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CHARLES B. BOURNE*

The International Law Association's Contribution to International Water Resources Law

ABSTRACT

In the early 1950s, there were several serious international river disputes, in particular those over the Indus, the Jordan, the Nile, and the Columbia rivers. At that time, however, there were no accepted rules of international law applicable to these disputes. This state of affairs led the International Law Association (ILA) to embark in 1954 on a study of the legal aspects of the use of the waters of international drainage basins, a study that continues to this day. Three committees of the ILA have been engaged in this work. The first, from 1954 to 1966, produced the 1966 Helsinki Rules, a code expressing the ILA's view of the law on the subject. The second committee, from 1966 to 1986, formulated a number of articles amplifying particular aspects of the Helsinki Rules. And the third committee, established in 1990, continues this work of amplification. By 1966, in the Helsinki Rules, the ILA had identified the basic rule of international water resources law—the principle of equitable utilization. In the intervening years, the ILA has based its work on the proposition that this principle is the fundamental law on the subject, the more detailed rules subsequently adopted by it being merely more precise expressions of the principle and subject to it. The principle, requiring the reasonable and equitable sharing of the benefits of the waters of an international drainage basin, is seen as the one best suited for achieving the rational management of these waters. This article serves as a complete history of the work of the ILA on international water resources law.

I. INTRODUCTION

The International Law Association (ILA) began its work on the law governing the utilization of international fresh water resources in

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1954. The impetus for its doing so was concern about a number of serious international river disputes that had arisen after 1945, in particular the dispute between India and Pakistan over the Indus, between Egypt and the Sudan over the Nile, between Israel and its neighbors over the Jordan, and between Canada and the United States over the Columbia. In these cases, the international legal rights of the concerned states to use the waters of the rivers were in issue; the upstream states held views of the law that were the opposite of those held by the downstream states. This divergence of views clearly indicated the urgent need of an authoritative statement of the international law applicable to the uses of international rivers. A common view of this law would undoubtedly have promoted the peaceful resolution of the disputes in question and, moreover, would tend to prevent similar disputes in the future.

In the early 1950s, then, international lawyers faced the question, what is the law on the utilization of international water resources? There was no consensus on this subject. Four theories had their advocates: territorial sovereignty (no restraint on a state's use of waters in its territory); riparian rights (a state is entitled to the flow of the waters undiminished in quantity and unchanged in quality unless it consents otherwise); prior appropriation (existing uses cannot be adversely affected by subsequent uses); and equitable apportionment (each co-basin state is entitled to a reasonable and equitable share of the beneficial uses of the waters). In short, one could not say with conviction in 1950 that there were rules of customary international law applicable to international rivers.

At this juncture, Professor Clyde Eagleton of New York University proposed to the Executive Council of the ILA that the Association should establish a committee to study and make recommendations concerning this branch of international law. His proposal was favorably received and the topic was placed on the agenda of the ILA's Conference held at Edinburgh in 1954. As a result, that Conference adopted a resolution "emphasizing the vast potential importance of the question of rights and obligations between states as to inland waters" and resolving to establish a committee under the chairmanship of Professor Eagleton "to study the various legal, economical and technical aspects of this important subject"¹ This committee was named "The Committee on The Uses of the Waters of International Rivers" but soon became known as "The Rivers Committee" and so it shall be called here.

The ILA was thus launched on a study of the legal aspects of the uses of international fresh water resources that has continued to this day.

1. INTERNATIONAL LAW ASS'N, REPORT OF THE FORTY-SIXTH CONFERENCE, Edinburgh, 1954, at vii.

The Rivers Committee was discharged in 1966 on the adoption by the Association of the Committee's recommendations now known as the Helsinki Rules,² but it was recognized at that time that further aspects of the subject should be studied. The Association therefore immediately established a new committee, the Committee on International Water Resources Law, under the chairmanship of Judge E. J. Manner of Finland. Likewise, the discharge of the Manner Committee in 1986 was followed by the creation of yet another "Committee on International Water Resources" in 1990 under the chairmanship of Professor Charles B. Bourne of Canada. This committee still continues its studies.

This continuing commitment to the study of international water resources law indicates the ILA's perception of the importance of the subject in the relations of states. It is true that the major international river disputes of the 1950s, with the exception of that concerning the Jordan River, were settled by treaties by 1961,³ but the potential for serious future disputes has grown during the past four decades, the number of international drainage basins meanwhile having multiplied as a result of the liberation of former colonies and the disintegration of the U.S.S.R. and Yugoslavia. The need of clarification and elaboration of this branch of international law remains.

This article serves as a complete history of the work of the ILA on international water resources law. To judge the contribution of the ILA to this branch of international law, one must examine the work of the three committees mentioned above. This will be done here chronologically.

II. THE RIVERS COMMITTEE, 1954-66

A. Membership

The composition of the Rivers Committee is significant, for it influenced the formulation of the Committee's conclusions that were expressed in the 1966 Helsinki Rules. The credentials of its members and the offices held by some of them not only ensured that these rules reflected the political, economic, and social realities of drainage basin development but also enhanced the authority of those rules and their acceptability by the international community.

On its creation in 1954, the Committee was composed of eight

2. INTERNATIONAL LAW ASS'N, REPORT OF THE FIFTY-SECOND CONFERENCE, Helsinki, 1966, at 484-532 [hereinafter HELSINKI RULES].

3. The Nile Waters Treaty, Nov. 8, 1959, 453 U.N.T.S. 51; The Indus Waters Treaty, Sept. 19, 1960, 419 U.N.T.S. 125; and The Columbia River Treaty, Jan. 17, 1961 & Jan. 23, 1964, U.S.-Can., 15 U.S.T. 1555.

members including its chairman. By the 1956 ILA Conference, it had 25 members; by 1958, 32 members; by 1962, 37 members plus two alternates; and by 1966, when the Committee ceased to exist, 36 members and 5 alternates. These bare numbers indicate the wide interest in the Committee's work, not only among lawyers but among governments as well, especially those involved in the disputes of the 1950s, who were concerned lest the outcome of the Committee's deliberations would prejudice their bargaining positions. This concern was reflected not only in the rapid increase in the size of the Committee but also in the individuals who became its members.

An examination of the list of members reveals that the states then involved in international water disputes were well represented on the Committee. For example, Mr. S. M. Sikri was a member throughout the life of the Committee. Initially he was the Advocate-General of the Punjab and later the Chief Justice of India. Dr. K. Krishna Rao, a member of the Indian Ministry of External Affairs, was an early member and so was Professor F. J. Berber of Germany who was an advisor to the Indian government in its water dispute with Pakistan. Somewhat later, Dr. Nagendra Singh joined the Indian contingent. Pakistan, too, was well represented by Hon. Mujibur Khan, Hon. S. S. Pirzada, and Hon. Manzur Qadir. Furthermore, an American member of the Committee, Mr. John Laylin, was counsel to the government of Pakistan in the Indus River dispute. The quality of the Indian and Pakistani members, with their close association with their governments, shows the importance that these governments attached to the Committee's work. Of course, some other members of the Committee were also citizens of states involved in international river disputes: there were two Sudanese and one Egyptian; two Israeli with one alternate; three Canadians and seven Americans (the number of Americans reflects the fact that the chairman and vice-chairman were Americans and that the secretariat and the major part of the research for the Committee was done at New York).

