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for peaceful settlement of international disputes.29

25. The obligation under international law to negotiate in good faith to resolve outstanding issues follows not only from customary international law but, as stated by the Court in the *North Sea Continental Shelf* cases, is "a special application of a principle which underlies all international relations", as well as from the Charter of the United Nations and from international jurisprudence, including the precedents of the ICJ and of its predecessor, the Permanent Court of International Justice,30 and State practice.

26. However, in the context of article 4, the question arises whether the obligation concerning the conclusion of "system agreements" should go beyond an obligation to negotiate in good faith, for example by including an obligation to resort to other procedures for peaceful settlement in accordance with Article 33 of the United Nations Charter. The Special Rapporteur touched upon those problems in his second report, where he quoted from the "Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States" prepared by UNEP.31 Principle 11, paragraph 2, provides:

2. In case negotiations or other non-binding means have failed to settle a dispute within a reasonable time, it is necessary for States to submit the dispute to an appropriate settlement procedure which is mutually agreed by them, preferably in advance. The procedure should be speedy, effective and binding.

27. With regard to the provisions of article 4, paragraph 2, the Special Rapporteur dwelt on the possibility and necessity of subsystem agreements for individual watercourses. He emphasized that the possibility of entering into subsystem agreements for individual parts of an international watercourse might be of special pertinence "when there are three or more system States, because in such cases dealing with only a part of the watercourse may have advantages of simplicity and utility".32 A number of watercourse agreements in force are limited to part of a watercourse system. The need for such subsystem agreements and for agreements covering limited areas is obvious. In that context, the Special Rapporteur made the following observation:

... In some watercourse systems, such as the Indus, the Plate and the Niger, the differences between subsystems are as marked as those between separate watercourse systems. Agreements on subsystems are likely to be more readily attainable than agreements on the watercourse system as a whole, particularly if a considerable number of States are involved.33

28. It is equally apparent, however, that the need for limited agreements is not explained by geographic limitations only. A great number of international watercourse agreements are included for the purpose of regulating particular projects, programmes or uses rather than for the purpose of regulating certain subsystems or geographically limited sections of an international watercourse. A number of separate agreements regulating hydroelectrical developments are among functionally limited watercourse agreements that come to mind.

29. Some agreements are concluded for the purpose of one project or one specific part of an international watercourse system. However, there are also examples of such functionally limited conventions of a general nature. Mention may be made of the Geneva Convention of 9 December 1923 relating to the development of hydraulic power affecting more than one State.34 Draft provisions on system agreements must be so drafted as to take into account the different types of agreements, bilateral, multilateral, geographically restricted or functionally restricted.

30. Article 5 proposed in the second report dealt with "Parties to the negotiation and conclusion of system agreements". In his comments, the Special Rapporteur stated that the article "deals with the right to participate in the negotiation of an agreement rather than with the duty to negotiate, which is addressed in article 4. If there is a duty to negotiate, there is a complementary right to participate in the negotiations. Article 5 is limited to identification of the States which are entitled to exercise this right ...".35

31. The Special Rapporteur proposed as a condition for exercising the right to participate in the negotiation (and conclusion) of a system agreement that the use and enjoyment of the waters of an international watercourse system of the State concerned may be affected "to an appreciable extent"36 by the proposed system agreement, even though such agreement would apply to only a part of the system. The criterion "to an appreciable extent" may perhaps be lacking in scientific, technical and mathematical stringency. The present Special Rapporteur is of the opinion that it is hardly possible to devise "scientific, technical or mathematical" formulae that could be more or less automatically applied to the great variety of elements that may be relevant, and to the concrete problems which necessarily will arise from time to time in regard to the relative use and enjoyment by the various system States of the waters of an international watercourse system. The more flexible approach inherent in the formulation "to an appreciable extent"

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33 Ibid., para. 101.
34 See footnote 12 above.
36 Ibid., paras. 115-123.
is recommendable as a guideline for the maze of widely varying issues that will arise in this field of international law and international relations. It is not unusual for the legal profession to accept the indisputable fact that human society, and especially international relations, are so dynamic and so varied that legal standards, with the necessary flexibility and faculty of forming and amending themselves with the endless variety of cases and developments, are preferable to hard and fast formulae. The present Special Rapporteur doubts whether a body of experts would be able, on the basis of scientific, technical or mathematical considerations, to come forward with formulae that would be more acceptable than the criterion "to an appreciable extent".

32. In his first report, the Special Rapporteur presented rather detailed proposals on data collection (art. 8), exchange of data (art. 9), and costs of data collection and exchange (art. 10) (see para. 11 above). In his second report, he revised his approach and presented in the new article 6 his proposal for collection and exchange of information. The Special Rapporteur considered that the relevant draft articles proposed in the first report might be "unduly specific for use in a framework agreement". On the other hand, he emphasized that "the need for the collection and exchange of information is so essential that its expression can and should be cast in the form of a basic obligation". The present Special Rapporteur shares the view that the necessity for a general principle regarding the collection and exchange of data and other information cannot be challenged.

33. In chapter III of his second report, the Special Rapporteur dealt in an illuminating manner with water as a shared natural resource. He emphasized how the concept of shared natural resources, and of cooperation among States with respect to the mutually beneficial development and use of such shared resources, had become widely accepted, not least in a United Nations context. And he described the waters of international watercourses as "the archetype of the shared natural resource". Consequently, the Special Rapporteur proposed in article 7, as the first main principle governing the uses of water of an international watercourse, that such water was a shared natural resource.

34. A descriptive but brief analysis of the consequences that should be drawn from the fact that the water of an international watercourse must be treated as a shared natural resource is found in the Mar del Plata Action Plan adopted by the United Nations Water Conference which convened at Mar del Plata in 1977. Recommendation 85 of the Action Plan states:

85. Countries sharing water resources, with appropriate assistance from international agencies and other supporting bodies, on the request of the countries concerned, should review existing and available techniques for managing shared water resources and co-operate in the establishment of programmes, machinery and institutions necessary for the co-ordinated development of such resources. Areas of cooperation may with agreement of the parties concerned include planning, development, regulation, management, environmental protection, use and conservation, forecasting, etc. Such cooperation should be a basic element in an effort to overcome major constraints such as the lack of capital and trained manpower as well as the exigencies of natural resources development.

It was further recommended that countries sharing an international watercourse should sponsor studies, establish joint committees, encourage joint education and training schemes, encourage exchanges between interested countries and meetings between representatives of international or inter-State river commissions, etc.

35. The Action Plan also recognized the need for close international co-operation among co-riparian States. Thus recommendation 90 provides:

90. It is necessary for States to co-operate in the case of shared water resources in recognition of the growing economic, environmental and physical interdependencies across international frontiers. Such co-operation, in accordance with the Charter of the United Nations and principles of international law, must be exercised on the basis of the equality, sovereignty and territorial integrity of all States ....

Recommendation 91 provides:

91. In relation to the use, management and development of shared water resources, national policies should take into consideration the right of each State sharing the resources to equitably utilize such resources as the means to promote bonds of solidarity and co-operation.

36. It is also interesting to note that recommendation 93 (b) confirms the existence of "generally accepted principles of international law in the use, development and management of shared water resources" in the absence of bilateral or multilateral agreements. In regard to the collection and exchange of information and data, recommendation 93 (g) provides that "the United Nations system should be fully utilized in reviewing, collecting, disseminating and facilitating exchange of information and experiences on this question".

37. In dealing with the concept of shared natural resources, the Special Rapporteur examined the River Oder case adjudicated by the PCIJ in 1929. He stressed that the decision of the Court was notable "in placing the weight of the Permanent Court ... behind the principle of 'a community of interest of riparian States' " in respect of international watercourses. The decision may be of interest because it dealt with tributaries of the Oder, albeit it dealt with navigational aspects only and was based to a large extent on the interpretation of articles 341 and 343 of the Treaty of Versailles.

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* Ibid., p. 51.
* Ibid., p. 53.
* Ibid.
* Ibid., pp. 53-54.
38. After his election as a judge of the ICJ in January 1981, Mr. Schwebel submitted for the consideration of the Commission at its thirty-fifth session, in 1982, his third report on the topic, on which he had begun research prior to resigning from the Commission. He submitted that third report with a view to facilitating the continued consideration of the topic by the Commission, in accordance with the recommendation of the General Assembly contained in paragraph 4 (e) of its resolution 35/163 of 15 December 1980.

39. The third report is a monumental work. The present Special Rapporteur has studied it with the greatest admiration and respect. It has proved invaluable in providing source material and in presenting a set of draft articles on the topic, taking as its starting point the six draft articles provisionally adopted by the Commission during its thirty-second session, in 1980. The articles adopted were: “Scope of the present articles” (art. 1); “System States” (art. 2); “System agreements” (art. 3); “Parties to the negotiation and conclusion of system agreements” (art. 4); and “Use of waters which constitute a shared natural resource” (art. 5). An additional article “X” was likewise provisionally adopted in order to make it clear at the outset that treaties in force with respect to “a particular international watercourse system or any part thereof or particular project, programme or use” were not to be affected by the draft articles.

40. Following the first five articles provisionally adopted by the Commission, the Special Rapporteur presented in his third report 11 other articles with the purpose of placing at the disposal of the Commission a complete set of proposals for the “codification and, to a certain extent, progressive development of international law on the subject”.

41. The 11 draft articles proposed in the third report deal with the following issues: “Equitable participation” (art. 6); “Determination of equitable use” (art. 7); “Responsibility for appreciable harm” (art. 8); “Collection, processing and dissemination of information and data” (art. 9); “Environmental pollution and protection” (art. 10); “Prevention and mitigation of hazards” (art. 11); “Regulation of international watercourses” (art. 12); “Water resources and installation safety” (art. 13); “Denial of inherent use preference” (art. 14); “Administrative management” (art. 15); and “Principles and procedures for the avoidance and settlement of disputes” (art. 16).

42. The draft articles presented in the third report are characterized by a comprehensive approach to the issues dealt with as well as by great detail in drafting. The technical and legal expertise with which they have been drafted is almost overwhelming. Thus the third report is a monumental achievement. For students of the topic it is of unique value, as it furnishes source material of unexcelled richness and will be a constant source of thought and inspiration. It has been of great assistance to the present Special Rapporteur in the preparation of the present report. But the proposals of the third report may at times seem so detailed that their interpretation and the practical application of the articles may be difficult in concrete cases. It should perhaps also be borne in mind that the issues involved are of a highly delicate nature, both politically and legally; furthermore, each international watercourse system has its distinctive characteristics and its specific and unique set of problems, in addition to the common features pertaining to the administration and management of international watercourse systems in general.

43. The present Special Rapporteur has attempted in this report to formulate the principles in a somewhat different manner in order to make the texts of the various provisions slightly more accessible. He has also slightly different views with regard to substance. However, in drafting his set of articles, he has relied heavily on the third report of the previous Special Rapporteur and has to a great extent used formulations presented in that report. One main difficulty that the Special Rapporteur has experienced in this context is the fact that the Commission has not acted upon the third report, for the obvious reason that, after Mr. Schwebel’s resignation as Special Rapporteur, there was no Special Rapporteur on the topic either at the thirty-third session, in 1981, or at the thirty-fourth session, in 1982. Nor has there been any discussion in the Sixth Committee of the General Assembly based on that third report.

44. In spite of the comprehensiveness of the draft articles submitted with the third report, the previous Special Rapporteur considered that there were several issues that had not been addressed. In addition to possible articles on specific uses, he mentioned “the legality of diversion of water outside the international watercourse system”, the intricate question of cost sharing, with special reference to the “production and processing of data or joint studies, the design, construction and operation of projects”, the training of technical and managerial personnel, and protection and control measures of both a structural and a non-structural nature. The previous Special Rapporteur also mentioned the highly sensitive issue of “use, protection and control of the waters of shared groundwater resources”. Another topic that he did not address in the form of a draft article in his third report was the “preservation of wild and scenic watercourses”. Worthy of note in this context is the following observation:

It may be hoped that more and more States will act upon their awareness of the progressive loss of these priceless and, once spoiled, irretrievable parts of their heritage. The Governments of many system States can be expected to designate some streams or extensive portions

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of such streams for preservation under special legal regimes. In some cases, system States may join forces to preserve an especially valuable portion of an international watercourse.

45. One question of principle which has created great difficulty for the present Special Rapporteur derives from some of the issues dealt with in article 13, "Water resources and installation safety". It is obvious that the question of public safety raised by possible failure, mismanagement, natural hazards and force majeure, including sabotage, in regard to watercourses and installations, involves problems that may be of major importance. In article 13, which is excellently drafted and which contains well-reasoned observations, the previous Special Rapporteur dealt with serious and highly relevant issues. The present Special Rapporteur fully shares his views and concerns and will probably have no major reservations with regard to drafting.

46. However, the present Special Rapporteur sees one major difficulty of principle with regard to this article. In paragraphs 2, 3, 5 and 6, issues are dealt with that pertain not only to the use, administration and management of international watercourse systems in ordinary circumstances and in time of peace. Protection in times of armed conflict is also extensively and laudably dealt with therein. Thus principles pertaining to the realm of the laws of war and to the realm of civil wars (non-international armed conflicts) are introduced in this article. The proposed provisions in that regard are obviously in harmony with the scope and tenor of the 1949 Geneva Conventions on rights and duties in time of war and their two Additional Protocols of 1977. In view of the great difficulties with which the Geneva Diplomatic Conference of 1977 was faced, it seems somewhat doubtful whether questions pertaining to the laws of armed conflicts should be introduced in the present draft convention. Such an effort might easily be construed as an attempt to amend or change some of the instruments concerned, especially Protocol I, relating to the protection of victims of international armed conflicts. This may create unforeseen difficulties in the Commission's work. If need be, the Commission could possibly propose special amendments to the Geneva Protocols of 1977 along the lines of certain of the proposals contained in article 13 of the third report. The present Special Rapporteur will express no opinion as to whether it would be expedient for the Commission to do so.

47. The first and second reports of the previous Special Rapporteur were extensively discussed in the Commission and in the Sixth Committee of the General Assembly in 1979 and 1980, and resulted in the aforementioned six articles being provisionally adopted by the Commission in 1980 (see para. 39 above). The previous Special Rapporteur used those six draft articles as his starting-point for the proposed additional articles contained in his third report.

48. The present Special Rapporteur shares the view that the six articles adopted by the Commission, albeit provisionally, must serve as the natural starting-point for his work on the topic.

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**Chapter II**

**Brief outline of work**

49. In his statement at the opening of the United Nations Water Conference at Mar del Plata on 14 March 1977, the Secretary-General of the Conference, Mr. Abdel Mageed, emphasized that:

> ... It is a fact of contemporary life that there are important points of difference among many countries with regard to the problems of shared water resources. It appears that no significant progress can be achieved in the management and development of these resources without a more effective system or framework within which the differing national positions, interests or approaches can be harmonized so as to facilitate co-operation.

He further expressed the hope that:

> ... these shared resources [would] be viewed as links to promote the bonds of unity, solidarity and fraternity among the nations sharing a common destiny.

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51. The uses made of international watercourses are many and varied. Before the advent of the technological revolution, the main concerns with regard to international watercourses were navigational. Those aspects lie in principle outside the scope of the work now entrusted to the Commission. Thus, according to article 1, paragraph 2, provisionally adopted by the Commission, navigational aspects will be taken into consideration only "in so far as other uses of the waters affect navigation or are affected by navigation".

52. In its questionnaire of 1974, the Commission suggested comments by States on the uses of fresh water under three headings: agricultural uses; economic and commercial uses; and domestic and social uses (see para. 1 above). Such a classification may be useful as an illustration of the main categories of uses to which waters and watercourses are put. By the same token, the questionnaire made it clear that there existed, among the manifold uses to which a river might be put, a state of interdependence which demanded unity of efforts.

53. The most important agricultural uses are irrigation of cultivated land, consuming large quantities of fresh water as the case may be, consumption of water for domestic purposes, and the watering of livestock of adjacent farms. Fishing and fish breeding may also be vital sources of food supply or income. Lack of water for agricultural purposes remains one of the insurmountable problems for self-sufficiency in food production. While about one tenth of the land area of the world is cultivated, only about one sixth of this cultivated land is currently under irrigation. "Yet this same irrigated land produces between 40 and 50 per cent of all agricultural output. It is clear that, if future famines are to be avoided, more land will have to be placed under irrigation." 56

54. Timber-floating is still a vital part of forestry in many parts of the world, as is the flooding of farmland, inter alia for silting purposes as a natural fertilizing technique. The agricultural uses of a watercourse may have obvious repercussions. Irrigation may result in heavy consumption, which may affect other uses. Pollution may result from the use of artificial or natural fertilizers as well as from the waste products from livestock.

55. With the technological revolution, the use of watercourses and the waters thereof for economic and industrial purposes has increased dramatically, with ensuing harmful consequences and possible conflicts between uses and between co-riparian States. One main economic use which may frequently have repercussions on competing uses and on other States of a shared water resource is that of hydroelectric power installations. Such installations, however, are also among the most encouraging instances of close co-operation among co-riparian States in joint projects and in bilateral and multilateral agreements on friendly co-operation and the orderly development and exploitation of the power-generating facilities of an international watercourse.

56. Industrial activities may create serious complications for other legitimate uses of an international watercourse because of heavy consumption and/or serious pollution of the waters when the watercourse (or its affluents) is used as a means of waste disposal, outlets for sewage, etc.

57. The pressure on fresh water resources in the 20th century is further increased by the population explosion and the ever-increasing tendency of populations to gather in cities or densely populated areas. Thus the fresh water resources required for domestic purposes are taxed to their limits, at the same time as waste disposal needs and sewage from such population centres tax the hydrological environment drastically.

58. The recreational and social uses of watercourses will likewise increase with the developments outlined above.

59. The examination of the various uses to which an international watercourse may be subjected is useful in pointing out problem areas and the conflicts inherent in such a multitude of uses. However, the discussion in and the work of the Commission have been directed towards elaborating general principles and rules based on the experiences drawn from such an examination of uses rather than towards elaborating specific rules for individual uses. This was also the predominant view in the Sixth Committee at the thirty-fourth session of the General Assembly. That approach was expressed in the following manner by the previous Special Rapporteur in his third report:

... The predominant view was that the product of the Commission's work should serve to provide ... the general principles and rules governing international watercourses in the absence of agreement among the States concerned and to provide guidelines for the negotiation of future specific agreements. That is, the Commission's articles would contain general principles plus residual rules applicable to subject matters not covered by such agreements. ... 57

60. One question which arises as to the scope of the draft articles is whether the term "non-navigational uses of international watercourses" should be taken in a narrower sense or whether the principles and rules to be drafted on the topic should cover broader issues. As indicated in its questionnaire, the Commission drew attention to certain issues of a broader nature than those raised by the list of specific issues. Thus it asked States for their comments on such issues as flood control and erosion problems. States replying to the questionnaire supported the adoption of such a more comprehensive approach. There are several pressing problems of such a broader character which may arise from uses of a watercourse or affect such uses by their seasonal or long-term consequences on a watercourse or the surrounding land. A number of these problems may fall under the heading of natural hazards. The two previous Special Rap-

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56 Ibid.

57 See the second report of the previous Special Rapporteur, document A/CN.4/332 and Add.1 (see footnote 13 above), paras. 19-26.

58 Document A/CN.4/348 (see footnote 46 above), para. 2.
porteurs were of the opinion that those broader issues found their natural place in the draft articles. The present Special Rapporteur shares that view.

61. In his second report, the previous Special Rapporteur proposed the following formulation for paragraph 1 of article 1 ("Scope of the present article"):

1. The present articles apply to the uses of the water of international watercourse systems and to problems associated with international watercourse systems, such as flood control, erosion, sedimentation and salt water intrusion.

The reference here to "flood control, erosion, sedimentation and salt water intrusion" was obviously meant as an exemplification of the broader approach.

62. Article 1, paragraph 1, provisionally adopted by the Commission at its thirty-second session, in 1980, was drafted in a somewhat different manner:

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

This change in drafting seems to make the article more purpose-oriented than the original proposal, and may consequently command broader support.

63. In his third report, the previous Special Rapporteur dealt in great detail with these issues: environmental pollution and protection (art. 10); prevention and control of water-related hazards (art. 11); regulation of international watercourses (art. 12); and water resources and installation safety (art. 13). The proposals are illustrative of the role these issues play for States sharing international watercourse systems and for the reasonable and effective management of such watercourses. Among the water-related hazards taken up for examination in the third report are: floods and flood control; ice conditions, concerning which it is stressed that "the problem of damage from ice ranks with floods as a concern to many system States located in the northern latitude"; drainage problems, concerning which it is stressed that measures "to improve or ensure adequate drainage" have been the subject matter of "a good number of international agreements"; flow obstructions, either man-made, such as dams, locks or other installations, or caused by natural forces, such as landslides, earthquakes, sedimentation and log-jams, which may constitute a constant hazard in a great number of international watercourses; avulsion, an occurrence which takes place when a watercourse precipitously abandons its original river bed and "is redirected across-country"; sedimentation (siltation) which, it is emphasized, is frequently one of the main problems of international watercourse systems:

... As this sediment load is shifted continually downstream, reservoirs are gradually filled in, spawning beds may be smothered, water supply intakes and treatment plants become clogged and damaged, channels silt up, decreasing the depth of the fairway and harbours, light transmission essential for aquatic life is reduced and recreational uses are spoiled. Costly dredging and filtration efforts are engaged in and are frequently overwhelmed ... 

Erosion is closely related to sedimentation. Control measures aim at the protection of river banks and adjacent land against erosion stemming from the forces of river currents and floods. Erosion is a main source of sedimentation. Thus control of erosion is closely related to that of sedimentation. Saline intrusion, i.e. the penetration of sea water upstream from the mouth of a watercourse and likewise into groundwater aquifers, "is a serious 'harmful effect' in a number of international watercourse systems". Concerning drought and other natural hazards, the United Nations Water Conference drew attention to the fact that "the negative economic impact of water-related natural disasters in developing countries was greater than the total value of all the bilateral and multilateral assistance given to these countries". For drought control as well as for flood control, the Conference stressed the obvious: that it was "necessary to plan ahead and co-ordinate the measures that need to be taken ..." In the work necessary to mitigate the disastrous effects of drought, the coordinated development and management of water resources as well as drought forecasting on a long-term basis should be viewed as a key element. The present Special Rapporteur shares the view expressed in the third report that

... The Commission's articles should include a proper provision comprehending this concern with respect to international watercourse systems. ...

Desertification or similar harmful changes to the environment through human activities or natural hazards may in many cases be closely related to the lack of effective administration and management of watercourse systems, in combination with other factors, such as excessive deforestation. Water-related health hazards have become a matter of increased concern, especially to developing countries. Certain types of watercourse developments may unfortunately have increased the in-

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68 Ibid., paras. 350-352.

69 Ibid., paras. 353-358.
cidence of water-related diseases. This increasingly grievous problem has been addressed in a number of system agreements and consultations concerning the management and administration of international watercourse systems. As an example, the third report cites article VIII of the Treaty for Amazonian Co-operation of 3 July 1978, which provides:

The Contracting Parties decide to promote co-ordination of the present health services in their respective Amazonian territories and to take other appropriate measures to improve the sanitary conditions in the region and perfect methods for preventing and combating epidemics.

64. The provisions contained in article 13 proposed in the third report have been touched upon earlier (see paras. 45-54 above). They deal with the protection and safety of shared water resources and of constructions and installations in international watercourses. The article deals mainly with the question of terrorist acts, sabotage and situations relating to times of war or armed conflict. The present Special Rapporteur doubts whether it would be expedient to include an article along these lines in the present draft. There are, however, other aspects of safety and control that may have their rightful place in a draft convention, namely those pertaining to the general conditions and safety standards for the establishment, upkeep and management of installations and constructions; the methods for exercising technical control; establishment of reasonable public security routines, including the protection of sites, etc.

 Certain guidelines on these matters may be found in bilateral or multilateral agreements such as the Geneva Convention of 1923 relating to the development of hydraulic power affecting more than one State.

65. On the basis of the work of the previous Special Rapporteur and the considerations developed in this report, the Special Rapporteur will propose the following outline for a draft convention:

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Footnotes:

14 In his third report (ibid., footnote 510), the previous Special Rapporteur provided an excellent summary of water-related health hazards. The wide variety of water developments have increased the incidence of water-related diseases. The creation of ponds, reservoirs, irrigation and drainage canals as well as the widespread inadequacy of waste water disposal systems favour the persistence and spread of such diseases. In recent years new irrigation systems and reservoirs have provided ideal habitats for the snail, host of schistosomiasis. This debilitating disease of the intestinal and urinary tract affects an estimated 250 million people throughout the world. In some irrigation-project and reservoir areas, up to 80 per cent of the population is affected. There are numbers of other serious water-related diseases. These include malaria, filariasis (elephantiasis) and yellow fever transmitted by mosquitoes. Onchocerciasis (river blindness disease) is another water-related disease transmitted by flies; likewise paragonimiasis, transmitted by a snail. Poorly managed water resource development and the impact of urbanization on aquatic habitats and water quality contribute to the spread of these diseases. Diseases typical of waste water contaminated by faeces are cholera, typhoid fever, amoebic infections and bacillary dysentery. In the developing countries almost 1.5 billion persons are exposed to these diseases for lack of safe water supplies and human waste disposal facilities.

17 The text of the Treaty was circulated to the General Assembly under the symbol A/35/580 (to be issued in United Nations, Treaty Series, No. 19194).

18 See footnote 12 above.
66. In chapter I of the draft articles, the Special Rapporteur deals with the introductory articles of the draft. Articles 2 to 5 correspond to articles 1 to 4 of the draft provisionally adopted by the Commission at its thirty-second session, in 1980. In article 1, the Special Rapporteur has made a first try at explaining (defining) the term "international watercourse system". In this attempt he has relied heavily on the note agreed on by the Commission "describing its tentative understanding of what was meant by the term 'international watercourse system'". 17

Chapter I.
INTRODUCTORY ARTICLES

Article 1. Explanation (definition) of the term "international watercourse system" as applied in the present Convention

1. An "international watercourse system" is a watercourse system ordinarily consisting of fresh water components, situated in two or more system States.

   Watercourses which in whole or in part are apt to appear and disappear more or less regularly from seasonal or other natural causes such as precipitation, thawing, seasonal avulsion, drought or similar occurrences are governed by the provisions of the present Convention.

   Deltas, river mouths or other similar formations with brackish or salt water forming a natural part of an international watercourse system shall likewise be governed by the provisions of the present Convention.

2. To the extent that a part or parts of a watercourse system situated in one system State are not affected by or do not affect uses of the watercourse system in another system State, such parts shall not be treated as part of the international watercourse system for the purposes of the present Convention.

Commentary to article 1

67. In this article the Special Rapporteur attempts to set forth an explanation (definition) of the term "international watercourse system" as applied in the present draft. The Commission's note "describing its tentative understanding of what was meant by the term 'international watercourse system'" is the basis for the present proposal.

68. One question with which the Special Rapporteur grappled was whether the criterion for an international watercourse system should be that its components "are situated in two or more States" or that "sovereignty" over the watercourse system was exercised by two or more States. The Special Rapporteur considered that the geographically-oriented criterion proposed by the Commission in the above-mentioned note was preferable to the criterion of sovereignty.

69. In the well-known Helsinki Rules, adopted on 20 August 1966 by the International Law Association, 18 the concept of an "international drainage basin" was formulated in articles I and II in the following terms:

Article I

The general rules of international law as set forth in these chapters are applicable to the use of the waters of an international drainage basin except as may be provided otherwise by convention, agreement or binding custom among the basin States.

Article II

An international drainage basin is a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus.

70. Article III of the Helsinki Rules contained the following definition of a "basin State":

Article III

A "basin State" is a State the territory of which includes a portion of an international drainage basin.

71. For several reasons, the concept of "international drainage basin" met with opposition in the discussions both of the Commission and of the Sixth Committee of the General Assembly. Concern was expressed that "international drainage basin" might imply a certain doctrinal approach to all watercourses regardless of their special characteristics and regardless of the wide variety of issues and special circumstances of each case. It was likewise feared that the "basin" concept put too much emphasis on the land areas within the watershed, in-

17 See footnote 48 above.

18 See footnote 11 above.
indicating that the physical land area of a basin might be governed by the rules of international water resources law.

72. Consequently, the previous Special Rapporteur introduced the concepts of "international watercourse systems" and "system States". In that context, he stated that the term, "system" was believed preferable to the terms "basin" or "drainage basin", and distinct from them, primarily in that its focus was on the waters and their uses and their interdependences. The term "watercourse system" was sufficiently comprehensive to include, in addition to rivers, lakes and tributaries, other components such as canals, streams, brooks and aquifers and groundwater. At the same time, it was sufficiently flexible to make it possible, in each concrete case and concrete problem area, to determine what components should be affected by the principles provided for in regard to international watercourse systems in general or in regard to a specific watercourse system. Furthermore, the concept of "watercourse system", according to the Special Rapporteur was a recognized concept employed in State practice and by specialists in and commentaries upon the topic. It was so accepted by the Commission.

73. The explanation (definition) submitted in article 1 is of a purely descriptive nature. No legal rule or principle can be deduced from this article. The interdependence of the various components of an international watercourse system is the inevitable consequence of the very nature of things. In subsequent articles, principles of a legal nature will be proposed based on such interdependence, mainly in the form of framework principles.

74. In the view of the Special Rapporteur, it is advisable to mention expressly that the term "international watercourse system" includes watercourses that appear and disappear more or less regularly from seasonal or other natural causes. River beds will normally be obvious indications of such "seasonal" watercourses. In arid areas this type of watercourse may be of special significance. The Special Rapporteur likewise thought that express mention should be made in article 1 of deltas, river mouths and similar formations with brackish or salt water. These forms in many instances not only a natural part but also a highly important part of an international watercourse system. Aside from the obvious question of navigational uses, such areas may be of great importance for other uses and be significant problem areas for other reasons as well, for example, as throughways for anadromous stocks of fish, salt-water intrusion in aquifers and ground water, problems of sedimentation and flooding, etc.

75. The proposed paragraph 2 of article 1 corresponds to the first sentence of paragraph 3 of the "note" of the Commission (see para. 66 above).

Article 2. Scope of the present Convention

1. The present Convention applies to uses of international watercourse systems and of their waters for purposes other than navigation and to measures of administration, management and conservation related to the uses of those watercourse systems and their waters.

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

Commentary to article 2

76. Article 2 corresponds verbatim to article 1 as provisionally adopted by the Commission at its thirty-second session, in 1980, except for a minor addition in paragraph 1: the reference to "measures of conservation" has been expanded as follows: "measures of administration, management and conservation".

Article 3. System States

For the purposes of the present Convention, a State in whose territory components/part of the waters of an international watercourse system exist[s] is a system State.

Commentary to article 3

77. Article 3 is taken verbatim from article 2 as provisionally adopted by the Commission at its thirty-second session, in 1980, except that the Special Rapporteur proposes that the term "components" be substituted for the word "part". This possible change has been indicated as follows: "components/part". It may make the concept of "system State" somewhat clearer.

Article 4. System agreements

1. A system agreement is an agreement between two or more system States which applies and adjusts the provisions of the present Convention to the characteristics and uses of a particular international watercourse system or part thereof.

2. A system agreement shall define the waters to which it applies. It may be entered into with respect to an entire international watercourse system, or with respect to any part thereof or particular project, programme or use, provided that the use by one or more
other system States of the waters of an international watercourse system is not, to an appreciable extent, affected adversely.