The ILA is a non-governmental organization composed of individuals. Those who serve on its committees do so in their individual capacities and not as representatives of their governments or any other person or organization. Nevertheless, some members of the Rivers Committee were evidently concerned about protecting the interests of their governments and thus opposed propositions that were contrary to positions taken by their governments in disputes with co-basin states. An illustration of this is Mr. Sikri's adherence to the territorial sovereignty theory. At the 1958 ILA New York Conference, he stated as follows: "I must say that I am still of the opinion that strictly speaking the Harmon

Doctrine is still the law"⁴ In this view he was supported throughout the Committee's proceedings by Professor Berber who qualified his support of the adoption of the Helsinki Rules in 1966 by saying that they were a compromise between many divergent views, a delicate balance, not meant to be regulations to bind a judge but directives which could guide and inspire negotiators of future concrete water treaties.⁵ On the other hand, the view favorable to Pakistan was equally firmly pressed; Mr. Laylin was an unrepentant adherent of the doctrine of prior appropriation, arguing at Helsinki that existing uses must be respected.⁶

A statement of a Canadian member, Mr. Bloomfield, perhaps gives a true picture of the atmosphere in which the work of the Committee proceeded. In the final deliberations of the Rules at Helsinki in 1966, he said: "When the Committee was first organized, it was fairly balanced between the upper riparians and the lower riparians, and most of our members, including myself, adopted strong national views, but I have found myself, like other members of the Committee, moving away, over the years, from strict national considerations to broader international ideas."⁷

B. Substantive Rules

1. Equitable utilization

The first product of the Rivers Committee was "A Statement of Principles Upon Which to Base Rules of Law Concerning the Uses of International Rivers." This Statement was included in the Committee's first report which was submitted to the ILA's Conference at Dubrovnik in 1956.⁸ As the chairman Professor Eagleton emphasized, the Committee in this report did not attempt to state rules of law but only principles on which rules of law could be formulated.⁹

These principles seem to have been prepared by Professor Eagleton himself, undoubtedly with the advice of American colleagues but without the benefit of much consultation with members of the Committee other than Americans. This is evident from the remarks of Mr. Sikri at Dubrovnik. In arguing against the adoption of the principles at

4. INTERNATIONAL LAW ASS'N, REPORT OF THE FORTY-EIGHTH CONFERENCE, New York, 1958, at 37-38 [hereinafter NEW YORK REPORT-1958].

5. HELSINKI RULES, *supra* note 2, at 462.

6. *Id.* at 453-54.

7. *Id.* at 460-61.

8. INTERNATIONAL LAW ASS'N, REPORT OF THE FORTY-SEVENTH CONFERENCE, Dubrovnik, 1956, at 244-48 [hereinafter DUBROVNIK REPORT].

9. *Id.* at 216, 244.

that time, he pointed out that "the whole committee has not yet met; further, there has been hardly any exchange of material or views between members of the committee."¹⁰ It is not surprising, therefore, that the principles proved to be controversial.

Eight principles, with a brief comment on each, were listed in the Statement. They reveal an attempt to reconcile two opposing views of the law. On the one hand, Principle III provided that "in general, the maxim *sic utere tuo* should be followed by riparian States in all matters concerning the use of the waters of an international river by one or several of them," Principle IV that "a State is responsible, under international law, for every act, public or private, affecting the waters of an international river to the injury of another State, which it could have prevented by proper diligence," and Principle VI that "a State, which proposes new work . . . or change of previously existing use of the water which might injuriously affect another State, must first obtain the consent of the other State, which consent shall not (under means of redress to be supplied) be unreasonably withheld." On the other hand, Principle V stated that "in accordance with the general principle stated in No. III above, the States upon an international river should in reaching agreements, and States or tribunals in settling disputes, weigh the benefit to one State against the injury done to another through a particular use of the water. For this purpose, the following factors, among others, should be taken into account: (a) The right of each to a reasonable use of the water. (b) . . . dependence of each State upon the waters . . . (c) The comparative social and economic gains accruing to each and to the entire river community. (d) Pre-existent agreements . . . (e) Pre-existent appropriation of water by one State."

On the face of it, these principles appear to be inconsistent with each other; they juxtapose the "no harm principle" and the principle of "equitable utilization." The authors of the statement, however, seem not to have found any such inconsistency, given Principle V which stated that "this is an effort to make understandable the doctrine of equitable apportionment to which it refers. It is not enough merely to assert *sic utere tuo* or 'equitable apportionment'; some guides must be provided for balancing benefits against injuries. It is impossible to establish a scale of priorities, for they vary with the situation, but these factors should help to establish priorities in each case. It is not intended to exclude others such, perhaps, as refusing agreement under No. VI."

In the light of this comment, one might conclude that in its first report the Committee considered that the no harm rule ultimately had to yield first place in international water law to equitable apportionment. As

10. *Id.* at 216.

for the notion of territorial sovereignty, it was passed over in silence, its rejection being thus signaled.

If it were the intention to make equitable apportionment the dominant rule, that intention was expressed in a manner that was bound to lead to controversy. On seeing the Report of the Committee, Mr. Sikri immediately prepared a document strongly criticizing the statement of principles, in particular the concept of *sic utere tuo* which he thought was "mere verbiage." This sally provoked a lengthy response by some members of the committee established by the American Branch of the ILA to study and comment on the First Report of the Rivers Committee; the group included Professor R. R. Baxter and Mr. Laylin, both members of the Rivers Committee. Their response vigorously defended the principles in the Report.¹¹

The debate started by Mr. Sikri's comments and the response of members of the American Branch was continued in the sessions at the Dubrovnik Conference. The result was a resolution adopting a set of principles that for the most part incorporated those proposed by the Committee in its First Report, but in two important respects were different.¹² Principle III of the Report, making the *sic utere tuo* applicable, was replaced with the following wording: "While each State has sovereign control over the international rivers within its own boundaries, the State must exercise this control with due consideration for its effects upon other riparian States." This formulation removed one bone of contention and made Principle III compatible with the principle of equitable apportionment. Principle IV, however, which in substance embodied the no harm rule, was retained with only one minor change; the words "proper diligence" were replaced with "reasonable diligence."

The more substantial change was made to Principle VI. Instead of its requiring the consent of the state that might be injuriously affected by a utilization of the waters of an international river, it merely called for consultation with that state. The decision to reject any reference to consent was wise, for a consent rule in effect would allow a state to veto proposed utilizations of water by a co-basin state and thus would be quite inconsistent with the principle of equitable utilization. It is true that the consent rule as proposed in the Committee's Report was qualified by the statement that the consent could not be unreasonably withheld, but this qualification had no legal effect in the absence of any obligation on a state under customary international law to submit a dispute to third-party determination.

11. Copies of these documents, dated May 22, 1956 and August 5, 1956 respectively were printed by the ILA and circulated at the Dubrovnik Conference.

12. DUBROVNIK REPORT, *supra* note 8, at x-xii, 241-43.

The rejection of the consent rule at Dubrovnik was in accordance with the opinion expressed in the *Lake Lanoux Case*; the tribunal there stated that "the rule according to which States may utilize the hydraulic force of international watercourses only on condition of a prior agreement between the interested States, cannot be established either as a custom, or even less as a general principle of law."¹³

After Dubrovnik, the Rivers Committee continued its work and submitted the results to the 1958 ILA New York Conference in its Second Report.¹⁴ This report set out a list of "Principles of Law and Recommendations," consisting of four parts which together contained 43 sections. For the most part, these principles and recommendations merely elaborated those adopted at Dubrovnik; for example, Part III, section 3, restated the equitable utilization principle in clearer language. Part III, section 9, however, removed any ambiguity about the priority of existing uses, section 9 was worded as follows: "Existing treaties and . . . customary uses having the force of law respecting the uses of waters shall not be disturbed unilaterally. Vested rights in the use of waters may not be divested except: (1) upon agreement, (2) by an arbitration tribunal, (3) by a judicial tribunal, and in every case upon the payment or delivery of just compensation in some form."¹⁵

The Second Report of the Committee was not its last word on the subject at New York. Professor Knauth had foreseen this, commenting in the Report that "in the present state of national rivalries and political jealousies, it is not to be hoped that there could be a sort of declaration of a Human Rights to the present benefit of water."¹⁶ In fact, national rivalries and political jealousies were very evident at New York. When the Committee met during the Conference, it soon became clear that the Report did not have the support of many of its members. As a result of the discussion in the Committee and at the first working session of the Conference, the Committee submitted a new report, entitled the Third Report, to the Conference. This Report was a brief document setting forth a "Statement of some principles of International Law Governing, and Recommendations Respecting, the Uses of the Waters of Drainage Basins within the Territories of two or more States, as to which the Members of the Committee present . . . have reached *unanimous agreement*."¹⁷ This

13. *Lake Lanoux Case* (Fr.-Spain), 53 AM. J. INT'L LAW 165 (1959) (Award of Nov. 16, 1957).

14. NEW YORK REPORT-1958, *supra* note 4, at 72. This report was prepared by Professor Arnold Knauth of New York, who replaced Professor Eagleton after Eagleton's death in January 1958.

15. *Id.* at 90.

16. *Id.* at 96.

17. *Id.* at 99-102 (emphasis added).

Statement of principles and recommendations was adopted by the Conference.¹⁸

There were four principles of law and ten recommendations in the Statement. Principle 2 merely reworded the earlier version of equitable utilization without any change of substance. Principle 3, on the other hand, modified the earlier provision about existing uses, eliminating the references to "customary uses having the force of law" and to "vested rights"; instead, it provided that "co-riparian States are under a duty to respect the legal rights of each co-riparian State in the drainage basin."

This formulation of Principle 3, however, cannot be taken to give an existing use absolute protection against a subsequent use that is lawful under the principle of equitable utilization, even if the existing use in question is deemed to have the status of a "legal right." This may be deduced from the wording of the first agreed recommendation of the Third Report which provided that "co-riparian States should refrain from unilateral acts or omissions that affect adversely the legal rights of a co-riparian State . . . so long as such co-riparian State is willing to resolve differences as to their legal rights within a reasonable time by consultation"; if consultation did not resolve a difference, the recommendation continued, "the parties should seek a solution in accordance with the principles and procedures . . . set out in the Charter of the United Nations and the procedures envisaged in Article 33 thereof."¹⁹ Since Article 33 of the Charter does not provide for compulsory settlement of disputes, the Committee's Third Report clearly contemplated that a basin state, acting within the limits of its rights under equitable utilization, could take unilateral acts adversely affecting the existing uses of a co-basin state if a dispute were not settled within a reasonable time.

The debate about the priority of existing uses was in truth whether a state that has established uses of the waters of a drainage basin, has thus acquired the right to veto subsequent uses by a co-basin state. That this was the issue was recognized explicitly in some of the discussion at the working sessions at New York. The observations of Mr. W. L. Griffin, of the State Department of the United States, are in point: "I am sure that anyone who has studied this matter would admit that there is no rule of law giving such a veto. In its final report the Committee has improved its drafting on this point by making it clear that a co-riparian would be under a duty to refrain from its proposed change only so long as the objecting State is willing to consult or submit the validity of its objection to third party process. This principle does not call

18. *Id.* at viii.

19. *Id.* at 100.

for compulsory arbitration nor give a right of veto; . . . Unfortunately, this procedural principle . . . is now relegated to the status of a recommendation."²⁰ Professor Myres McDougal, speaking of the draft articles proposed by the Committee in its Second Report, said that "no single State should be accorded a permanent veto over development in the common interest. Your restatement of principles falls far short, however, of removing this veto."²¹

The Committee's deliberations at the New York Conference, therefore, marked an important step forward in the definition of the relationship of equitable utilization and existing uses. The debate about whether existing uses had absolute protection under the law or were subject to the equitable utilization principle, had ended in favor of the latter.

After the 1958 Conference, the Rivers Committee focused its attention on other aspects of international water resources law. Its report to the ILA Hamburg Conference in 1960 dealt with procedural issues and with pollution, and its report to the Brussels Conference in 1962 with the settlement of disputes. Meanwhile, studies on navigation and timber floating were in progress. There was, however, still some unease within the Committee about the New York statement of the principle of equitable utilization. This was evident in the resolution adopted by the 1964 Tokyo Conference, stating that the Conference accepted "provisionally, subject to any changes that may be necessitated by the chapter on the equitable sharing of uses, the text and commentary of the chapters contained in the 1964 report of the Committee" and recommended that the Committee continue "its studies, particularly on the subject of the equitable sharing of uses"²²

Professor Cecil Olmstead, the chairman of the Committee, made several attempts to draft articles on equitable utilization that would be acceptable to its members. He did so in a memorandum to members dated 23 July 1963 "to spell out in some detail the international law rules of the doctrine of equitable apportionment," and again in a memorandum of March 1964 containing revised articles with commentary on the subject.²³ Several members of the Committee rejected these articles, mainly on the ground that they departed from the New York principles by giving a certain priority to existing uses. In other words, the old debate on the relationship between existing uses and equitable utilization

20. *Id.* at 44.

21. *Id.* at 43.

22. INTERNATIONAL LAW ASS'N, REPORT OF THE FIFTY-FIRST CONFERENCE, Tokyo, 1964, at xxx [hereinafter TOKYO CONFERENCE].

23. Memoranda from Professor Cecil Olmstead to members of the ILA's Rivers Committee (July 23, 1963 & March, 1964).

seemed about to be revived. Since the Rivers Committee was to present its final report to the ILA Helsinki Conference in August 1966, this issue had to be settled before that time.

The Committee tackled the problem during a meeting at Harvard Law School from 9-12 September 1965. There Professor Olmstead, with the aid of Mr. Jerome Lipper of New York, presented the Committee with a new set of articles and commentary. Again some members found the articles to be unsatisfactory. After much debate, in the course of which various changes were proposed, a sub-committee was established to produce a set of articles on equitable utilization taking into account the tenor of the discussion.

The articles drafted by the sub-committee were approved by the full Committee and, subsequently, along with commentary, were included almost verbatim in the Report of the Committee to the 1966 Helsinki Conference. All of the articles in that Report were adopted by the Conference, which specified that they would be known henceforth as the 1966 Helsinki Rules.²⁴

For present purposes, Articles IV, V, and VIII of the Helsinki Rules are the most relevant. Article IV provides that "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." By Article V(1), this share "is to be determined in the light of all the relevant factors in each particular case." Article V(2) lists eleven factors as examples of what is relevant, one of which is "(d) the past utilization of the waters of the basin, including in particular existing utilization." Article V(3) provides that "the weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors" The subordinate status of existing uses is further emphasized by Article VIII(1), which provides that "an existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible use."