3. In so far as the uses of an international watercourse system may require, system States shall negotiate in good faith for the purpose of concluding one or more system agreements.

Commentary to article 4

78. Article 4 corresponds verbatim to article 3 as provisionally adopted by the Commission at its thirty-second session, in 1980. The general merits of the article seem obvious. The importance of the conclusion of system agreements for the effective and orderly administration, management and conservation of the wide variety of international watercourse systems, and the fair and equitable distribution of their resources to the system States, is further emphasized by the fact that the article on system agreements is placed among the introductory articles. The previous Special Rapporteur presented detailed comments on system agreements in his second report and in his third report. These questions have also been dealt with in chapter I of the present report (paras. 24-29).

80. In this chapter, the Special Rapporteur deals with chapter II of the draft articles, that is with articles 6 to 9 pertaining to "General principles". It is a general principle that an international watercourse system must be considered as a shared natural resource that must be used and distributed in an equitable manner among the relevant system States (arts. 6 and 7). In article 8, the Special Rapporteur has attempted to lay down guidelines for the determination of what amounts to equitable and reasonable uses. In article 9, a corollary to articles 6 to 8 has been suggested, namely, that activities pertaining to an international watercourse system that cause appreciable harm to other system States are prohibited. The four articles have been drafted as general legal principles binding upon system States, unless otherwise provided for in this draft convention or in system State agreements, or otherwise. In the view of the Special Rapporteur, these articles give expression to prevailing principles of international law applicable to the rights and duties of co-riparian States of an international watercourse system.

Chapter II

GENERAL PRINCIPLES: RIGHTS AND DUTIES OF SYSTEM STATES

Article 6. The international watercourse system—a shared natural resource. Use of this resource

1. To the extent that the use of an international watercourse system and its waters in the territory of one system State affects the use of a watercourse system or its waters in the territory of another system State or other system States, the watercourse system and its waters are, for the purposes of the present Convention, a shared natural resource. Each system State is entitled
to a reasonable and equitable participation (within its territory) in this shared resource.

2. An international watercourse system and its waters which constitute a shared natural resource shall be used by system States in accordance with the articles of the present Convention and other agreements or arrangements entered into in accordance with articles 4 and 5.

Commentary to article 6

81. Article 6 sets out the main principle with regard to international watercourse systems, namely, that the system proper as well as its waters shall be regarded as a shared natural resource and constitute such a resource. In this shared natural resource each of the system States is entitled to a reasonable and equitable share. This basic principle, as laid down in article 6, is a codification of prevailing principles of international law following from customary international law, as evidenced by general State practice and general principles of law (including those laid down in Articles 1 and 2 of the Charter of the United Nations), and also following from the very nature of things.

82. The present formulation for article 6 is taken mainly from article 5 as provisionally adopted by the Commission at its thirty-second session, in 1980, with some minor adjustments and amendments.

83. In the Helsinki Rules, the principle is drafted in the following manner in article IV:

Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.

84. The comment to this article includes the following pertinent observations:

This article reflects the key principle of international law in this area that every basin State in an international drainage basin has the right to the reasonable use of waters of the drainage basin. It rejects the unlimited sovereignty position, exemplified by the "Harmon doctrine", which has been cited as supporting the proposition that a State has the unqualified right to utilize and dispose of the waters of an international river flowing through its territory; such a position imports its legal corollary, that a State has no right to demand continued flow from co-basin States.

The Harmon doctrine has never had a wide following among States and has been rejected by virtually all States ... .

85. A main starting-point for the drafting and application of the provisions contained in article 6 is not only the sovereignty of States but also the equality of States and their obligation to act in good faith towards each other, consonant with their territorial integrity, the development of friendly relations and good neighbourliness. The article is further based on the obvious: that an international watercourse system must be viewed as an integrated whole, and administered and dealt with in keeping with this concept in order that it may render the greatest possible service to the human communities and the environments that it serves.

86. In paragraph 1 of article 6, an additional proposal is made to the effect that each system State is entitled to reasonable and equitable participation—within its territory—in the benefits of the watercourse as a shared natural resource. The present Special Rapporteur shares the view expressed in the third report of the previous Special Rapporteur that the wording "equitable participation" is preferable to the words "equitable share", as used in article IV of the Helsinki Rules. The word "participation" conveys in a more appropriate form the dual aspect of a system State's "sharing": the "right to use", but also "the duty to contribute" to the necessary management and conservation of a watercourse system for the optimal distribution, in a reasonable and equitable manner, of the benefits to be derived from the international watercourse system. Because of the infinite diversity of watercourse systems and the wide variety of uses and problems arising in that connection, system States should to the extent necessary conclude system agreements of a general or specific nature.

Article 7. Equitable sharing in the uses of an international watercourse system and its waters

An international watercourse system and its waters shall be developed, used and shared by system States in a reasonable and equitable manner on the basis of good faith and good-neighbourly relations with a view to attaining optimum utilization thereof consistent with adequate protection and control of the watercourse system and its components.

Commentary to article 7

87. Article 7 deals with certain aspects of the concept of "shared natural resource". From the natural unity of each international watercourse system follows the unity of purpose that system States must demonstrate in a spirit of "good faith and good-neighbourly relations". This also follows from established principles of international law, as evidenced by a number of bilateral and multilateral system agreements entered into in all regions of the world. Because of the natural diversities of watercourses and also the wide variety of interests, concerns and political circumstances, these principles must of necessity be couched in the form of "legal standards".

88. Inherent in this legal concept is the need and obligation of system States to co-operate in the development, use and sharing of an international watercourse system, and to do so in a reasonable and equitable manner. Only in such a framework of political will and practical co-operation will system States be able to attain the ultimate goal of the management and administration of...
an international watercourse system, namely, optimum utilization and the necessary control and protection of the watercourse system and its components. In order to attain these goals, system States must co-operate like neighbours in a spirit of good faith and friendly relations. In so doing in such an important and politically delicate area as the administration and management of an international watercourse system, they will further enhance and strengthen their good-neighbourly relations and, necessarily, the realization of the interdependence of States and the brotherhood of man.

89. Concretely, the administration and management of an international watercourse system—in spite of its highly political and delicate diplomatic nature—is essentially a practical task, constituting as often as not a day-to-day routine. This is a concrete task governed by the circumstances of each particular case. The variety and diversity of these special circumstances and details are legion. The task of the Commission in drafting these articles must first and foremost be to draft principles, some of them of an obligatory nature, by codifying already established principles of international law; others as legal ideas of a more progressive nature as guidelines or ideas for inclusion in bilateral or multilateral system agreements. In the opinion of the Special Rapporteur, the provisions laid down in article 7 belong to the first category of principles.

90. The previous Special Rapporteur demonstrated in his reports how international and national tribunals had applied these general principles to concrete cases. Thus, in the award rendered in the Lake Lanoux case on 16 November 1957 in a dispute between France and Spain, the arbitral tribunal held:

... The Tribunal considers that the upper riparian State, under the rules of good faith, has an obligation to take into consideration the various interests concerned, to seek to give them every satisfaction compatible with the pursuit of its own interests and to show that it has, in this matter, a real desire to reconcile the interests of the other riparian with its own.

91. In this context, the arbitral tribunal stressed the obligation of co-riparian States to conduct real and effective negotiations. The tribunal emphasized that among the settlement procedures to be followed by co-riparian States negotiations played an important role. It also stressed that such negotiations cannot be reduced to purely formal requirements, such as taking note of complaints, protests or expressions of regret submitted by the lower riparian State.

92. In the Donauversinkung case (1927), the Constitutional Court of Germany expressed the applicable principles of international law as follows:

... No State may substantially impair the natural use of [an international] river by its neighbour ... The application of this principle is governed by the circumstances of each particular case. The interests of the States in question must be weighed in an equitable manner against one another. One must consider not only the absolute injury caused to the neighbouring State, but also the relation of the advantage gained by one to the injury caused to the other.

93. Various aspects of the general principle set out in article 7 will be dealt with more specifically in subsequent draft articles.

Article 8. Determination of reasonable and equitable use

1. In determining whether the use by a system State of a watercourse system or its waters is exercised in a reasonable and equitable manner in accordance with article 7, all relevant factors shall be taken into account, whether they are of a general nature or specific for the watercourse system concerned. Among such factors are:

(a) The geographic, hydrographic, hydrological and climatic factors together with other relevant circumstances pertaining to the watercourse system concerned;

(b) The special needs of the system State concerned for the use or uses in question in comparison with the needs of other system States, including the stage of economic development of all system States concerned;

(c) The contribution by the system State concerned of waters to the system in comparison with that of other system States;

(d) Development and conservation by the system State concerned of the watercourse system and its waters;

(e) The other uses of a watercourse system and its waters by the State concerned in comparison with the uses by other system States, including the efficiency of such uses;

(f) Co-operation with other system States in projects or programmes to attain optimum utilization, protection and control of the watercourse system and its waters;

(g) The pollution by the system State in question of the watercourse system in general and as a consequence of the particular use, if any;

(h) Other interference with or adverse effects, if any, of such use for the uses or interests of other system States including, but not restricted to, the adverse effects upon existing uses by such States of the watercourse system or its waters and the impact upon protection and control measures of other system States;

(i) Availability to the State concerned and to other system States of alternative water resources;

(j) The extent and manner of co-operation established between the system State concerned and other system States in programmes and projects concerning

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45 See footnote 30 above. Large extracts from the award of the arbitral tribunal are reproduced in Yearbook ... 1974, vol. 11 (Part Two), pp. 194 et seq., document A/5409, paras. 1055-1068.

46 Para. 22 of the award.

47 Idem.

the use in question and other uses of the international watercourse system and its waters in order to attain optimum utilization, reasonable management, protection and control thereof.

2. In determining, in accordance with paragraph 1 of this article, whether a use is reasonable and equitable, the system States concerned shall negotiate in a spirit of good faith and good-neighbourly relations in order to resolve the outstanding issues.

If the system States concerned fail to reach agreement by negotiation within a reasonable period of time, they shall resort to the procedures for peaceful settlement provided for in chapter V of the present Convention.

Commentary to article 8

94. In article 8, the Special Rapporteur has given an example of the factors that might be relevant in determining whether the provisions laid down in article 7 have been complied with in concrete cases. In drafting these proposals, the Special Rapporteur has used as precedents bilateral and multilateral system agreements,\(^9\) the Helsinki Rules, and article 7 proposed in the third report submitted by the previous Special Rapporteur.\(^100\)

95. The relevant provisions in article V of the Helsinki Rules\(^101\) read:

1. What is a reasonable and equitable share ... is to be determined in the light of all the relevant factors in each particular case.

2. Relevant factors which are to be considered 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 utilization 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 uses; and
   (k) the degree to which the needs of the basin State may be satisfied, without causing substantial injury to a co-basin State.

3. The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors.

96. The factors mentioned in paragraph 1 of article 8 are not intended to be exhaustive but to serve as examples of certain main factors. It is equally obvious that the factors mentioned may not be applicable to a concrete case.

97. Paragraph 2 of article 8 provides for the duty to commence negotiations expeditiously and peacefully, in a spirit of good faith and good-neighbourly relations, in order to resolve the issues that have arisen as to the uses of the watercourse system. It goes without saying that any system State concerned may demand the opening of such negotiations. The Special Rapporteur therefore deemed it superfluous to mention this expressly.

98. The second part of paragraph 2 provides that the system States concerned are under an obligation to resort to available procedures for peaceful settlement in case the parties fail to reach a solution by negotiations. This obligation follows from general principles of international law, as laid down for example in Article 2, paragraphs 3 and 4, and in Article 33, of the Charter of the United Nations. Such procedures for peaceful settlement are also provided for in chapter V of this draft.

Article 9. Prohibition of activities with regard to an international watercourse system causing appreciable harm to other system States

A system State shall refrain from and prevent (within its jurisdiction) uses or activities with regard to a watercourse system that may cause appreciable harm to the rights or interests of other system States, unless otherwise provided for in a system agreement or other agreement.

Commentary to article 9

99. The principle laid down in article 9 is a basic rule of international law pertaining to international watercourse systems. Thus it is a codification of an established principle of international law. In the Helsinki Rules\(^102\) it is provided in article X, regarding pollution:

1. Consistent with the principle of equitable utilization of the waters of an international drainage basin, a State
   (a) must prevent any new form of water pollution or any increase in the degree of water pollution in an international drainage basin which would cause substantial injury* in the territory of a co-basin State, and
   (b) should take all reasonable measures to abate existing water pollution in an international drainage basin to such an extent that no substantial damage* is caused in the territory of a co-basin State.

100. The issue has been dealt with in a number of bilateral and multilateral system agreements and other arrangements. Thus, in the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), adopted on 16 June 1972,\(^103\) principle 21 provides:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources...

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\(^9\) See, for example, the agreements referred to in the third report of the previous Special Rapporteur (document A/CN.4/348 (see footnote 46 above), paras. 99-105); and in the report of the Secretary-General on the legal problems relating to the utilization and use of international rivers (Yearbook ... 1974, vol. II (Part Two), pp. 57-187, document A/5409, part II).

\(^100\) Document A/CN.4/348 (see footnote 46 above), para. 106.

\(^101\) See footnote 11 above.

\(^102\) Idem.

but also that they have
... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

The words “cause damage” are used without further qualification. Other treaties use the term “abuse of rights”. This term was used as recently as in the United Nations Convention on the Law of the Sea, article 300 of which deals with issues of “good faith and abuse of rights”. In the Act of Asunción of 1971, the States of the River Plate Basin decided, in resolution No. 25, paragraph 2, that “each State may use the waters in accordance with its needs provided that it causes no appreciable damage to any other State of the basin”. The same term, “appreciable damage”, was used in the Act of Santiago of 1971 concerning hydrologic basins.

101. The Special Rapporteur shares the view of the previous Special Rapporteur that the appropriate criterion in the matter is that expressed by the term “appreciable harm”.

104. However, both the United Nations Water Conference, convened at Mar del Plata in March 1977, and the aforementioned Dakar Interregional Meeting, stressed the importance of co-operation and of the establishment of the necessary organizations as a basis for such co-operation at the international and/or regional levels and for specific watercourse systems. Thus recommendation 85 of the Mar del Plata Action Plan provides:

85. Countries sharing water resources, with appropriate assistance from international agencies and other supporting bodies, on the request of the countries concerned, should review existing and available techniques for managing shared water resources and co-operate in the establishment of programmes, machinery and institutions necessary for the co-ordinated development of such resources. Areas of cooperation may with agreement of the parties concerned include planning, development, regulation, management, environmental protection, use and conservation, forecasting, etc. Such co-operation should be a basic element in an effort to overcome major constraints such as the lack of capital and trained manpower as well as the exigencies of natural resource development.

105. The urgent need for technical and financial support for such institutional arrangements was repeatedly stressed at the above-mentioned conferences. Thus, in

106. In this chapter, the Special Rapporteur deals with chapter III of the draft articles, comprising articles 10 to 19, pertaining to co-operation and management in regard to international watercourse systems.

103. It follows from the fact that an international watercourse system is a shared natural resource that co-operation between system States is essential for the effective management and administration of such watercourse systems and to secure optimum utilization of these invaluable resources and the reasonable and equitable sharing of them between system States. It has also been increasingly recognized that such inter-State and international co-operation must be institutionalized to a reasonable extent. However, some participants at the Interregional Meeting of International River Organisations, convened by the United Nations at Dakar in May 1981, expressed concern

... that, if international river and lake commissions were given too extensive responsibilities, the result would be a degree of supranational authority unacceptable to many Governments.
its conclusions, the Dakar Interregional Meeting of International River Organizations held that:

12. ... with a view to promoting greater co-operation between neighbouring States, and where the interested States request the establishment of new and strengthened institutional arrangements, it is desirable that the Secretary-General of the United Nations strengthen the support available within the Department of Technical Co-operation for Development to service the various needs for such organizations and of States concerned. \(^{112}\)

106. In article 10, the Special Rapporteur proposes general provisions on co-operation and management. The question is reverted to in more detail in article 15, concerning management of international watercourse systems. Articles 11 to 14 deal with the obligation of a system State to notify others of plans for new projects, programmes or constructions pertaining to a watercourse system, the effects of protests concerning such plans and the effects of failure to follow the procedure outlined in these articles. These issues were dealt with by the previous Special Rapporteur in paragraphs 3 to 9 of article 8 proposed in his third report. \(^{113}\) Articles 16 to 19 deal with issues pertaining to the collection, processing and dissemination of information and data.

**Chapter III**

**Co-operation and management in regard to international watercourse systems**

**Article 10. General principles of co-operation and management**

1. System States sharing an international watercourse system shall, to the extent practicable, establish co-operation with regard to uses, projects and programmes related to such watercourse system in order to attain optimum utilization, protection and control of the watercourse system. Such co-operation shall be exercised on the basis of the equality, sovereignty and territorial integrity of all system States.

2. System States should engage in consultations (negotiations) and exchange of information and data on a regular basis concerning the administration and management of such watercourse and other aspects of regional interest with regard to watercourse systems.

3. System States shall, when necessary, establish joint commissions or similar agencies or arrangements as a means of promoting the measures and objects provided for in the present Convention.

**Commentary to article 10**

107. The Special Rapporteur deems it essential at the outset of chapter III to state the general principle of co-operation among system States of an international watercourse. It follows from the concept of a shared natural resource and from the fact that every water-course system in many respects constitutes an “indivisible unity” that such co-operation is necessary for the orderly use, administration and management of international watercourse systems. The previous Special Rapporteur expressed this principle in the following terms:

> A number of international organs have in recent years taken clear stands in favour of strengthened co-operation among system States in view of the perceived need for more rational utilization of the world’s shared water resources. Thus the Committee on Natural Resources of the United Nations Economic and Social Council received a report from the Secretary-General which emphasized that a shift had taken place from the early period of minimal international co-ordination to a more active approach in light of “the rapid expansion of increasingly complex societies in most parts of the world. ... Multiple, often conflicting uses and much greater total demand have made imperative an integrated approach to river basin development in recognition of the growing economic as well as physical interdependencies across national frontiers”. \(^{114}\)

108. The present Special Rapporteur, in drafting a general principle on co-operation among system States, has deemed it advisable to refer to the established principle that such co-operation shall be exercised on the basis of the equality, sovereignty and territorial integrity of all system States.

109. In paragraph 2 of article 10, it has been deemed natural to refer to consultations (negotiations) and exchange of information and data on a regular basis as an essential part of the general principle of co-operation. These issues are dealt with in more detail, in the subsequent articles of chapter III of the draft.

110. The reference to joint commissions or similar agencies or arrangements reflects the widespread practice of co-riparian States to establish joint commissions or inter-State committees in multilateral or bilateral system agreements in order to activate and institutionalize the necessary co-operation among system States. \(^{115}\) These issues are reverted to in more detail in article 15 below.

**Article 11. Notification to other system States. Content of notification**

1. Before a system State undertakes, authorizes or permits a project or programme or alteration or addition to existing projects and programmes with regard to the utilization, conservation, protection or management of an international watercourse system which may cause appreciable harm to the rights or interests of another system State or other system States, the system State concerned shall submit at the earliest possible date due notification to the relevant system State or system States about such projects or programmes.

2. The notification shall contain *inter alia* sufficient technical and other necessary specifications, information and data to enable the other system State or States to evaluate and determine as accurately as possible the...
potential for appreciable harm of such intended project or programme.

Commentary to article 11

111. The principle of adequate notification laid down in article 11 is, in the view of the Special Rapporteur, an expression of a prevailing principle of international law. This principle of notification has been spelled out in some detail in this article and the following articles in order to concretize the obligations of system States that follow from the general principle. The principle of notifying other States should become effective not only where the system State plans new constructions, projects or programmes that may cause appreciable harm to the rights or interests of another system State, but also where alterations of or additions to existing constructions, projects or programmes may cause such harm.

112. It also seems obvious that such notification must contain adequate information, data and specifications so as to enable other system States to assess the potential for harmful effects as accurately as possible.

113. The obligation to notify other system States provided for in article 11 was formulated in the following manner in paragraph 2 of article XXIX of the Helsinki Rules.6

2. A State, regardless of its location in a drainage basin, should in particular furnish to any other basin State, the interests of which may be substantially affected, notice of any proposed construction or installation which would alter the regime of the basin in a way which might give rise to a dispute. The notice should include such essential facts as will permit the recipient to make an assessment of the probable effect of the proposed alteration.

114. In its resolution on the utilization of non-maritime international waters (except for navigation), adopted at Salzburg in 1961, the Institute of International Law likewise provided, in article 5, that “works or utilizations” which seriously affect the possibility of utilization of the same waters by other States “may not be undertaken except after previous notice to interested States”.7 The principle of notification has also been laid down in a number of system State agreements.

115. A proposal similar to that in article 11 was made in article 8, paragraph 3, proposed by the previous Special Rapporteur in his third report.8

Article 12. Time-limits for reply to notification

1. In a notification transmitted in accordance with article 11, the notifying system State shall allow the receiving system State or States a period of not less than six months from the receipt of the notification to study and evaluate the potential for appreciable harm arising from the planned project or programme and to communicate its reasoned decision to the notifying system State.

2. Should the receiving system State or States deem that additional information, data or specifications are needed for a proper evaluation of the problems involved, they shall inform the notifying system State to this effect as expeditiously as possible. Justifiable requests for such additional data or specifications shall be met by the notifying State as expeditiously as possible and the parties shall agree to a reasonable extension of the time-limit set forth in paragraph 1 of this article for the proper evaluation of the situation in the light of the available material.

3. During the time-limits stipulated in paragraphs 1 and 2 of this article, the notifying State may not initiate the project and programme referred to in the notification without the consent of the system State or system States concerned.

Commentary to article 12

116. Inherent in the principle of notification is the obligation to allow the recipient system State or States a reasonable time to study and assess the information received and the possible effects for such other State or States of the planned project or programme. It is equally reasonable to give recipient States the possibility to request additional necessary information and data. In cases where this is obviously practical, a reasonable extension of the time-limit must be granted. It seems equally reasonable that the notifying State should not be able to work on the planned project or programme before the time-limit provided for has expired, unless the recipient State or States agree to it.

117. Article XXIX, paragraph 3, of the Helsinki Rules9 provides:

3. A State providing the notice... should afford to the recipient... a reasonable period of time* to make an assessment of the probable effect of the proposed construction or installation and to submit its views thereon to the State furnishing the notice.

118. The criterion of “a reasonable period of time” would reflect a somewhat flexible time criterion in a general principle of law pertaining to notification. In his third report, in article 8, paragraph 4, the previous Special Rapporteur proposed that the reference to “a reasonable period of time” be replaced by a reference to a period of not less than six months.10 The present Special Rapporteur deems it advantageous to concretize the time-limit in this manner. He has consequently included in article 12, paragraph 1, the reference to “a period of not less than six months”, but has added the words “from the receipt of the notification”.

119. Nevertheless, the criterion “a reasonable period of time” would still be the basic guideline in international law. This is inherent in the term “not less than six months”. Six months has been proposed as a reasonable

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6 See footnote 11 above.
8 Document A/CN.4/348 (see footnote 46 above), para. 156.
9 See footnote 11 above.
10 Document A/CN.4/348 (see footnote 46 above), para. 156.
minimum period. In complicated cases it may very well prove to be too short for an adequate assessment of the information and data contained in a notification and of the implications of a planned project or programme for a recipient State. In such cases, a six-month period may not correspond to "a reasonable period of time", and should be prolonged accordingly.

**Article 13. Procedures in case of protest**

1. If a system State having received a notification in accordance with article 12 informs the notifying State of its determination that the project or programme referred to in the notification may cause appreciable harm to the rights or interests of the State concerned, the parties shall without undue delay commence consultations and negotiations in order to verify and determine the harm which may result from the planned project or programme. They should as far as possible arrive at an agreement with regard to such adjustments and modifications of the project or programme or agree to other solutions which will either eliminate the possible causes for any appreciable harm to the other system State or otherwise give such State reasonable satisfaction.

2. If the parties are not able to reach such agreement through consultations and negotiations within a reasonable period of time, they shall without delay resort to the settlement of the dispute by other peaceful means in accordance with the provisions of the present Convention, system agreements or other relevant agreement or arrangement.

3. In cases where paragraph 1 of this article applies and the outstanding issues have not been resolved by agreement between the parties concerned, the notifying State shall not proceed with the planned project or programme until the provisions of paragraph 2 have been complied with, unless the notifying State deems that the project or programme is of the utmost urgency and that a further delay may cause unnecessary damage or harm to the notifying State or other system States.

4. Claims for damage or harm arising out of such emergency situations shall be settled in good faith and in accordance with friendly neighbourly relations by the procedures for peaceful settlement provided for in the present Convention.

**Commentary to article 13**

120. Article 13 deals with the situation where a recipient State determines that the project or programme planned by the notifying system State may cause appreciable harm to its interests. Within the time-limit laid down in the notification in accordance with article 12 or agreed upon between the parties, it must inform the notifying State of its determination that the planned project or programme may cause "appreciable harm" to its interests and, within a reasonable time-limit, give the reasons for this determination.

121. In a somewhat different form, this principle was also laid down by the previous Special Rapporteur in article 8, paragraph 5, contained in his third report. The same idea is conveyed in article XXIX, paragraph 3, of the Helsinki Rules, which states that the recipient system State having received such "notice" shall "submit its views thereon to the State furnishing the notice" (see para. 117 above).

122. The obligation of system States to commence consultations and negotiations concerning these issues without undue delay follows from general provisions of international law and also from other provisions of this draft convention (see paras. 24-26 above).

123. The purpose of these negotiations would first and foremost be to amend planned projects or programmes so as to eliminate the causes for any appreciable harm or otherwise to give a protesting system State reasonable satisfaction. The previous Special Rapporteur expressed this as follows in his third report:

> The rule ... does not require modification to the extent of removing all harm to the other system State, but only such changes as will avoid impermissible appreciable harm ... Modern, multipurpose projects and programmes contemplate, under appropriate and agreed circumstances, the yielding of a use or benefit by one system State in order that the greater total benefits of the integral project or programmes, or of a set of works and programmes, may be achieved. The system State constricting or even forgoing its particular use ... would be compensated for the value of its sacrifice; such compensation might be financial or it might be in the form of electricity supplies, flood control measures, enlargement of another use, or other good ..."111

124. The provisions laid down in paragraph 2 of article 13, to the effect that the parties must resort to other peaceful means of settlement should the consultations and negotiations be unsuccessful, follow from basic principles of international law which are repeatedly invoked in the draft convention.

125. Paragraph 3 of article 13 provides that a notifying State shall not proceed with a planned project or programme until the outstanding issues that have arisen have been resolved. This principle is likewise accepted as a principle of international law in accordance with the concept of good faith and friendly neighbourly relations. It was expressed in the following manner by the Institute of International Law, in article 7 of its resolution on utilization of non-maritime international waters, adopted at Salzburg in 1961:

> During the negotiations, every State must, in conformity with the principle of good faith, refrain from undertaking the works or utilizations which are the object of the dispute or from taking any other measures which might aggravate the dispute or render agreement more difficult.113

126. The Special Rapporteur has proposed an exception to the main rule contained in paragraph 3, to the effect that a planned project or programme may be commenced provided that the following two conditions are fulfilled: the programme or project must be "of the utmost urgency", and "a further delay may cause un-

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111 Ibid.
112 Ibid., para. 162.
113 See footnote 117 above.
necessary damage or harm to the notifying State or other system States”.

127. The proposed paragraph 4 of article 13 is a corollary to such situations of urgency.

Article 14. Failure of system States to comply with the provisions of articles 11 to 13

1. If a system State having received a notification pursuant to article 11 fails to communicate to the notifying system State within the time-limits provided for in article 12 its determination that the planned project or programme may cause appreciable harm to its rights or interests, the notifying system State may proceed with the execution of the project or programme in accordance with the specifications and data communicated in the notification.

In such cases the notifying system State shall not be responsible for subsequent harm to the other system State or States, provided that the notifying State acts in compliance with the provisions of the present Convention and provided that it is not apparent that the execution of the project or programme is likely to cause appreciable harm to the other system State or States.

2. If a system State proceeds with the execution of a project or programme without complying with the provisions of articles 11 to 13, it shall incur liability for the harm caused to the rights or interests of other system States as a result of the project or programme in question.

Commentary to article 14

128. The provisions proposed in article 14 deal, in paragraph 1, with the failure of a recipient system State to communicate to the notifying system State its determination that a planned project or programme may cause appreciable harm to its interest within the prescribed time-limits. The previous Special Rapporteur dealt with this issue in his third report, in article 8, paragraph 6.124

129. In paragraph 2 of article 14, the Special Rapporteur deals with the issues arising if a system State proceeds with the execution of a project without transmitting the prescribed notifications to other system States. The consequence of such failure will be that the system State is liable for any harm caused to other system States as a result of the project or programme in question. The previous Special Rapporteur proposed this principle in his third report, in article 8, paragraph 9.125

130. Acute emergency situations are not covered by the provisions of article 14, paragraph 2. Whether these provisions and the provisions of article 13, especially paragraph 3, shall apply to such situations must depend on the special circumstances of the emergency.

Article 15. Management of international watercourse systems. Establishment of commissions

1. System States shall, where it is deemed advisable for the rational administration, management, protection and control of an international watercourse system, establish permanent institutional machinery or, where expedient, strengthen existing organizations or organs in order to establish a system of regular meetings and consultations, to provide for expert advice and recommendations and to introduce other decision-making procedures for the purposes of promoting optimum utilization, protection and control of the international watercourse system and its waters.

2. To this end system States should establish, where practical, bilateral, multilateral or regional joint watercourse commissions and agree upon the mode of operation, financing and principal tasks of such commissions.

Such commissions may, inter alia, have the following functions:

(a) To collect, verify and disseminate information and data concerning utilization, protection and conservation of the international watercourse system or systems;

(b) To propose and institute investigations and research concerning utilization, protection and control;

(c) To monitor on a continuous basis the international watercourse system;

(d) To recommend to system States measures and procedures necessary for the optimum utilization and the effective protection and control of the watercourse system;

(e) To serve as a forum for consultations, negotiations and other procedures for peaceful settlement entrusted to such commissions by system States;

(f) To propose and operate control and warning systems with regard to pollution, other environmental effects of water uses, natural hazards or other hazards which may cause damage or harm to the rights or interests of system States.

Commentary to article 15

131. In the history of the administration and management of international watercourse systems, there has been a clear trend towards institutionalizing the machinery for such administration, management and control. This trend is manifested in the practice of States as well as in the work of United Nations organs. In his third report, the previous Special Rapporteur outlined this development in the following manner:

Numerous international watercourse systems are now provided with permanent institutional machinery, tailored to the needs of the participating system States and the singularities of the shared water resources. These advances from ad hoc or sporadic negotiations and agreement-making through diplomatic channels to institutionalized collaboration involving data sharing, studies, analysis and projects and programmes, manifest the commitment of the parties to “manage” their shared resources technically and in a more integrated fashion than would otherwise be possible. These international river
and lake organizations vary widely in their capacities and competences, and have had a long history of development.126

132. The importance of institutionalizing the cooperation of States in water resource management was emphasized by the United Nations Conference on the Human Environment in its recommendation 51,127 which reads as follows:

It is recommended that Governments concerned consider the creation of river-basin commissions or other appropriate machinery for co-operation between interested States for water resources common to more than one jurisdiction.