These articles, therefore, make it abundantly clear that, for the ILA, the principle of equitable utilization of the waters of an international drainage basin is the dominant theory of law. Article IV, it is said in the commentary on it, "reflects the key principle of international law in this area" And the commentaries on Articles V and VIII strongly support this view. For example, in the commentary on Article V, one finds these statements: "In short, no factor has a fixed weight . . . And no factor occupies a position of preeminence per se with respect to any other factor An existing reasonable use is entitled to significant weight as a

24. HELSINKI RULES, *supra* note 2, at 477, 484-94.

factor and . . . consideration must be given to protecting it. However, it is but one factor A careful analysis shows that, despite the usual desirability of protecting existing reasonable uses, the competing factors indicate that some modification of the existing use is called for." And in the commentary on Article VIII, the Rivers Committee drew the conclusion that "the rule stated in this Article reflects the current international attitude in this matter—a middle ground between the two extremes," the extremes being the theory of prior appropriation and that of territorial sovereignty.²⁵

2. Pollution

Pollution of water resulting from the use of rivers as sewers had long been recognized as a health hazard; by the 1950s, it was generally recognized that this pollution would grow worse with the rapid increase in population and in industrial activity. It was inevitable, therefore, that the Rivers Committee concerned itself with the legal aspects of the matter.

The Committee's first step in dealing with the subject was taken in its First Report to the 1956 Dubrovnik Conference. Principle VII of that Report's proposed statement of principles upon which to base the rules of law concerning the use of international rivers provided that "preventable pollution of water in one State which does substantial injury to another State renders the former State responsible for the damage done."²⁶ This principle was little noticed in the discussion at Dubrovnik; nevertheless, it appeared unchanged in the revised statement of principles adopted by the Conference.

The commentary on Principle VII stated "It is believed that the above principle would be generally acceptable" This statement, however, proved to be too optimistic; in the minutes of a meeting of the Rivers Committee at Geneva from 14-16 October 1957 where the Dubrovnik principles were considered in detail, there is only a short paragraph on pollution: "On the morning of October 16, there was further discussion among those who remained. Pollution was found to be a more difficult problem than is usually thought"²⁷

25. It should be emphasized that the commentaries to the Articles in the Helsinki Rules were not approved by the Conference. In its report to the Conference, the Committee requested that no action be taken, saying that "most of the commentary reflects the consensus of the Committee . . . but . . . not all members necessarily agree with each comment." *See id.* at 483.

26. DUBROVNIK REPORT, *supra* note 8, at 247.

27. Minutes from the meeting of the ILA's River Committee at Geneva, Switzerland (Oct. 14-16, 1957) (unpublished).

Notwithstanding this warning sign, the Second Report of the Committee submitted to the 1958 New York Conference contained the following proposed principle of law: "A riparian is under a duty not to increase the level of pollution of a system of 'international' waters to the detriment of a co-riparian."²⁸ As seen above, the principles of law proposed in the Second Report did not survive the scrutiny of the Committee or of the Conference at New York. In its Third Report to the Conference, the Committee included on its list of agreed recommendations the following: "8. Co-riparians should take immediate action to prevent further pollution and should study and put into effect all practicable means of reducing to a less harmful degree present uses which lead to pollution."²⁹ This provision was included in the resolution adopted by the Conference.

After the New York Conference, the Rivers Committee tried to formulate more precisely various aspects of the law governing the waters of an international drainage basin. For this purpose, it set up a number of working groups to undertake the necessary studies, among them a group on pollution under the chairmanship of Mr. K. W. Cuperus. This group, however, made little progress by the 1960 Hamburg Conference, and, on the recommendation of the Committee, the Conference could adopt only the following resolution:

1. For the control of water pollution in accordance with New York Recommendation 8, pollution-control commissions should be set up for each separate basin by agreement among the co-riparian States of that basin.
2. To define the scope and responsibilities of pollution-control commissions for a drainage basin, preliminary studies should be made by the appropriate agencies dealing with the control and abatement of water pollution.³⁰

Like the New York provision on pollution, this statement was a mere recommendation. Moreover, it was procedural rather than substantive in nature.

The Report of the Rivers Committee to the 1962 Brussels Conference was quite different. In it the Committee proposed for adoption three articles containing legal rules on water pollution.³¹ Article I defined water pollution as referring "to any artificial and

28. NEW YORK REPORT-1958, *supra* note 4, at 89.

29. *Id.*

30. INTERNATIONAL LAW ASS'N, REPORT OF THE FORTY-NINTH CONFERENCE, Hamburg, 1960, at xvi, xviii [hereinafter HAMBURG REPORT].

31. INTERNATIONAL LAW ASS'N, REPORT OF THE FIFTIETH CONFERENCE, Brussels, 1962, at 471-77 [hereinafter BRUSSELS REPORT].

detrimental change in the natural composition, content, or quality of the waters of a drainage basin." Article II, as redrafted by the Committee during the Conference, provided as follows:

1. Except as may be otherwise provided by convention, agreement or binding custom, a State is under a duty:
 - (a) to prevent any new form of water pollution or any increase in the degree of water pollution in a drainage basin which would cause substantial injury in the territory of another riparian State, and
 - (b) to take all reasonable measures to abate existing water pollution in a drainage basin to such an extent that no substantial injury is caused in the territory of another riparian State.

Article III required that a state that violated Article II abate the pollution and to pay appropriate compensation for the injury, except when abatement "would cause a manifestly unjust result to the responsible State"; in that case, relief would be limited to compensation for past and future injury. The Brussels Conference adopted a resolution in which it expressed its "tentative approval of the substance" of these articles.

In fact, the substance of these articles was exactly the same as that in Principle VII proposed in the Committee's Report to the Dubrovnik Conference in 1956. The debates leading to the adoption of the New York Principles which emphasized the primacy of equitable utilization seem to have been forgotten; protection against pollution of international waters was treated as having absolute priority.

The portion of the Committee's Report dealing with pollution which was considered at Brussels was prepared by Professor Olmstead. In the commentary to Article II, he supported the rule of international law proposed there by referring to the Trail Smelter Arbitration between Canada and the United States, to treaties, and to a passage from volume I of Lauterpacht, Oppenheim's International Law.³² Notwithstanding the weakness of the Trail Smelter Arbitration as an authority on the uses of water, Professor Olmstead's invocation of it was not unusual. But the use of the late Professor Lauterpacht's statement in 1962 as authoritative on a point of international water law was astonishing, given that the statement expressed, in an extreme form, the old riparian rights view of the law: "[A] State is not only forbidden to stop or divert the flow of a river . . . , but likewise to make such use of the water . . . as either causes danger to the neighboring State or prevents it from making proper use of the flow"³³ This view of the law was diametrically opposed to

32. *Id.* at 473-74.

33. Lassa Oppenheim, *INTERNATIONAL LAW* 475 (Sir Hersch Lauterpacht ed., 8th ed.

the 1958 New York principles endorsing equitable utilization.