... (c) Such arrangements, when deemed appropriate by the States concerned, will permit undertaking on a regional basis:

(i) Collection, analysis and exchanges of hydrologic data through some international mechanism agreed upon by the States concerned;
(ii) Joint data-collection programmes to serve planning needs;
(iii) Assessment of environmental effects of existing water uses;
(iv) Joint study of the causes and symptoms of problems related to water resources, taking into account the technical, economic and social considerations of water quality control;
(v) Rational use, including a programme of quality control, of the water resource as an environmental asset;
(vi) Provision for the judicial and administrative protection of water rights and claims;
(vii) Prevention and settlement of disputes with reference to the management and conservation of water resources;
(viii) Financial and technical co-operation of a shared resource;
(d) Regional conferences should be organized to promote the above considerations.

133. At the Interregional Meeting of International River Organizations, held in Dakar in May 1981, the importance of establishing international agencies to conduct and co-ordinate co-operation among system States was likewise emphasized. In a working paper evaluating its experiences, the International Joint Commission of Canada and the United States recommended the following principles for the establishment of joint watercourse commissions:

(a) The provision of an ongoing, permanent joint Commission, within which there is absolute parity between countries in spite of the very significant disparity in the size of their populations and of their economies. Thus Governments are assured that the Commission will provide a balanced forum within which issues can be resolved;
(b) The provision that the Commission establish its own rules of procedure ...;
(c) The development of a Commission structure ... to provide a broad network within which a great deal of information can be exchanged formally and informally between Governments. The structure provides a forum which encourages officials with similar responsibilities ... to work together and to know one another to a greater extent than they would were the Commission not in existence ...;
(d) The development of a Commission process that permits the Governments to depoliticize issues that are difficult to resolve. It often acts as a buffer between the two parties ... The process of joint fact-finding generally provides Governments with a common data base ...;
(e) Provision of a mechanism which can alert Governments to matters of concern that may or may not be fully appreciated by Governments to depoliticize issues that are difficult to resolve. It often acts as a buffer between the two parties ... The process of joint fact-finding generally provides Governments with a common data base ...;

134. In addition to the general provisions proposed in paragraph 1 of article 15, the Special Rapporteur has tried to reflect the concerns referred to above in paragraph 2 of the article. He has refrained from proposing suggestions as to how such commissions, joint arrangements or joint projects and programmes should be financed and how costs should be distributed among system States. These highly complicated questions were extensively discussed at the Dakar Meeting. But, as stated in the report of the Meeting:

The debate brought out difficulties even in the calculation of benefits and costs (including environmental costs). Apart from criteria for apportionment in joint projects, references were made, for example, to the relative impact of inflation on different components, problems of choosing commodity price levels (as in calculation of irrigation benefits) and those of exchange rates for currencies of participating States; other problems mentioned included "lag factors" in the time until components of multipurpose projects come into use at different time stages, and the difficulty in realistically evaluating growth of navigation and other uses made possible by proposed major projects in developing regions.128

135. The conclusions drawn at the Dakar Meeting with regard to topic III, "Economic and other considerations", included the following:

1. There is no one agreed or universally applicable methodology or formula for apportioning benefits and costs. The allocation, which is thus left flexible, should follow principles of equity, taking into account the nature of the works to be undertaken, the benefits and utilization which each receives, and the rights, needs and possibilities of each participant. It was further suggested that competent United Nations bodies could ... elaborate basic principles and methods as a guide for basin commissions and Member States ...;

2. Views on cost allocation procedures were divided. It was recognized that since each basin case tends to be unique, allocation norms have to be worked out in each case, taking into account the conclusions under the previous point.129

136. It follows from the foregoing that little or no guidance can be had from bilateral or multilateral agreements or specific arrangements pertaining to concrete projects, programmes or issues. In some cases concerning the development of hydroelectric power plants jointly by two system States, a 50-50 formula has been applied for the distribution of benefits and costs. But different formulae are not infrequent. The 50-50 formula may also be encountered with regard to other uses, such as irrigation. A number of treaties or agreements refer to equity, to the sharing of the waters on a just and reasonable basis, to principles of international law, to common agreement in each individual case, to the equitable share, etc., which shows that no concrete formula can possibly be extracted from State practice and that allocation norms must be worked out in each case, taking into consideration the special circumstances and features of the case in question.

126 United Nations, Experiences in the Development and Management ... (see footnote 110 above), p. 202, part three, "Selected papers prepared by international river organizations ...".
128 Ibid., p. 16, part one, "Report of the Meeting", para. 54.
129 Ibid., p. 19, para. 69.
Article 16. Collection, processing and dissemination of information and data

1. In order to ensure the necessary co-operation between system States, the optimum utilization of a watercourse system and a fair and reasonable distribution of the uses thereof among such States, each system State shall to the extent possible collect and process the necessary information and data available within its territory of a hydrological, hydrogeological or meteorological nature as well as other relevant information and data concerning, inter alia, water levels and discharge of water of the watercourse, ground water yield and storage relevant for the proper management thereof, the quality of the water at all times, information and data relevant to flood control, sedimentation and other natural hazards and relating to pollution or other environmental protection concerns.

2. System States shall to the extent possible make available to other system States the relevant information and data mentioned in paragraph 1 of this article. To this end, system States should to the extent necessary conclude agreements on the collection, processing and dissemination of such information and data. To this end, system States may agree that joint commissions established by them or special (regional) or general data centres shall be entrusted with collecting, processing and disseminating on a regular and timely basis the information and data provided for in paragraph 1 of this article.

3. System States or the joint commissions or data centres provided for in paragraph 2 of this article shall to the extent practicable and reasonable transmit to the United Nations or the relevant specialized agencies the information and data available under this article.

Commentary to article 16

138. It is generally recognized that the collection, processing and dissemination of information and data are essential for the effective management and control of international watercourse systems; such collection and exchange of information and data are an essential part of an integrated water system approach by system States and of the co-operation needed for such an approach.

139. Thus, at the 1981 Dakar Interregional Meeting, the participants concluded, in respect of topic II, “Progress in co-operative arrangements”:

11. An adequate and reliable data base is deemed indispensable to rational planning and project and programme execution. Since data gathering, processing and dissemination for complex shared water resource systems is costly and is a continuous process, it is more than normally important that the system States agree quite specifically on the kinds of data needed for different purposes ... With respect to the basic hydrologic data and operational information, however, a free and ample flow on a timely basis is called for at all times.\[137\]

140. They furthermore concluded:

12. In light of the desirability of intensifying exchange of information and experience among international river or lake organizations in various regions, and with a view to promoting greater co-operation between neighbouring States, and ... the establishment of new or strengthened institutional arrangements, it is desirable that the Secretary-General of the United Nations strengthen the support available within the Department of Technical Co-operation for Development to service the various needs of such organizations and of States concerned.\[138\]

141. At its forty-eighth Conference, held at New York in 1958, the International Law Association adopted the following recommendation with regard to exchange of data and information:

3. Co-ririparian States should make available to the appropriate agencies of the United Nations and to one another hydrological, meteorological and economic information, particularly as to stream flow, quantity and quality of water, rain and snow fall, water tables and underground water movements.\[139\]

142. In article XXIX of the Helsinki Rules,\[140\] the International Law Association formulated, in paragraph 1, the following additional rule:

1. With a view to preventing disputes from arising between basin States ..., it is recommended that each basin State furnish relevant and reasonably available information to the other basin States concerning the waters of a drainage basin within its territory and its use of, and activities with respect to, such waters.

143. In the Mar del Plata Action Plan, the importance of co-operation with international organizations in regard to the collection and exchange of river data is emphasized in recommendation 93 (g):

(g) The United Nations system should be fully utilized in reviewing, collecting, disseminating and facilitating exchange of information and experiences on this question. The system should accordingly be organized to provide concerted and meaningful assistance to States and basin commissions requesting such assistance.\[141\]

144. A number of bilateral and multilateral treaties contain provisions concerning the collection and dissemination of information and data.\[142\] The previous Special Rapporteur dealt with the question in chapter IV of his first report,\[143\] in his second report,\[144\] and extensively in his third report, which included a proposed article 9 on the question.\[145\]

145. Article 16 contains general provisions on the collection, processing and dissemination of information...
and data. Provisions on special requests for information and data are proposed in article 17. Article 18 contains provisions on the obligation to provide information about emergencies and article 19 has rules on restricted information.

146. According to paragraph 1 of article 16, each system State shall, to the extent possible, collect and process relevant information and data available within its territory as well as information and data pertaining to the international watercourse system concerned. The limitations and this obligation inherent in the words "to the extent possible" refer not only to factual possibilities but also to the fact that this obligation must be within reason, economically as well as otherwise. The enumeration made in the last part of paragraph 1 as to relevant information and data is not exhaustive.

147. The obligation to make such information and data available to other system States is provided for in paragraph 2. This obligation is likewise tempered by the criterion "to the extent possible". Paragraph 2 also proposes the conclusion of special agreements concerning the collection, processing and dissemination of information and data and the possibility of entrusting such tasks to joint commissions or other data centres.

148. Paragraph 3 of the article provides that the information and data thus collected and processed should be made available to the relevant agencies of the United Nations. This is a corollary to the tasks entrusted to the relevant United Nations agencies to assist system States by providing information and data and by affording them technical or expert assistance in general, or for special projects or problems.

Article 17. Special requests for information and data

If a system State requests from another system State information and data not covered by the provisions of article 16 pertaining to the watercourse system concerned, the other system State shall, upon the receipt of such a request, use its best efforts to comply expeditiously with the request. The requesting State shall refund the other State the reasonable costs of collecting, processing and transmitting such information and data, unless otherwise agreed.

Commentary to article 17

149. The provisions contained in this article were proposed by the previous Special Rapporteur in his third report in article 9, paragraph 1, second sentence.\(^\text{141}\)

Article 18. Special obligations in regard to information about emergencies

A system State should by the most rapid means available inform the other system State or States concerned of emergency situations or incidents of which it has gained knowledge and which have arisen in regard to a shared watercourse system—whether inside or outside its territory—which could result in serious danger of loss of human life or of property or other calamity in the other system State or States.

Commentary to article 18

150. The obligation that would follow from this proposal with regard to emergencies of a more serious nature would also follow from the principle of good faith and good-neighbourly relations. The Special Rapporteur has been in doubt whether he should apply the term "shall" or "should" in laying down this special obligation. His preliminary reaction has been to apply the word "should", but not in order to weaken the obligation to inform other States. This special obligation has strong moral and humanitarian overtones which ought to carry more weight than a narrow legal obligation. The Special Rapporteur considered that use of the word "should" would more appropriately convey this meaning and purpose. In addition, specific early warning machinery should be agreed upon and elaborated in specific areas of watercourses where such emergencies might arise. The previous Special Rapporteur dealt with these issues in article 9, paragraph 7, proposed in his third report.\(^\text{142}\)

Article 19. Restricted information

1. Information and data the safeguard of which a system State considers vital for reasons of national security or otherwise need not be disseminated to other system States, organizations or agencies. A system State withholding such information or data shall co-operate in good faith with other system States in furnishing essential information and data to the extent practicable on the issues concerned.

2. Where a system State for other reasons considers that the dissemination of information or data should be treated as confidential or restricted, other system States shall comply with such a request in good faith and in accordance with good-neighbourly relations.

Commentary to article 19

151. These questions were dealt with by the previous Special Rapporteur in article 9, paragraph 6, proposed in his third report. By way of commentary he stated, inter alia:

... The very real needs in the information and data field when dealing with shared water resources must here be balanced against ... [the] undeniable interest of the system State to retain confidentiality in sensitive circumstances. This sensitive area is not limited to strategic or military types of information ... The matter of "trade secrets", national or corporate, has also come up in this context, as has a reluctance to divulge certain aspects of economic planning or local socio-economic conditions ...\(^\text{143}\)

\(^{141}\) Ibid., para. 230.

\(^{142}\) Ibid., paras. 230 and 241.

\(^{143}\) Ibid., para. 239.
Chapter VI

Environmental protection, pollution, health hazards, natural hazards, regulation and safety, use preferences, national or regional sites

(Chapter IV of the draft)

152. In this chapter the Special Rapporteur deals with environmental questions. In article 20, he proposes general provisions on the protection of the environment and in article 21 provisions on the purposes of such environmental protection of international watercourse systems. In articles 22 to 25, he deals with the special problem of pollution of international watercourse systems. Thus in article 22 a definition of pollution is proposed. Article 23 contains provisions establishing the obligation to prevent pollution. Article 24 deals with the special need of co-system States to co-operate in protective measures in order to prevent and reduce pollution. Article 25 has provisions dealing with emergency situations.

153. In articles 26 to 28, the Special Rapporteur makes proposals with regard to the prevention and abatement of other water-related hazards, mainly from natural causes such as floods, ice conditions and other obstructions, sedimentation, avulsion, deficient drainage and salt-water intrusion and the scourge of drought. Article 26 contains general provisions on the prevention and control of water-related hazards; article 27 deals with the regulation of international watercourses for such purposes. Article 28 contains provisions on safety precautions.

154. Article 29 deals with the issue of use preferences. Article 30 deals with concerns that have made themselves increasingly felt in recent years, namely, the question of the establishment of international watercourse systems or parts thereof as protected national or regional sites.

Commentary to article 20

155. The pressure which modern technology has exerted on the natural environment of international watercourse systems and the concern to protect them from and to abate such pressures and harmful consequences are evidenced in a number of conventions and agreements of fairly recent date, not only on protection against pollution but also on broader environmental aspects.

156. Thus the European Water Charter of 1968 \(^{144}\) contains inter alia the following observations and recommendations on the conservation of nature and the natural resources of international watercourse systems:

> Persuaded that the advance of modern civilization leads in certain cases to an increasing deterioration in our natural heritage;
> Conscious that water holds a place of prime importance in that natural heritage;
> Adopts and proclaims the principles of this Charter ...:

1. There is no life without water. It is a treasure indispensable to all human activity

> Man depends on it for drinking, food supplies and washing, as a source of energy, as an essential material for production, as a medium for transport, and as an outlet for recreation which modern life increasingly demands.

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\(^{144}\) Adopted in 1967 by the Consultative Assembly and by the Committee of Ministers of the Council of Europe and proclaimed at Strasbourg on 6 May 1968; text reproduced in Yearbook ... 1974, vol. II (Part Two), pp. 342-343, document A/CN.4/274, para. 373.
VI. The maintenance of an adequate vegetation cover, preferably forest land, is imperative for the conservation of water resources. It is necessary to conserve vegetation cover, preferably forests, and wherever it has disappeared to reconstitute it as quickly as possible. The conservation of forests is a factor of major importance for the stabilization of drainage basins and their water regime.

157. Mention may also be made of the following two examples of expression of concern not only about pollution but also about the environment in a broader context. In the Treaty on the River Plate and its maritime outlet of 1973, the parties undertook to “protect and preserve the aquatic environment” in general “and, in particular, to prevent its pollution”. In the 1975 Statute of the Uruguay River, great emphasis was placed on environmental aspects. Thus article 35 provides:

The parties undertake to adopt the necessary measures to ensure that the management of land and forests and the use of groundwater and of the river’s tributaries do not effect an alteration such as to cause appreciable harm to the regime of the river or the quality of its waters.

Article 36 further provides:

The parties shall, through the Commission, co-ordinate appropriate measures to prevent alteration of the ecological balance ...

158. At the United Nations Water Conference, in 1977, the issues of environment, health and pollution control were extensively debated. Emphasizing the environmental repercussions of large-scale water development projects and their possible adverse effects on human health, the Conference, in recommendation 35 of the Mar del Plata Action Plan, stressed the need “to evaluate the consequences which the various uses of water have on the environment, to support measures aimed at controlling water-related diseases, and to protect ecosystems”.