In the interval between the Brussels Conference of the ILA and its Tokyo Conference in 1964, the Rivers Committee reconsidered the Articles on pollution adopted at Brussels and, as a result, revised them substantially. It made two changes in the wording of Article II, paragraph 1. First, the principle of equitable utilization was added to the exceptions in the opening clause, which then read: "Except as may be otherwise provided by convention, agreement or binding custom, consistent with the principle of equitable utilization of the waters of an international drainage basin, a State (a) must prevent any new form of pollution. . . ." And, second, in sub-paragraph (b) of Article II, the duty to take all reasonable measures to abate existing pollution became a "should take. . ."³⁴ These revisions were not made easily; as Professor Olmstead stated in his Report to the Tokyo Conference, "the Committee has had most difficulty with the subject of pollution."³⁵

The text of the revised Articles with commentary thereon were accepted provisionally by the Tokyo Conference. On their face the Articles made pollution of the waters of an international drainage basin subject to the rule of equitable utilization. This intention was clear from the statements of Professor Olmstead in the commentary on the Articles:

Thus, uses of the waters by a riparian State that cause pollution resulting in injury in a co-riparian State must be considered from the overall perspective of what constitutes an equitable utilization . . . Certainly, a diversion of water that denies a co-riparian State an equitable share [of uses] is in violation of international law. A use that causes pollution to the extent of depriving a co-riparian State of an equitable share stands on the same basis. By parallel reasoning, a State that engages in a use or uses causing pollution is not required to take measures with respect to such pollution that would deprive it of equitable utilization.³⁶

Such pollution may well interfere with an equitable sharing in the uses of the waters of the drainage basin . . . A general rule of abatement might result in undue hardship. In some cases the detriment to the responsible State would be out of all proportion to the benefit to be derived by the injured State.³⁷

1955).

34. For the text and commentaries on the revised Articles, see TOKYO REPORT, *supra* note 22, at 175-86.

35. *Id.* at 165, 132.

36. *Id.* at 179.

37. *Id.* at 184.

The adoption of the Articles on pollution at the Tokyo Conference ended the Rivers Committee's work on pollution. Thereafter, only minor editorial polishing was done and the Articles went forward in the Committee's Report to the Helsinki Conference. They now appear in the Helsinki Rules as Articles IX, X, and XI.³⁸

3. Navigation

The Rivers Committee was authorized by resolution of the 1956 Dubrovnik Conference to widen the scope of its work to include all uses of the waters of international rivers, including navigation. The Committee thereupon appointed Dr. H. Fortuin of The Netherlands as rapporteur on the subject of navigation.

By the 1960 Hamburg Conference, Dr. Fortuin had presented the Committee with two reports, but no action was taken on them at this conference as they had not been circulated to ILA members beforehand. At the 1962 Brussels Conference, however, the Committee included in its Report a chapter prepared by Dr. Fortuin in which he proposed ten articles with commentary on navigational uses.³⁹ The essential principle of these articles was a riparian state's right of freedom of navigation of the entire course of an international river, except for its vessels of war or vessels performing police or administrative functions.⁴⁰ Freedom of cabotage was preserved.⁴¹ The substance of these proposed Articles was tentatively approved by the Conference.

In the discussion in the Committee and at the Brussels Conference, it was not seriously questioned that a riparian's right to free navigation existed in customary international law. There was some argument, however, about whether the right of freedom of navigation of an international river extended to the ships of all states.⁴² Dr. Fortuin took the view that non-riparian states did not have this right, but he thought that they should have it and had proposed an article stating that "a river may be opened to navigation by vessels flying the flag of a non-riparian State by treaty or other international instrument."⁴³ While it was generally agreed that non-riparian states should be given this right, the prevailing view was that it was not then part of international law.

The Brussels Articles on navigation, virtually unchanged in

38. HELSINKI RULES, *supra* note 2, at 494-505.

39. BRUSSELS REPORT, *supra* note 31, at 453-69.

40. *Id.* at arts. II, IX.

41. *Id.* at art. V.

42. *Id.* at 403-07, 411-12.

43. *Id.* at art. VI.

substance, were adopted by the ILA at Tokyo and then at Helsinki. The provision of Article VI concerning free navigation for non-riparians was retained; it appears in Article XVII of the Helsinki Rules.⁴⁴ But Article VIII was dropped; it had "recommended that riparian States take measures on a co-operative basis to place a river in such condition as will enable it to meet the expanding needs of navigation."⁴⁵

In the past, the right to use an international river for navigation was thought by some to have priority over other uses. In recent times, however, the supporters of the supremacy of the principle of equitable utilization contend, as they do in the case of other existing uses, that navigation is only one factor among many that must be taken into account in applying this principle. What then is the relationship between navigation and the principle of equitable utilization in the 1966 Helsinki Rules?

The first indication of a subordinate role for navigation is found in the Article II of the draft articles on navigation presented by the Rivers Committee to the Brussels Conference in 1962; while this article conferred upon each riparian state the right of free navigation, it qualified this right with the words "subject to any limitation or qualification referred to in this chapter."⁴⁶ Nothing in this provision imposed limits on free navigation arising outside the chapter. But when the Articles on navigation were laid before the 1964 Tokyo Conference, the words of Article II quoted above were changed to "subject to any limitations or qualifications referred to in these Chapters,"⁴⁷ and they appear in this form in Article XIII of the Helsinki Rules.⁴⁸

Chapter 4 on navigation is but one among the six chapters of the Helsinki Rules. Thus, the right of free navigation is subject to any limitations or qualification in the other chapters.⁴⁹ It may be argued, therefore, that this right is subject to the provisions of chapter 2 of the Helsinki Rules on equitable utilization. It is true that the qualifying words in chapter 4 on navigation are not as explicit as those in the chapter in the Helsinki Rules on pollution, namely "consistent with the principle of equitable utilization of the waters of an international drainage basin." Nevertheless, it is clear that the Rivers Committee intended the two formulations to have the same effect. In the discussion on the Articles on navigation at the working session at the Tokyo Conference, Professor Olmstead stated that "as a preliminary conclusion, the Committee's view

44. HELSINKI RULES, *supra* note 2.

45. BRUSSELS REPORT, *supra* note 31, at 466.

46. *Id.* at 456.

47. TOKYO REPORT, *supra* note 22, at 167.

48. HELSINKI RULES, *supra* note 2, at art. XIII.

49. *Id.*

is that no use is an absolute one, but that any use must be consistent with the principle of equitable sharing. . . .⁵⁰ Moreover, in the commentary to Article XIII of the Helsinki Rules, it is stated that "the principle of free navigation . . . does not assure navigation any priority over conflicting non-navigational uses," and the same point was made in the commentary to Article XVII.⁵¹

4. Timber floating

The use of rivers for timber floating is important for forested areas, but as Dr. E. J. Manner of Finland, the Rivers Committee's rapporteur on the subject, said in introducing discussion of his draft Articles on timber floating at the 1964 ILA Conference at Tokyo, "I know that floating of timber will not be one of the main points of interest here."⁵² In fact, the Articles provoked little discussion at Tokyo and were largely ignored at the 1966 Helsinki Conference where they were adopted.

The reason for this lack of interest was simply that the Articles were not controversial. In particular, they consisted only of recommendations and thus did not threaten states with new legal obligations. This accorded with Dr. Manner's view that "there are . . . no generally accepted rules of international law regulating the floating of timber. . . ."⁵³ Moreover, Dr. Manner admitted that if the use of a river for timber floating were in conflict with another use of that river, it would have no automatic priority; the conflict would be resolved by the application of the principle of equitable utilization.⁵⁴ The treatment of existing uses, therefore, was not in issue in the discussion of timber floating.

C. Procedural Rules

Substantive rules of international law play an important role in decisions about the utilization of the waters of an international drainage basin, for a state's notions about its rights will often influence its actions decisively. In the avoidance and settlement of disputes about the utilization of these waters, however, procedural rules are, in practice,

50. TOKYO REPORT, *supra* note 22, at 119-20.

51. HELSINKI RULES, *supra* note 2, at 507, 509.

52. TOKYO REPORT, *supra* note 22, at 129. For text of the Articles adopted at Helsinki, see HELSINKI RULES, *supra* note 2, at 513-16.

53. TOKYO REPORT, *supra* note 22, at 170; see also INTERNATIONAL LAW ASS'N, REPORT OF THE FIFTY-SECOND CONFERENCE, Helsinki, 1966, at 513-14 [hereinafter HELSINKI RULES].

54. TOKYO REPORT, *supra* note 22, at 172; see also HELSINKI RULES, *supra* note 53, at 515.

more important than substantive law; this is indicated by the fact that nearly all of these disputes are settled by agreements.

The Rivers Committee recognized this fact and concerned itself with procedural rules from the beginning. In its Report to the ILA Dubrovnik Conference in 1956, it proposed the ultimate procedural rule, namely the requirement of the consent of a co-basin state that might be injuriously affected by a change in the use of the waters. The Conference, however, replaced the consent rule with the provision that a state proposing such a change of use "must first consult with the other state" and, if that did not result in agreement, the concerned states "should seek the advice of a technical commission," and, if still no agreement were reached, "resort should be had to arbitration."⁵⁵

In the resolution adopted by the 1958 New York Conference, procedural rules were more extensively stated. Reference was made not only to consultation, technical commissions, and arbitration, but also to the assembling, exchange, and dissemination of information concerning drainage basins, and to permanent or ad hoc agencies for the continuous study for all problems of the use of the waters of these basins. There was also an omnibus clause stating that disputing basin states "should seek a solution in accordance with the principles and procedures . . . set out in the Charter of the United Nations and the procedures envisaged in Article 33 thereof."⁵⁶ All of these procedures, however, were mere recommendations.

The next stage in this evolution was the ILA's adoption in 1960 by the ILA of the "Hamburg Recommendations on Procedure Concerning Non-Navigational Uses."⁵⁷ Far from being a refinement of the New York recommendations, this document retreated from them by mentioning only consultation, then resort to an ad hoc commission, and finally arbitration. Under the leadership of Professor R. R. Baxter of Harvard Law School, the co-chairman of the Committee and rapporteur for this topic, the Committee presented to the 1962 Brussels Conference a draft chapter concerning the settlement of disputes, and its substance was tentatively approved by the Conference.

The chapter drafted by Professor Baxter consisted of 12 articles with commentary and an annex.⁵⁸ Article II provided that "consistently with the Charter of the United Nations, States are under an obligation to settle international disputes as to their legal rights or other interests by

55. DUBROVNIK REPORT, *supra* note 8, at 242. For the Committee's proposal, see *id.* at 247.

56. INTERNATIONAL LAW ASS'N, REPORT OF THE FORTY-EIGHTH CONFERENCE, New York, 1958, at 18 [hereinafter NEW YORK REPORT-1958].

57. HAMBURG REPORT, *supra* note 30, at xvi-xviii.

58. BRUSSELS REPORT, *supra* note 31, at 429-43.

peaceful means," and Article III provided that states are under a primary obligation to resort to means of settlement stipulated in treaties binding on them. These were statements of the obvious, adding nothing new to the obligations of basin states, yet they were the only articles to assert the existence of a legal obligation. The other Articles of the chapter merely recommended certain procedures for settling disputes.

These procedures, briefly outlined, were: exchanging information followed by negotiation; establishing joint agencies "for the purpose of surveying" the river system and "of formulating plans or recommendations for the fullest and most efficient use thereof"; good offices or mediation of a third state or qualified international organization; ad hoc conciliation commissions constituted in accordance with the provisions of the attached annex; submission to arbitration or to the International Court of Justice.⁵⁹

The Brussels chapter on procedures for settling disputes about the waters of international rivers, with a few changes that were mostly minor, was accepted provisionally by the 1994 Tokyo Conference.⁶⁰ The title of the chapter was changed so that it applied to prevention as well as to settlement of disputes. Two changes, however, were significant. First, the recommendation on the exchange of information was qualified by the words "relevant and reasonably available." Second was the recommendation that a state proposing to undertake a work that may substantially affect the interests of a co-basin state should give this other state notice of that work with the essential facts concerning it and then allow that state a reasonable period of time to assess the impact of the work on it.⁶¹ It was then provided that "if a State has failed to give the notice referred to . . . , the alteration by the State in the regime of the drainage basin shall not be given the weight normally accorded to temporal priority in use in the event of a determination of what is a reasonable and equitable share of the waters of the basin."⁶² This sanction, though mild, is noteworthy, for it mandates a penalty for the breach of a recommendation.⁶³

The Rivers Committee made no further changes to the substance of the chapter on the prevention and settlement of disputes after the Tokyo Conference. Before presenting the chapter to the 1966 Helsinki Conference, however, it did make some editorial changes and renu-

59. *Id.*

60. TOKYO REPORT, *supra* note 22, at 187-202.

61. *Id.* at art. IV.

62. *Id.* at art. IV ¶ 4. See also HELSINKI RULES, *supra* note 53, at art. XXIX ¶ 4.

63. For a comment on the effect of a failure to give notice, see Charles B. Bourne, *Procedure in the Development of International Drainage Basins*, 22 U. TORONTO L.J. 172, 190-91 (1972).

bered the Articles to fit them into the comprehensive set of articles that it was submitting to the Conference on the uses of the waters of international rivers.⁶⁴

While the procedures provided for in Chapter 6 of the Helsinki Rules are merely recommended, a mandatory procedural rule is found in Article XI, paragraph 2. This paragraph provides that if a state fails to take reasonable measures to abate existing pollution, it "shall be required promptly to enter into negotiations with the injured state with a view toward reaching a settlement equitable under the circumstances."⁶⁵

D. The Drainage Basin Approach

As seen above, the ILA adopted, at its Dubrovnik Conference in 1956, a number of principles as a basis for further study of the law on international rivers. The eighth principle was that "so far as possible, riparian states should join with each other to make full utilization of the waters of a river both from the viewpoint of the river basin as an integrated whole, and from the viewpoint of the widest variety of uses of the water to assure the greatest benefit to all."⁶⁶ In 1958, at the New York Conference, the ILA reaffirmed this principle, stating that the waters of a drainage basin "should be treated as an integrated whole (and not piece-meal)"; it gave the principle first place among the four principles appearing under the heading "Agreed Principles of International Law."⁶⁷

The concept of this principle is undoubtedly sound; the waters of a drainage basin are interdependent and it is clearly not satisfactory to ignore this fact, for example, by excluding tributaries from the regime of international law. By co-operating with each other, co-basin states may make the best use of the waters that they have in common. But the assertion of the unity of an international drainage basin, which is really the basis of the principle, was and still is a doubtful proposition of law. Furthermore, some have criticized the concept on the ground that it is too narrow. It has been argued that, in the light of present social and economic needs and of the capacity of modern technology to link all of the water resources of a state together physically, the co-operation of states should extend to areas beyond the drainage basin. The Helsinki Rules do not oppose this wider concept; factors beyond the drainage

64. These articles now appear as Articles XXVI to XXXVII in chapter 6 of the Helsinki Rules. The model rules for the constitution of the conciliation tribunal provided for in Article XXIII are included in an annex. See HELSINKI RULES, *supra* note 53.

65. HELSINKI RULES, *supra* note 53, at 501.

66. INTERNATIONAL LAW ASS'N, REPORT OF THE FORTY-SEVENTH CONFERENCE, Dubrovnik, 1956, at 242 [hereinafter DUBROVNIK REPORT].