159. The question of environment was likewise extensively discussed at the 1981 Dakar Interregional Meeting. The debates were summed up as follows in the report of the Meeting:

There was considerable discussion on the requirements for environmental studies with stress on the positive—as well as negative—impacts that projects have on the environment. However, it was felt by many participants that the requirements in industrial countries for the amount of data collected, places too great a burden on planning if applied in developing countries. Although environmental impacts may sometimes take the form of long-term damage on the resource base, it was at the same time stressed that there are serious difficulties in transferring environmental experiences between ecological zones. Environmental concern must be harmonized with development.

160. The Special Rapporteur has taken these various considerations into account in attempting to draft general provisions on the protection of the environment in paragraphs 1 and 2 of article 20.

161. Paragraph 3 of article 20 contains a reference to the obligations which States have undertaken in part XII of the United Nations Convention on the Law of the Sea of 1982, concerning the “protection and preservation of the marine environment”. The pertinent articles are articles 194, 197 and 207.

162. Thus article 194, on measures to prevent, reduce and control pollution of the marine environment, provides in paragraphs 1 and 5:

1. States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

5. The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species or other forms of marine life.

163. Article 207, on pollution from land-based sources, provides in paragraph 1:

1. States shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules, standards and recommended practices and procedures.

164. The provisions proposed in this report concerning the protection of the marine environment correspond in general to article 10, paragraph 8, proposed by the previous Special Rapporteur in his third report. Paragraph 2 of that article contained a definition of “environmental protection”. The present Special Rapporteur has found it unnecessary to include a definition of the term in the draft articles. In any event, he feels that the definition given in the above-mentioned article is too restrictive.

Article 21. Purposes of environmental protection

The measures and régimes established under article 20 shall, inter alia, be designed to the extent possible:

(a) To safeguard public health;

(b) To maintain the quality and quantity of the waters of the international watercourse system at the level necessary for the use thereof for potable and other domestic purposes;

(c) To permit the use of the waters for irrigation purposes and industrial purposes;

(d) To safeguard the conservation and development of aquatic resources, including fauna and flora;

(e) To permit to the extent possible the use of the watercourse system for recreational amenities, with special regard to public health and aesthetic considerations;

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146 See footnote 108 above.


148 United Nations, Experiences in the Development and Management ... (see footnote 110 above), p. 17, part one, para. 61.

149 See footnote 80 above.

150 Document A/CN.4/348 (see footnote 46 above), para. 312.
(f) To permit to the extent possible the use of the waters by domestic animals and wildlife.

**Commentary to article 21**

165. The enumeration given in article 21 is not intended to be exhaustive. Nor does it indicate any qualitative indication of the relative importance of the various uses. The importance of the various uses in regard to environmental protection may vary from watercourse to watercourse, and no indication of general priority of uses is possible or rational. The uses specifically mentioned in this article are to be found in other agreements as well.  

**Article 22. Definition of pollution**

For the purposes of the present Convention, "pollution" means any physical, chemical or biological alteration in the composition or quality of the waters of an international watercourse system through the introduction by man, directly or indirectly, of substances, species or energy which results in effects detrimental to human health, safety or well-being or detrimental to the use of the waters for any beneficial purpose or to the conservation and protection of the environment, including the safeguarding of the fauna, the flora and other natural resources of the watercourse system and surrounding areas.

**Commentary to article 22**

166. The definition of pollution here proposed corresponds to the definitions applied since the United Nations Conference on the Human Environment, held at Stockholm in June 1972. It is in all essentials the same definition as that proposed by the previous Special Rapporteur in article 10, paragraph 1, submitted in his third report.

**Article 23. Obligation to prevent pollution**

1. No system State may pollute or permit the pollution of the waters of an international watercourse system which causes or may cause appreciable harm to the rights or interests of other system States in regard to their equitable use of such shared water resources or to other harmful effects within their territories.

2. In cases where pollution emanating in a system State causes harm or inconveniences in other system States of a less serious nature than those dealt with in paragraph 1 of this article, the system State where such pollution originates shall take reasonable measures to abate or minimize the pollution. The system States concerned shall consult with a view to reaching agreement with regard to the necessary steps to be taken and to the defrayment of the reasonable costs for abatement or reduction of such pollution.

3. A system State shall be under no obligation to abate pollution emanating from another system State in order to prevent such pollution from causing appreciable harm to a third system State. System States shall—as far as possible—expeditiously draw the attention of the pollutant State and of the States threatened by such pollution to the situation, its causes and effects.

**Commentary to article 23**

167. The obligation to prevent pollution of an international watercourse is now well established in international law, as evidenced by the practice of States in an increasing number of bilateral and multilateral instruments. Article 42 of the Statute on the utilization of the River Uruguay of 1975 annexed to recommendation 555, adopted on 12 May 1969 by the Consultative Assembly of the Council of Europe, provides:

Each party shall be liable to the other for damage resulting from pollution caused by its own activities or by those of natural or juridical persons domiciled in its territory.

168. Article X of the Helsinki Rules contains provisions on pollution of international watercourses to the following effect:

1. Consistent with the principle of equitable utilization of the waters of an international drainage basin, a State

   (a) must prevent any new form of water pollution or any increase in the degree of existing water pollution in an international drainage basin which would cause substantial injury in the territory of a co-basin State, and

   (b) should take all reasonable measures to abate existing water pollution in an international drainage basin to such an extent that no substantial damage is caused in the territory of a co-basin State.

169. The draft European convention on the protection of fresh water against pollution annexed to recommendation 555, adopted on 12 May 1969 by the Consultative Assembly of the Council of Europe, provides in paragraph 1 of article 2:

1. Contracting States shall take measures to abate any existing pollution and to prevent any new form of water pollution or any increase in the degree of existing water pollution causing or likely to cause substantial injury or damage in the territory of any other contracting State.

170. In the draft European convention for the protection of international watercourses against pollution of 1974, the Ad Hoc Committee of Experts proposed the following provisions:

**Article 2**

Each contracting party shall endeavour to take, in respect of all surface waters in its territory, all measures appropriate for the reduction of existing water pollution and for the prevention of new forms of such pollution.

133 See in particular the draft European convention on the protection of fresh water against pollution, prepared in 1969 under the aegis of the Council of Europe (see footnote 155 below).

144 Document A/CN.4/348 (see footnote 46 above), para. 312.
Article 3

1. Each contracting party undertakes, with regard to international watercourses, to take:
   (a) all measures required to prevent new forms of water pollution or any increase in the degree of existing water pollution;
   (b) measures aiming at the reduction of existing water pollution.

171. The three draft instruments here quoted seem to distinguish between two categories of pollution: existing pollution and new pollution. More recent developments indicate that such a distinction between old and new sources of pollution is not acceptable. Injurious pollution of an international watercourse system must not be permitted, whether the source of pollution has caused pollution over a period of time or is new. To pollute an international watercourse system so as to cause appreciable harm to other system States cannot acquire "the rank of a vested right".

172. In article 23, paragraph 1, the Special Rapporteur proposes that pollution causing appreciable harm to other system States shall be prohibited. Paragraph 2 of the article deals with pollution that is of a less serious nature. Even here the system State concerned must take reasonable measures to abate or minimize the pollution. In such cases, the question of defrayment of the reasonable cost may arise. The system States concerned must consult with a view to reaching agreement on the defrayment of such costs.

173. Paragraph 3 provides that a system State is under no obligation to abate pollution emanating from the territory of another State. But it should expeditiously draw the attention of the pollutant State and the States threatened by such pollution to the situation. The problems dealt with in article 23 were dealt with by the previous Special Rapporteur in article 10, paragraphs 3 and 4, proposed in his third report. 117

Article 24. Co-operation between system States for protection against pollution. Abatement and reduction of pollution

1. System States of an international watercourse system shall co-operate through regular consultations and meetings or through their joint regional or international commissions or agencies with a view to exchanging on a regular basis relevant information and data on questions of pollution of the watercourse system in question and with a view to the adoption of the measures and regimes necessary in order to provide adequate control and protection of the watercourse system and its environment against pollution.

2. The system States concerned shall, when necessary, conduct consultations and negotiations with a view to adopting a comprehensive list of pollutants, the introduction of which into the waters of the international watercourse system shall be prohibited, restricted or monitored. They shall, where expedient, establish the procedures and machinery necessary for the effective implementation of these measures.

3. System States shall to the extent necessary establish programmes with the necessary measures and timetables for the protection against pollution and abatement or mitigation of pollution of the international watercourse system concerned.

Commentary to article 24

174. Article 24 spells out in a general manner the cooperation foreseen between system States for the control of and protection against pollution of a watercourse system. The practice of establishing lists concerning pollutants is endorsed in paragraph 2 of the article. In current practice at least two types of lists are established: a "black" list of pollutants, the introduction of which into the sea, rivers (or ground water) is prohibited, and a "grey" list of pollutants, the introduction of which is not absolutely prohibited but is nevertheless monitored. There exist in practice somewhat different approaches to categories of "lists" and to the contents of each "list".

175. The principles proposed in article 24 were dealt with by the previous Special Rapporteur in paragraphs 7, 10 and 11 of article 10 proposed in his third report. 118

Article 25. Emergency situations regarding pollution

1. If an emergency situation arises from pollution or from similar hazards to an international watercourse system or its environment, the system State or States within whose jurisdiction the emergency has occurred shall make the emergency situation known by the most rapid means available to all system States that may be affected by the emergency together with all relevant information and data which may be of relevance in the situation.

2. The State or States within whose jurisdiction the emergency has occurred shall immediately take the necessary measures to prevent, neutralize or mitigate danger or damage caused by the emergency situation. Other system States should to a reasonable extent assist in preventing, neutralizing or mitigating the dangers and effects caused by the emergency and should be refunded the reasonable costs for such measures by the State or States where the emergency arose.

Commentary to article 25

176. Reference is made to the general provisions on emergencies proposed in article 18 above. The obligations laid down in article 25 are more far-reaching with regard to the legal duty to inform other States and the obligation to provide other system States with all relevant information and data. Paragraph 2 provides that other system States should to a reasonable extent assist in preventing, neutralizing or mitigating the dangers and

117 Document A/CN.4/348 (see footnote 46 above), para. 312.
118 Ibid.
effects caused by the "accident" that has caused the pollution emergencies. This would follow from the principle of good faith and friendly neighbourly relations. On the other hand, those States should be refunded the reasonable costs for such measures of prevention by the pollutant State.

Article 26. Control and prevention of water-related hazards

1. System States shall co-operate in accordance with the provisions of the present Convention with a view to the prevention and mitigation of water-related hazardous conditions and occurrences, as the special circumstances warrant. Such co-operation should, inter alia, entail the establishment of joint measures and regimes, including structural or non-structural measures, and the effective monitoring in the international watercourse system concerned of conditions susceptible of bringing about hazardous conditions and occurrences such as floods, ice accumulation and other obstructions, sedimentation, avulsion, erosion, deficient drainage, drought and salt-water intrusion.

2. System States shall establish an effective and timely exchange of information and data and early warning systems that would contribute to the prevention or mitigation of emergencies with respect to water-related hazardous conditions and occurrences relating to an international watercourse system.

Commentary to article 26

177. The Special Rapporteur considers that, in addition to the articles proposed above with regard to the general protection of the environment and protection from the abatement of pollution, it is appropriate to include an article on control and prevention of water-related hazards due mainly to natural causes such as floods, ice accumulation, sedimentation and siltation, avulsion, drainage problems, drought and salt-water intrusion. It is unfortunately a fact that too "many parts of the world are prone to hazards caused by extremes of water—floods and droughts—...".159

178. At the 1981 Dakar Interregional Meeting of International River Organizations, it was repeatedly stressed that the dangers and damage caused by floods and droughts were viewed with the utmost concern. These problems were summed up in the following manner in the conclusions relating to topic II, "Progress in co-operative arrangements":

5. The prevention and mitigation of floods, droughts and other hazards, natural and man-made, are increasingly of concern to the cooperating States because of the numerous changes that are taking place at accelerating rates within the watersheds; therefore new or strengthened activities must be undertaken to deal effectively with the detrimental effects of water-related hazards and conditions. The international river and lake organizations are appropriate bodies for initiating studies and recommending measures, contingency plans or warning systems, as well as for conducting the necessary ongoing review of conditions and of the adequacy of measures undertaken.160

179. At its fifty-fifth Conference, held at New York in 1972, the International Law Association adopted articles on flood control,161 article 2 of which provides:

Basin States shall co-operate in measures of flood control in a spirit of good neighbourliness, having due regard to their interests and well-being as co-basin States.

Article 3 provides that co-operation between co-basin States with respect to flood control should include inter alia collection and exchange of relevant data; planning and designing of relevant measures; execution of flood control measures; flood forecasting and communication of flood warnings. According to article 4, paragraph 1,

1. Basin States should communicate amongst themselves as soon as possible on any occasion such as heavy rainfall, sudden melting of snow or other events likely to create floods and/or dangerous rises of water levels in their territory.

180. In a great number of system agreements concluded since the Second World War, system States have agreed on provisions aimed especially at measures for the prevention of floods, erosion and drought. Among such measures are exchange of information and data on high water, drifting ice or any other danger that may arise in rivers;162 establishment of reporting services and the duty of the competent services "to remain in constant communication" in case of flood warnings until "the end of the danger is announced";163 to "complete the necessary work to prevent ... changes in the course of the river as well as floods and erosion" and to "study and plan" new works which are necessary to establish necessary "permanent flood channels";164 to remove obstacles to the natural flow of rivers;165 to construct and strengthen dikes, and to install drainage systems and pumping stations.166 A number of other examples are mentioned in the 1963 report of the Secretary-


162 See the Agreement of 4 April 1958 between Yugoslavia and Bulgaria concerning water economy questions, art. 8 (see Yearbook ... 1974, vol. II (Part Two), p. 121, document A/5409, para. 516).

163 See the Treaty of 27 October 1956 between France and the Federal Republic of Germany concerning the settlement of the Saar question, art. 9 (ibid., p. 185, document A/5409, para. 998).

164 See the Exchange of Notes of 9 November and 21 December 1961 between Guatemala and Mexico constituting an agreement concerning the establishment of the International Commission on Boundaries and Waters (ibid., p. 293, document A/CN.4/274, para. 70).

165 See the Treaty of 15 February 1961 between Poland and the USSR concerning the régime of the Soviet-Polish frontier and cooperation and mutual assistance in frontier matters, art. 16, para. 3 (ibid., p. 306, document A/CN.4/274, para. 181).

166 See the Protocol of 19 January 1963 between Greece and Turkey concerning the final elimination of differences concerning the execution of hydraulic operations for the improvement of the bed of the River Meric-Evros carried out on both banks (ibid., p. 308, document A/CN.4/274, para. 206).
General and in his 1974 supplementary report,\textsuperscript{167} as well as in the third report of the previous Special Rapporteur.\textsuperscript{168}

181. In paragraph 1 of article 26, the Special Rapporteur proposes a general obligation of system States to co-operate in accordance with the provisions of this convention, in good faith and according to friendly neighbourly relations and within the bounds of the reasonable and possible, in order to prevent and mitigate the dangers of water-related hazards, mainly with a view to "natural hazards". The main hazards have been specifically mentioned but this enumeration is not meant as being exhaustive.

182. In paragraph 2, the Special Rapporteur has proposed an express reference to the timely exchange of information and data on such hazards and to this effect the establishment of early warning systems with respect to water-related hazards and occurrences.

183. The previous Special Rapporteur dealt with these issues in article 11 proposed in his third report.\textsuperscript{169}

\textit{Article 27. Regulation of international watercourse systems}

1. For the purposes of the present Convention, "regulation" means continuing measures for controlling, increasing, modifying or otherwise modifying the flow of the waters in an international watercourse system. Such measures may include, \textit{inter alia}, the storing, releasing and diverting of water by means of dams, reservoirs, barrages, canals, locks, pumping systems or other hydraulic works.