67. NEW YORK REPORT-1958, *supra* note 56, at viii, 99.

basin may be relevant and, therefore, should be taken into account in determining a state's reasonable and equitable share of the beneficial uses of the waters of the basin.⁶⁸

Professor Knauth had made a brief reference to "the idea of the river basin as an 'integrated whole'" at a meeting of the Rivers Committee in May 1959. Professor Andrassy of Yugoslavia, at a working session at the 1960 Hamburg Conference, had also referred to this idea, saying that "New York Principle I is not a principle of international law, or, at least, it is not . . . unanimously accepted . . . not recognized as such in theory and has not been followed in state practice."⁶⁹ The principle was not discussed again by the Committee or at subsequent ILA conferences including that of 1966 at Helsinki. But the idea was not completely forgotten. Traces of the principle may be found in the Articles of the Helsinki Rules dealing with procedures, particularly Article XXIX on the exchange of information "concerning the waters of a drainage basin within its territory" and Article XXXI on the reference of disputes to joint agencies; the provisions of these two articles, however, are only recommendations. The principle is mentioned in the commentary on Article II of the Helsinki Rules where it is stated that "the drainage basin is an indivisible hydrologic unit which requires comprehensive consideration," and that "the drainage basin approach has become a necessity."⁷⁰ It should be recalled, however, that the commentaries on the Helsinki Rules have not been approved by the ILA.

E. Diversion of Waters

The Helsinki Rules do not explicitly refer to diversion of the waters of international rivers from their natural watercourses, but they implicitly recognize that this diversion will be lawful if it is a reasonable and equitable use by a state. Article V requires all relevant factors to be taken into account in the application of the principle of equitable utilization. The diversion of water for needed irrigation is clearly one of those factors; the commentary to Article IV indicates that this is so, for there the point is made that a use "must be economically or socially valuable, as opposed, for example, to a diversion of waters by one State

68. For a full description on the ILA's work on the "integrated whole" approach, see Charles B. Bourne, *The Development of International Water Resources: The "Drainage Basin Approach"*, 63 CAN. BAR REV. 62 (1969). For criticism of the drainage basin approach, see in particular *id.* at 80-87. This criticism was voiced at the working session on the report of the Rivers Committee at the 1958 New York Conference. See New York Report-1958, *supra* note 56, at 57.

69. HAMBURG REPORT, *supra* note 30, at 38. For Professor Andrassy's view of New York Principle I, see 48 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 164-68 (1959).

70. HELSINKI RULES, *supra* note 53, at 485.

merely for the purpose of harassing another."⁷¹

The Helsinki Rules, then, may be invoked to support the legality of a diversion of water from one place to another within the drainage basin. What is the law concerning diversions of waters outside their drainage basin? The drafters of the Helsinki Rules did not explicitly address this question, but it may be argued that the Rules do support the legality of these diversions so long as they are considered to be "relevant factors" in the determination of a state's share of the beneficial uses of the waters of the basin.

In the discussion at the working sessions considering the proposed draft Rules at the Helsinki Conference, the matter of extra-basin diversions was raised. For example, Dr. Gamal M. Badr of Algeria spoke of "the illegal character of the diversion of waters beyond the geographical limits of a drainage basin"; he thought this proposition implicit in the draft but called for the inclusion of an explicit statement of the illegality of such a diversion.⁷² On the other hand, Dr. H. Zurbrugg of Switzerland strongly disputed Dr. Badr's assertion of illegality, citing several examples of these diversions. He argued that whether a diversion is illegal or not "is mainly a question of measure, of equitable utilization" as provided for in Article V of the Helsinki Rules.⁷³ For him, then, the Helsinki Rules apply to diversions of every nature. There the discussion ended.

III. THE COMMITTEE ON INTERNATIONAL WATER RESOURCES LAW, 1966-86

At the final working session on the use of the waters of international rivers at the 1966 Helsinki Conference, Dr. E. J. Manner of Finland, stated that much work on the subject remained to be done, a view shared by other members of the Rivers Committee. He therefore urged that the Conference should recommend to the Executive Council that it should establish a new committee to continue this work.⁷⁴ In its resolution, the Conference adopted this suggestion and asked the Executive Council to "instruct the newly constituted Committee to carry on a program of codification and study of certain selected aspects of water resources law," and it gave examples of these aspects.⁷⁵ As a result, the Executive

71. *Id.* at 447.

72. *Id.* at 448.

73. *Id.* at 461. For a statement by Charles Bourne of Canada in support of diversion beyond the geographical limits of a drainage basin made at the 1958 New York Conference, see NEW YORK REPORT-1958, *supra* note 56, at 56-57.

74. HELSINKI RULES, *supra* note 53, at 465-66.

75. *Id.* at xi, 476.

Council established the new Committee on International Water Resources Law in November 1966, with Dr. J. E. Manner as chairman.

At the end of its tenure, the Rivers Committee had 40 members. The new committee (hereafter called the Manner Committee) at its outset was composed of 41 members, about half of them having served on the former committee. The continuing members had consistently participated in the work that had resulted in the Helsinki Rules and they proved to be the most active in the work of the new Committee. Consequently, the approach of the Manner Committee to international water resources law was identical with that of the Rivers Committee. Furthermore, the Helsinki Rules were regarded as being essentially sound and not to be trifled with; the object of the new work was merely to elaborate these Rules and to fill any gaps left by them. This is evident from the record of the Committee's work during the 20 years of its existence.

In due course, the Manner Committee, basing its work on the reports of the sub-groups that it established to study various aspects of international water resources law, submitted draft articles for consideration at the biennial conferences of the ILA. In all cases, the articles were adopted by the ILA.⁷⁶ The evolution and substance of the articles on each topic are considered below.

A. Flood Control

The sub-group on flood control was chaired by Professor Berber. He regarded the subject to be of great practical importance and, as the report of the Committee to the 1972 ILA New York Conference shows, he made an extensive and thorough study of it.⁷⁷ He first found that "it is doubtful whether customary international law contains any specific rule at all about flood control. The same is true of general principles of law; if they exist at all . . . , they are so vague that they are incapable of immediate application, as, e.g., the general principle of good neighborliness which is a general guide-line for all international water problems."⁷⁸ And so he sought guidance from relevant treaties, canvassing them widely.

His studies, however, were not very fruitful. His ultimate conclusion was that it was not possible "to propose uniform detailed

76. These Draft Articles with commentaries are collected in FINNISH BRANCH OF THE INTERNATIONAL LAW ASSOCIATION, *THE WORK OF THE INTERNATIONAL LAW ASSOCIATION ON THE LAW OF INTERNATIONAL WATER RESOURCES* (E. J. Manner & Veli-Martti Metsalampi eds., 1988) [hereinafter *INTERNATIONAL WATER RESOURCES*].

77. See INTERNATIONAL LAW ASS'N, *REPORT OF THE FIFTY-FIFTH CONFERENCE*, New York, 1972, at 43-97 [hereinafter *NEW YORK REPORT-1972*].

78. *Id.* at 45.

regulations for all countries and all river basins" because "the diversity of conditions in different river basins is very great."⁷⁹ Nevertheless, he was able to prepare a set of Draft Articles on flood control which, after refinement in the light of discussion in the full Committee, were ultimately adopted by the ILA.