2. System States shall co-operate in a spirit of good faith and neighbourly relations in assessing the needs and possibilities for water system regulations with a view to obtaining the optimum and equitable utilization of shared watercourse resources. They shall cooperate in preparing the appropriate plans for such regulations and negotiate with a view to reaching agreement on the establishment and maintenance—individually or jointly—of the appropriate regulations, works and measures and on the defrayal of the costs for such watercourse regulations.

\textit{Commentary to article 27}

184. The effective regulation or "training" of international watercourse systems in order to obtain the optimum utilization and reasonable and equitable distribution of such shared resources is a main aim of all system agreements. In article 27, the Special Rapporteur has proposed a concretization of this obligation to cooperate with a view to achieving these ends through permanent or continuing measures, installations and machinery. As hereinbefore touched upon, it is, in the view of the Special Rapporteur, impossible to suggest a general formula for the defrayal of the costs of such measures because of the wide variety of situations pertaining to the different watercourse systems of the world and the possibility, necessity and desirability of regulating them. Co-system States must reach agreement with regard to these questions as well as with regard to all other problems of co-operation in these matters. The yardstick of good faith and friendly relations has to be applied also in these matters.

185. The previous Special Rapporteur dealt with the issue of regulation of international watercourses in article 12 proposed in his third report.\textsuperscript{170}

\textit{Article 28. Safety of international watercourse systems, installations and constructions}

1. System States shall employ their best efforts to maintain and protect international watercourse systems and the installations and constructions pertaining thereto.

2. To this end, system States shall co-operate and consult with a view to concluding agreements concerning:

(a) Relevant general and special conditions and specifications for the establishment, operation and maintenance of sites, installations, constructions and works of international watercourse systems;

(b) The establishment of adequate safety standards and security measures for the protection of the watercourse system, its shared resources and the relevant sites, installations, constructions and works from hazards and dangers due to the forces of nature, wilful or negligent acts or hazards and dangers created by faulty construction, insufficient maintenance or other causes.

3. System States shall as far as reasonable exchange information and data concerning the safety and security issues dealt with in this article.

\textit{Commentary to article 28}

186. In article 13 proposed in his third report,\textsuperscript{171} the previous Special Rapporteur dealt with the question of "Water resources and installation safety". In paragraph 1 of that article, he dealt with the question of the wilful poisoning of water resources and the prohibitions provided for in that context by Protocol I (art. 54, para. 2) and Protocol II (art. 14) of 1977 of the 1949 Geneva Conventions for the protection of war victims.\textsuperscript{172} In paragraphs 2 and 3, article 13 dealt with destruction and damage caused by military attack "during peacetime, or in time of armed conflict" on hydraulic installations, etc., and the prohibition of using such installations or facilities "in preparation for, or in the conduct of, offensive military operations".

\textsuperscript{167} Ibid., para. 389.

\textsuperscript{168} Ibid., para. 415. See also paras. 390-340.

\textsuperscript{169} See footnotes 53 and 54 above.

\textsuperscript{170} See footnotes 53 and 54 above.
Paragraph 4 contained provisions for protection against "terrorist attacks of sabotage". Paragraph 5 provided that system States should "during times of armed conflict" establish warning systems in co-operation with other system States for the purpose of informing a system State or system States of the threat or occurrence of a water-related hazardous event stemming from the armed conflict. Such provisions are obviously called for. Nevertheless, the present Special Rapporteur has doubts about the expediency of including such provisions in the present draft. The two Protocols of the 1949 Geneva Conventions were agreed on after long and delicate negotiations. The Special Rapporteur fears that the inclusion of such provisions here might be considered as constituting an amendment or an addition to the two Protocols and thus renew the discussions on the principles and rules pertaining to international and internal armed conflicts. Thus, although being in favour of provisions along these lines, he hesitates to include them in his first draft until he has obtained the guidance of the Commission and of the Sixth Committee of the General Assembly. He has touched upon this issue earlier in the present report (see para. 46 above).

187. On the other hand, the Special Rapporteur deems it essential to include in the draft general provisions concerning the safety of international watercourse systems, their construction, operation and maintenance. Such proposals are contained in article 28 of the present draft. Paragraph 1 proposes that system States shall employ their best efforts to maintain and protect international watercourse systems. To this end, paragraph 2 (a) proposes that system States shall co-operate and consult with each other with a view to establishing general and specific conditions and specifications, such as rules and regulations, handbooks and operating and inspection manuals, etc., for the establishment, operation and maintenance of sites.

188. Paragraph 2 (b) provides for the establishment of the necessary safety standards and security measures to protect the watercourse system and its works, installations, etc., against natural hazards as well as "wilful or negligent acts". Also included in this formulation are acts of terrorism and sabotage. Reasonable measures must be taken to give the best possible protection. Even so, accidents may happen. It seems to be an unfortunate fact that even the best of protection and supervision cannot totally prevent damage caused, for example, by acts of terrorism or sabotage.

189. In his third report, the previous Special Rapporteur proposed in article 13, paragraph 6, the following provision:

6. Withholding, by diversion or other means, of water from a system State so as to place in jeopardy the survival of the civilian population or to imperil the viability of the environment is prohibited in peacetime and in time of armed conflict. 114

190. The present Special Rapporteur has considered whether to include provisions along these lines in his proposed article 28. However, he has come to the conclusion that it is not advisable. He is of the opinion that it follows clearly from established principles of international law, as well as from the provisions of this draft, that such acts would be in flagrant violation of established principles pertaining to international watercourse systems, such as the principle of waters as a shared resource, the principle of reasonable and equitable use and distribution, the principle of close cooperation among system States in a spirit of good faith and of friendly, neighbourly relations. Thus the inclusion of a specific paragraph focusing on one somewhat atypical situation that forms part of a vast and difficult problem area might tend to weaken the protection given by the more general provisions of this draft. However, the attention of the Commission is drawn to the provisions of paragraph 6 of article 13 as proposed by the previous Special Rapporteur.

Article 29. Use preferences

1. In establishing systems or régimes for equitable participation in the utilization of an international watercourse system and its resources by all system States, no specific use or uses shall enjoy automatic preference over other equitable uses except as provided for in system agreements, other agreements or other legal principles and customs applicable to the watercourse system in question.

2. In settling questions relating to conflicting uses, the requirements for and the effects of various uses shall be weighed against the requirements for and effects of other pertinent uses with a view to obtaining the optimum utilization of shared watercourse resources and the reasonable and equitable distribution thereof between the system States, taking into account all considerations relevant to the particular watercourse system.

3. Installations and constructions shall be established and operated in such a manner as not to cause appreciable harm to other equitable uses of the watercourse system.

4. When a question has arisen with regard to conflicting uses or use preferences in an international watercourse system, system States shall, in conformity with the principles of good faith and friendly neighbourly relations, refrain from commencing works on installations, constructions or other watercourse projects or measures pertaining to the relevant conflicting uses which might aggravate the difficulty of resolving the questions at issue.

Commentary to article 29

191. Historically, navigation was the use on which the main interest was focused in early agreements between co-riparian States. Even today, navigation aspects are a main concern in regard to a number of international rivers. The sole or main emphasis on navigational issues has changed somewhat in recent years as other uses and interests have made themselves increasingly felt. This progressive shift in accent was expressed as follows in

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the commentary of the International Law Association to article VI of the Helsinki Rules:

Preferential use. Historically, navigation was preferred over other uses of water, irrespective of the later needs of the particular drainage basin involved. In the past twenty-five years, however, the technological revolution and population explosion, which have led to the rapid growth of non-navigational uses, have resulted in the loss of the former pre-eminence accorded navigational uses. Today, neither navigation nor any other use enjoys such a preference. A drainage basin must be examined on an individual basis and a determination made as to which uses are most important in that basin or, in appropriate cases, in portions of the basin.

192. In consequence, the International Law Association proposed the following principle in article VI:

A use or category of uses is not entitled to any inherent preference over any other use or category of uses.

193. The interrelationship between navigation and other uses in international watercourse systems where navigation is carried on or may be carried on was described by the previous Special Rapporteur, in his first report, in the following succinct manner:

... the impact of navigation on other uses of water and that of other uses on navigation must be addressed in the Commission's draft articles. Navigation requirements affect the quantity and quality of water available for other uses. Navigation may and often does pollute watercourses, and requires that certain levels of water be maintained; it further requires passages through and around barriers in the watercourse. The interrelationships between navigational and non-navigational uses of watercourses are so many that, on any watercourse where navigation is practised or is to be instituted, navigational requirements and effects and the requirements and effects of other water projects cannot be separated by the engineers and administrators entrusted with development of the watercourse. ..."  

194. That view was shared by the Commission which, basing itself on a proposal by the previous Special Rapporteur, provisionally adopted the provisions contained in article 2, paragraph 2, of the present report (see para. 75 above):

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

195. From this starting-point, however limited, it would follow that navigation may be affected by certain of the provisions of this draft. Thus the provisions contained in article 4, on system agreements, may be understood as implying that system agreements may include navigation among the uses regulated by such an agreement. Similarly, the provisions of article 5, by their very nature, may apply also to navigation. It must be equally clear that the provisions proposed in this report for article 6, pertaining to international watercourse systems as a shared natural resource, may also apply to navigational uses. This obvious assumption was succinctly stated by the previous Special Rapporteur as follows:

It will be noted that "use" in that article [article 6 in this report] is not limited to non-navigational uses, nor can it logically or properly be so limited. Though the specifics of regulation ... of the navigational uses are not to be taken up, the status of a shared resource comprehends conflicts between uses and the intimately related problems of, for example, pollution, environmental protection, hazards, public safety and improvement works ... Navigation is or may be involved in each of these aspects ..."

196. In article 29, the Special Rapporteur deals with "use preferences". Paragraph 1 provides that "no specific use or uses shall enjoy automatic preference over other equitable uses except as provided for in system agreements, other agreements or other legal principles or customs applicable to the watercourse system in question". These provisions apply to all uses, including navigation and its interrelationship with other uses.

197. Paragraph 2 of article 29, which concerns the question of settling conflicting uses, likewise provides that all relevant uses must be weighed against each other. Paragraphs 3 and 4 require no additional comments.

198. The previous Special Rapporteur dealt with these issues in article 14 (Denial of inherent use preference) proposed in his third report.

Article 30. Establishment of international watercourse systems or parts thereof as protected national or regional sites

1. A system State or system States may—for environmental, ecological, historic, scenic or other reasons—proclaim a watercourse system or part or parts thereof a protected national or regional site.

2. Other system States and regional and international organizations or agencies should in a spirit of good faith and friendly neighbourly relations co-operate and assist such system State or States in preserving, protecting and maintaining such protected site or sites in their natural state.

Commentary to article 30

199. Environmental concern has made itself increasingly felt in countries throughout the world, often in connection with concern for the protection of the habitat for wildlife or with the demands of local ethnic groups or tribes to be allowed to keep their environment and mode of life intact. The protection of such rivers or river stretches may be a relatively recent extension of the conservation movement, but has proved in many countries to be a very forceful one. "It may be hoped that more and more States will act upon their awareness of the progressive loss of these priceless and, once spoiled, irretrievable parts of their heritage."

See footnote 11 above.

Document A/CN.4/320 (see footnote 5 above), para. 61.

194 Document A/CN.348 (see footnote 46 above), para. 437.

197 Ibid., para. 451.

198 Ibid., para. 519.
CHAPTER VII

Settlement of disputes
(Chapter V of the draft)

200. In this chapter, the Special Rapporteur deals with the settlement of disputes concerning the interpretation and application of the proposed convention. The obvious starting-point is the fundamental principles formulated in Article 2 of the United Nations Charter, especially in paragraphs 3 and 4, that all Members of the United Nations have the unconditional obligation to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered" (para. 3) and to "refrain in their international relations from the threat or use of force" against other States (para. 4). The peaceful means referred to in the present chapter are those dealt with in Chapter VI of the United Nations Charter, on pacific settlement of disputes, in particular in Article 33.

201. The Special Rapporteur therefore proposes the following articles for chapter V of the draft: article 31 (Obligation to settle disputes by peaceful means); article 32 (Settlement of disputes by consultations and negotiations); article 33 (Inquiry and mediation); articles 34 and 35 (Conciliation and functions and tasks of the Conciliation Commission); article 36 (Effects of the report of the Conciliation Commission. Sharing of costs); articles 37 and 38 (Adjudication by the International Court of Justice, another international court or a permanent or ad hoc arbitral tribunal, and binding effect of such adjudication).

202. In addition to the obligations undertaken by the States Members of the United Nations in accordance with the aforementioned provisions of the United Nations Charter and the Statute of the ICJ, the Special Rapporteur has relied on a great number and variety of bilateral treaties on friendship and commerce, or on judicial settlement, and on a number of multilateral and international conventions such as the General Act (pacific settlement of international disputes) adopted by the League of Nations on 26 September 1928; the Revised General Act for the Pacific Settlement of International Disputes adopted by the General Assembly of the United Nations on 28 April 1949; and the European Convention of 1957 for the Peaceful Settlement of Disputes. Of considerable interest as a precedent for the peaceful settlement of disputes concerning international watercourse systems are the chapters and annexes of the 1982 United Nations Convention on the Law of the Sea. Part XV of the Convention deals with "Settlement of disputes". Section 5 of part XI of the Convention, on "The Area", deals with settlement of disputes and advisory opinions pertaining to disputes arising out of activities in the Area. In addition, four annexes deal in detail with the peaceful settlement of disputes: annex V with "Conciliation", annex VI with the "Statute of the International Tribunal for the Law of the Sea", composed of 21 judges, annex VII with "Arbitration", and annex VIII with "Special arbitration".

203. Part XV of the United Nations Convention on the Law of the Sea provides, in section 2, for compulsory court or arbitral procedures entailing binding decisions to a considerable degree (arts. 286 et seq.). But section 3 provides for a number of limitations and exceptions to the applicability of such compulsory procedures (arts. 297 et seq.). The Convention also provides for compulsory conciliation in certain situations (see art. 297, paras. 2 (b) and 3 (b), (c) and (d), and art. 298, para. 1 (a) (i)). Although lacking somewhat in clarity and consistency, the clauses of part XV of the Convention are both challenging and far-reaching in providing for compulsory settlement procedures in the context of a universal international instrument.

204. The Special Rapporteur has been in some doubt whether he should introduce compulsory settlement procedures, especially procedures entailing compulsory and binding adjudication, in the present draft. Upon reflection, he has deemed it inadvisable to do so. The main purpose of the draft articles is to serve as a framework agreement. A number of the principles proposed with regard to substance have been drafted as binding principles of international law which, by their very nature, apply to disputes with regard to the management and use of international watercourse systems. Other provisions are suggested as a yardstick to be recommended with regard to the behaviour of riparian States. The Special Rapporteur furthermore envisages that, in order to ensure maximum applicability of the proposed principles to concrete watercourse systems, agreements should to the widest possible extent be entered into. In addition to the firm obligation of system States to resolve their disputes by peaceful means and to this end to conduct negotiations, consultations and close co-operation on the basis of good faith and friendly neighbourly relations, system agreements should provide for compulsory settlement procedures such as commissions of inquiry, conciliation and, in more serious cases, resort to compulsory proceedings before international courts or arbitral tribunals. Although a warm supporter of compulsory procedures before international courts, the Special Rapporteur is not convinced that providing for such compulsory

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181 Done at Strasbourg on 29 April 1957 under the aegis of the Council of Europe (ibid., vol. 320, p. 243).
182 See footnote 80 above.
jurisdiction in an absolute form in this proposed framework agreement would be the best means of furthering this ultimate goal. The articles contained in this chapter reflect this opinion.

205. Obviously, States may be under an obligation to resort to special procedures for the settlement of disputes, including compulsory jurisdiction under general or special agreements on peaceful settlement of disputes. Of course, it is not the purpose of the articles proposed in this chapter to detract from such obligations already entered into. This principle was expressed in article XXVIII of the Helsinki Rules as follows:

1. States are under a primary obligation to resort to means of prevention and settlement of disputes stipulated in the applicable treaties binding upon them.

The Special Rapporteur has touched upon this self-evident principle in article 31, paragraph 2.

206. The previous Special Rapporteur dealt with "Principles and procedures for the avoidance and settlement of disputes" in article 16 proposed in his third report.  

CHAPTER V
SETTLEMENT OF DISPUTES

Article 31. Obligation to settle disputes by peaceful means

1. System States as well as other States Parties shall settle disputes between them concerning the interpretation or application of the present Convention by peaceful means in accordance with Article 2 of the Charter of the United Nations and, to this end, shall seek solutions by the means indicated in Article 33, paragraph 1, of the Charter.

2. Nothing in this chapter impairs the right of States Parties (system States) to agree at any time to settle a dispute between them concerning the interpretation or application of the present Convention by any peaceful means of their own choice.

Commentary to article 31

207. This article reiterates the obligation of all Member States to settle their disputes by peaceful means. Article 31, paragraph 1, is more or less identical with article 279 of the United Nations Convention on the Law of the Sea. Paragraph 2 of the article is identical with article 280 of the said Convention.

Article 32. Settlement of disputes by consultations and negotiations

1. When a dispute arises between system States or other States Parties concerning the interpretation or application of the present Convention, the parties to the dispute shall proceed expeditiously with consultations and negotiations with a view to arriving at a fair and equitable solution to the dispute.

2. Such consultations and negotiations may be conducted directly between the parties to the dispute or through joint commissions established for the administration and management of the international watercourse system concerned or through other regional or international organs or agencies agreed upon between the parties.

3. If the parties have not been able to arrive at a solution of the dispute within a reasonable period of time, they shall resort to the other procedures for peaceful settlement provided for in this chapter.

Commentary to article 32

208. The obvious starting-point for the peaceful settlement of disputes between system States or between a system State or another State party to the Convention is to commence consultations and negotiations in good faith to seek solutions to outstanding issues. Such an obligation to negotiate follows from established principles of international law, as touched upon earlier in the present report. This point of departure was laid down in article XXX of the Helsinki Rules as follows:

In case of a dispute between States as to their legal rights or other interests, ... they should seek a solution by negotiation.

209. Paragraph 2 of article 32 provides that such negotiations between the parties concerned may be conducted through or with the assistance of joint commissions or other organs or agencies. Such joint commissions or agencies are envisaged in a number of the foregoing articles. Such commissions may obviously possess expertise, knowledge or a more detached and impartial approach to the dispute and thus be able to assist the parties in many respects. Article XXXI of the Helsinki Rules deals in detail with this approach and provides, inter alia:

1. ... it is recommended that the basin States refer the question or dispute to a joint agency and that they request the agency to survey the international drainage basin and to formulate plans or recommendations ...

210. The obligation to negotiate must be tempered by a provision to the effect that such consultations and negotiations must go on only for a reasonable period of time. When all reasonable attempts at negotiations in good faith have been exhausted, the parties shall resort to the other procedures for peaceful settlement provided for in chapter V of the draft. As explained earlier, the Special Rapporteur holds the view that such other means of peaceful settlement should be resorted to, but that the parties should not be bound by compulsory settlement procedures unless they have so agreed.

113 See footnote 46 above.

Article 33. Inquiry and mediation

1. In connection with the consultations and negotiations provided for in article 32, the parties to a dispute concerning the interpretation or application of the present Convention may, by agreement, establish a Board of Inquiry of qualified experts for the purpose of establishing the relevant facts pertaining to the dispute in order to facilitate the consultations and negotiations between the parties. The parties must agree to the composition of the Board, the tasks entrusted to it, the time-limits for the accomplishment of its findings and other relevant guidelines for its work. The Board of Inquiry shall decide on its procedure unless otherwise determined by the parties. The findings of the Board of Inquiry are not binding on the parties unless otherwise agreed upon by them.

2. The parties to a dispute concerning the interpretation or application of the present Convention may by agreement request mediation by a third State, an organization or one or more mediators with the necessary qualifications and reputation to assist them with impartial advice in such consultations and negotiations as provided for in article 32. Advice given by such mediation is not binding upon the parties.

Commentary to article 33

211. This article provides for the establishment of a board of inquiry or mediation composed of a third State, an organization or persons with the necessary reputation and qualifications, in order to assist the parties in their consultations and negotiations. Inquiry or mediation may serve as a useful corollary to negotiations between parties to a dispute. Neither has been widely used in recent years nor included in the procedures for peaceful settlement advocated in the 1982 United Nations Convention on the Law of the Sea (see para. 202 above). But the Special Rapporteur deems that inquiry or mediation may serve a useful purpose in disputes pertaining to international watercourses, where expertise may be a basic foundation on which the parties may build peaceful solutions.

212. Good offices, mediation and inquiry were recommended in articles XXXII and XXXIII of the Helsinki Rules.187

Article 34. Conciliation

1. If a system agreement or other regional or international agreement or arrangement so provides, or if the parties agree thereto with regard to a specific dispute concerning the interpretation or application of the present Convention, the parties shall submit such dispute to conciliation in accordance with the provisions of this article or with the provisions of such system agreement or regional or international agreement or arrangement.

Any party to the dispute may institute such proceedings by written notification to the other party or parties, unless otherwise agreed upon.

2. Unless otherwise agreed, the Conciliation Commission shall consist of five members. The party instituting the proceedings shall appoint two conciliators, one of whom may be its national. It shall inform the other party of its appointments in the written notification.

The other party shall likewise appoint two conciliators, one of whom may be its national. Such appointment shall be made within thirty days from the receipt of the notification mentioned in paragraph 1.

3. If either party to the dispute fails to appoint its conciliators as provided for in paragraphs 1 or 2 of this article, the other party may request the Secretary-General of the United Nations to make the necessary appointment or appointments unless otherwise agreed upon between the parties. The Secretary-General of the United Nations shall make such appointment or appointments within thirty days from the receipt of the request.

4. Within thirty days after all four conciliators have been appointed the parties shall choose by agreement the fifth member of the Commission from among the nationals of a third State. He shall act as the president of the Conciliation Commission. If the parties have not been able to agree within that period, either party may within fourteen days from the expiration of that period request the Secretary-General of the United Nations to make the appointment. The Secretary-General of the United Nations shall make such appointment within thirty days from the receipt of the request.

Commentary to article 34

213. Chapter I of the General Act of 1928 for the pacific settlement of international disputes188 contains provisions on conciliation. Such provisions are in general included in other instruments on the peaceful settlement of disputes, for example in chapter II of the European Convention for the Peaceful Settlement of Disputes189 and also in annex V of the 1982 United Nations Convention on the Law of the Sea.190 Provisions concerning the composition of conciliation commissions and the appointment of their members are also contained in the “Model rules for the constitution of the Conciliation Commission” annexed to the Helsinki Rules.191

214. The establishment of conciliation commissions has in practice proved to be useful in the search for peaceful solutions to international disputes. The advantage of such commissions consists, inter alia, in that their procedures are less cumbersome than court or arbitration proceedings. They are also less time-

187 Idem.
188 See footnote 179 above.
189 See footnote 181 above.
190 See footnote 80 above.
191 See footnote 11 above.
Commentary to article 35

217. The Special Rapporteur has deemed it advisable to spell out in some detail the functions traditionally assigned to a conciliation commission. Thus the provision contained in paragraph 1 that, in the absence of agreement to the contrary, the Conciliation Commission shall lay down its own procedure, is a generally accepted principle, as evidenced by article 11 of the Revised General Act for the Pacific Settlement of International Disputes of 1949, article 12 of the European Convention for the Peaceful Settlement of Disputes of 1957 and article V of the “Model rules for the constitution of the Conciliation Commission” annexed to the Helsinki Rules. Procedural matters, such as the fact that conciliation shall ordinarily not be conducted in public, rules and procedures with regard to possible pleadings, voting etc., have not been spelled out in detail, except for the provision in paragraph 2 that the Conciliation Commission shall hear the parties. Paragraph 3 of article 35 provides for a time-limit of 12 months for the filing by the Conciliation Commission of its report. The Revised General Act of 1949 (art. 15, para. 3) and the European Convention of 1957 (art. 15, para. 3) provide for a time-limit of six months. The Special Rapporteur deems this time-limit to be unrealistically short. Reference is made, in that connection, to article 7, paragraph 1, of annex V of the 1982 United Nations Convention on the Law of the Sea. It is proposed that the report should be filed by the Commission with the Secretary-General of the United Nations. However, the parties should have the possibility to decide otherwise.

218. A report rendered by a conciliation commission in matters pertaining to international watercourses may be of interest to the international community. The filing of the report with the Secretary-General does not automatically imply that the report will be made public. It may be of interest in this connection to draw attention to article 16 of the Revised General Act for the Pacific Settlement of Disputes of 1949, which provides:

The Commission’s proces-verbal shall be communicated without delay to the parties. The parties shall decide whether it shall be published.

219. The European Convention of 1957 has a provision in article 16 which seems somewhat more restrictive, to the following effect:

The Commission’s proces-verbal shall be communicated without delay to the parties. It shall only be published with their consent.

220. However, the Special Rapporteur considers that, regardless of these provisions, it seems reasonable to provide that the report of a conciliation commission in these matters should be filed with the Secretary-General and to the extent possible be made available to the international community. If the report records an agreement between the parties concerned, it seems to follow from the principles contained in Article 102 of the United Na-
tions Charter that it should “be registered with the Secretariat and published by it”.

221. Annex V, on “Conciliation”, of the United Nations Convention on the Law of the Sea, provides in article 7, paragraph 1, that the report of a conciliation commission “shall be deposited with the Secretary-General of the United Nations and shall immediately be transmitted by him to the parties to the dispute”. However, the Special Rapporteur is in some doubt whether this very formal approach would be advisable in all cases.

**Article 36. Effects of the report of the Conciliation Commission. Sharing of costs**

1. Except for agreements arrived at between the parties to the dispute through the conciliation procedure and recorded in the report in accordance with paragraphs 2 and 3 of article 35, the report of the Conciliation Commission—including its recommendations to the parties and its conclusions with regard to facts and law—is not binding upon the parties to the dispute unless the parties have agreed otherwise.

2. The fees and costs of the Conciliation Commission shall be borne by the parties to the dispute in a fair and equitable manner.

*Commentary to article 36*

222. The task entrusted to a conciliation commission will obviously vary with the agreement entered into between the parties. In some instances, emphasis has been placed on the commission’s task as being one of negotiation. When a conciliation procedure results in agreement between the parties, it is natural for this agreement to be recorded in the conciliation commission’s report. To this extent, the report is binding upon the parties under general principles of international law. Often, however, the conciliation commission will be entrusted with the task of making recommendations to the parties if they have been unable to achieve agreement. The commission may also put forward its views with regard to the facts and the law which it deems applicable to the dispute. Such recommendations and such findings on the facts and the law are in principle not binding on the parties to the dispute, even though they may have considerable influence on a final amicable solution. This principle has been expressly laid down in article 7, paragraph 2, of annex V of the United Nations Convention on the Law of the Sea. The agreement between the parties instituting conciliation may expressly or implicitly provide that the recommendations of the conciliation commission shall be taken into account to the extent reasonable in subsequent negotiations between the parties. Of course, it is also possible that the conciliation commission is not able to formulate recommendations to the parties because of substantial divergence of views within the commission or for other reasons. It may be of interest in this connection to note that, in the conciliation agreement between Iceland and Norway, it was provided that the Commission should not file a report with recommendations unless such recommendations were unanimously adopted by the commission. In that particular case, the conciliation commission submitted unanimous recommendations. These served as the basis for subsequent agreement between Iceland and Norway (see para. 215 above).

223. Paragraph 2 of article 36 refers to fees and costs. Ordinarily, the parties contribute in equal shares to such expenses. See, for example, article 14 of the Revised General Act of 1949194 and article 17 of the European Convention for the Peaceful Settlement of Disputes of 1957.195

**Article 37. Adjudication by the International Court of Justice, another international court or a permanent or ad hoc arbitral tribunal**

States may submit a dispute for adjudication to the International Court of Justice, to another international court or to a permanent or ad hoc arbitral tribunal if they have not been able to arrive at an agreed solution of the dispute by means of articles 31 to 36, provided that:

(a) The States parties to the dispute have accepted the jurisdiction of the International Court of Justice in accordance with Article 36 of the Statute of the Court or accepted the jurisdiction of the International Court of Justice or of another international court by a system agreement or other regional or international agreement or specifically have agreed to submit the dispute to the jurisdiction of the Court;

(b) The States parties to the dispute have accepted binding international arbitration by a permanent or ad hoc arbitral tribunal by a system agreement or other regional or international agreement or specifically have agreed to submit the dispute to arbitration.

*Commentary to article 37*

224. Article 287 of the 1982 United Nations Convention on the Law of the Sea196 provides that, in signing, ratifying or acceding to the Convention, a State shall “be free to choose” between “one or more of the following means” of settlement of disputes:

(a) the International Tribunal for the Law of the Sea established in accordance with annex VI;

(b) the International Court of Justice;

(c) an arbitral tribunal constituted in accordance with annex VII;

(d) a special arbitral tribunal constituted in accordance with annex VIII for one or more of the categories of disputes specified therein.

225. It is further provided in article 296 of the Convention:

1. Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute.

194 See footnote 180 above.
195 See footnote 181 above.
196 See footnote 80 above.
Any such decision shall have no binding force except between the parties and in respect of that particular dispute.

These provisions derive mainly from Articles 59 and 60 of the Statute of the ICJ (see also Article 94 of the United Nations Charter). It is inherent in the very act of submitting a dispute to the ICJ, to another international court or to an arbitral tribunal that the decision rendered by such court or tribunal is binding and also final, unless, contrary to common practice, a court of appeals has been provided for. The Special Rapporteur has repeated this main principle in article 38.

The resort to adjudication provided for in article 37 refers to the jurisdiction of the ICJ, of another international court or of an arbitral tribunal, as the case may be. As mentioned before, annex VI of the United Nations Convention on the Law of the Sea provides for the establishment of an “International Tribunal for the Law of the Sea”. The question may obviously arise whether this tribunal could be such another international court which could be charged with the task of adjudicating disputes relating to international watercourses. Suffice it here to refer to article 21 of annex VI of the Convention relating to the jurisdiction of the International Tribunal for the Law of the Sea, which provides:

The jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.

The provisions contained in part XV, section 2, of the United Nations Convention on the Law of the Sea clearly envisage compulsory adjudication (arts. 286 et seq.). However, it is equally important to note that this compulsory jurisdiction entailing binding decisions is predicated on a system where a great number of important disputes are excepted from such adjudication (see articles 297-299).

The Special Rapporteur has not deemed it advisable to provide for compulsory jurisdiction in article 37. Such compulsory jurisdiction by the ICJ or another international court may follow from other international instruments, as provided for in subparagraph (a). The obligation to submit to binding arbitration may follow from other international instruments, as provided for in subparagraph (b).

The Special Rapporteur, in choosing this approach, was not convinced that a general principle providing for compulsory adjudication of disputes relating to international watercourses would be acceptable.

Article 38. Binding effect of adjudication

A judgment or award rendered by the International Court of Justice, by another international court or by an arbitral tribunal shall be binding and final for States Parties. States Parties shall comply with it and in good faith assist in its execution.

Commentary to article 38

See the commentary to article 37 above.

Chapter VIII

Relationship to other conventions and final provisions

(Chapter VI of the draft)

At its thirty-second session, in 1980, the Commission adopted provisionally an article X on “Relationship between the present articles and other treaties in force”. Such provisions are ordinarily dealt with in the final chapter of international agreements, together with other “final clauses”. In an attempt to give as complete as possible an outline for a draft convention on the non-navigational uses of international watercourses, the Special Rapporteur suggests that this article X be placed as article 39 in chapter VI, entitled “Final provisions”.

The Special Rapporteur has ventured to make some slight amendments to the text provisionally adopted as article X.