Article 2 is noteworthy. It provides that "Basin States shall co-operate in measures of flood control in a spirit of good neighborliness, having due regard to their interests and well-being as co-basin States." This is the first assertion by the ILA that international law imposes a duty on basin states to co-operate. It may be argued that this duty is implicit in the procedures outlined in the Helsinki Rules, but those procedures are not mandatory. There was a difference of opinion in the Manner Committee about the use of "shall" rather than "should"; the majority view was that "Article 2 corresponds to an already existing rule of law."⁸⁰ In any event, the scope of the obligation provided for in Article 2 is rendered uncertain by its concluding words; as Dr. Manner said in dealing with this point while presenting the report of his Committee to the New York Conference, "the practical contents of such an obligation cannot be regarded as specified in any detail by either law or custom."⁸¹

In fact, these draft Articles do not advance the law beyond the principle of equitable utilization adopted in the Helsinki Rules. This may be seen clearly throughout the Articles and the commentaries on them. For example, Article 3 states that "co-operation with respect to flood control may, by agreement between basin States, include among others: . . .," and goes on to list a number of items of a practical nature, beginning with the collection and exchange of relevant data. The commentary on this Article states "that this Article is not self executing, that the topics mentioned do not represent rights or obligations based on customary law or on general principles, but that their translation into existing law requires an express agreement between Governments. . . . [T]he important thing is: no obligation without previous consent."⁸²

Article 7 does impose an obligation on a basin state to pay compensation for damage caused to another basin state by floods if "it has acted contrary to what could be reasonably expected under the circumstances, and . . . the damage caused is substantial."⁸³ This substantive rule of law seems to fall within the ambit of the rule of the reasonable and equitable use of the waters of a drainage basin which echoes the basic principle of the Helsinki Rules.

79. *Id.* at 46.

80. *Id.* at 48.

81. *Id.* at 23.

82. *Id.* at 48.

83. *Id.* at 87-88.

Far from imposing new legal obligations on states causing damage by floods, the draft Articles emphasized the rights of states whose actions may cause floods. Article 5, paragraph 1, provides that "the use of the channel of rivers and lakes for the discharge of excess waters shall be free and not subject to any limitations provided this is not incompatible with the object of flood control"; and paragraph 3 provides that "no basin State shall be prevented from undertaking schemes of drainage, river draining, conservation of soil against erosion and dredging, or from removal of stones, gravel or sand from the beds of its portions of water-courses provided that . . . it avoids any unreasonable interference with the object of flood control, and provided that such schemes are not contrary to any legal restrictions which may exist otherwise." The commentary states that these rules are to be "of practical expediency" and "in consonance with existing international law." The proviso in Article 5, paragraph 3, limits the right to undertake the activities mentioned, to what is reasonable. As for the willful and malicious creation of flood damage in peace time, it undoubtedly is illegal, as recognized in the commentary on Article 7.⁸⁴

Article 6 seems at first glance to create a new obligation on basin states by providing that expenses for the collection and exchange of relevant data, and for studies and other related activities concerning floods "shall be borne jointly by the basin States co-operating in such matters."⁸⁵ The concluding words of the Article, and the general tenor of the Draft Articles as a whole, however, make it clear that there is no new legal rule here; the obligation of a state to pay will arise only when the activities involved are undertaken with the concurrence of that state.

In sum, the draft Articles on flood control do not add any legal substance to the content of the Helsinki Rules. Insofar as they do contain legal rules, these rules are merely restatements of existing law. For the rest, they are valuable guidelines, indicating what is the rational and desirable conduct of co-basin states in the matter of flood control.

B. Pollution

As seen above, the Rivers Committee had considerable difficulty in formulating the rules on pollution now found in Articles IX, X, and XI of the Helsinki Rules; further, it considered these rules to be minimal. It was to be expected, therefore, that pollution would be the first topic placed on the agenda of the Manner Committee.

Two sub-groups of the Committee studied different aspects of the

84. *Id.* at 88.

85. *Id.* at 85.

subject. Their work resulted in the adoption by the ILA of Draft Articles on Marine Pollution of Continental Origin (1972) and on Water Pollution in an International Drainage Basin (1982).

1. Marine Pollution of Continental Origin

The sub-group working on the effects of pollution of the waters in an international drainage basin on the marine environment was led by Mr. K. W. Cuperus of the Netherlands. As a resident of a city at the mouth of the highly polluted Rhine River, he was aware of the urgency of reducing and ultimately halting the flow of polluting substances into the sea, but he was also aware of the depth and complexity of the problem of controlling this pollution from the technical, economic, and political aspects. In approaching the subject, he took a realistic view of the matter, maintaining that the objective of the sub-group should be an ILA statement of rules that would advance the law in a practical way, rather than idealistic rules having little chance of acceptance by the states concerned.

At the outset, the Manner Committee considered the subject of its study as "marine pollution" generally, whether its source was from activities on land or those at sea. It was decided, however, that pollution from the land would be studied first because it largely resulted from the use of the waters of international drainage basins and therefore clearly came within the Committee's terms of reference and expertise. The idea of producing articles on pollution from the sea, however, still persisted in mid-1970,⁸⁶ but it was ultimately abandoned, chiefly because by 1972 the subject was under active investigation by other bodies, in particular the Third United Nations Conference on the Law of the Sea.

The sub-group, indeed the Committee as a whole, initially took the view that any rules proposed by it would come within the framework of the Helsinki Rules; that is to say, equitable utilization would be the guiding principle and the rules would be an elaboration of this principle.⁸⁷ Consequently, in the first draft of Articles on Marine Pollution of Continental Origin prepared by the sub-group and revised in the light of discussion in the Committee, the principal substantive article echoes Article X of the Helsinki Rules, its opening words being "Consistent with the principle of equitable utilization of the waters of contiguous zones and of international drainage basins"⁸⁸ This formula was used until

86. Memorandum from K.W. Cuperus to members of the sub-group on the proceedings of a meeting of the Committee at Rome in March 1970 (unpublished) (on file with the author).

87. NEW YORK REPORT-1972, *supra* note 77, at 97-98.

88. Memorandum of K.W. Cuperus to members of the sub-group containing draft

a meeting of the Manner Committee at Rome at the end of March 1970. At that time its words were changed to read: "Taking into account the principle of equitable utilization of waters [of the sea], States shall . . ."⁸⁹ The words were different, but the substance was the same.

A further change in the wording of this formula was proposed in a draft of the Articles submitted to the sub-group by Dr. Manner in August 1970. His wording was: "Taking into account all relevant factors referred to in Article III, a State" His Article III was patterned on Article V of the Helsinki Rules; it listed some of the pertinent factors that would have to be considered in determining the obligations of states under the articles.

At the Hague meeting in late August 1970, the Manner Committee had before it draft articles with both versions of the formula. It did not, however, choose between them; that choice was made at the Montreal meeting of the Committee in May, 1971, adopting Dr. Manner's wording, which thus forms the opening words of Article II of the 1972 Draft Articles on Marine Pollution of Continental Origin. Was this rejection of an explicit reference to the Helsinki Rules and to the principle of equitable utilization significant? Or did it amount only to a change of form rather than of substance, so that the Rules and principle by implication still hold sway? These questions can be answered best after a review of the main features of the Draft Articles.⁹⁰

The heart of these Articles is located in Article II, which provides as follows:

Taking into account all relevant factors referred to in Article III, a State

- (a) shall prevent any new form of continental sea-water pollution or any increase in the degree of existing continental sea-water pollution which would cause substantial injury in the territory of another State or to any of its rights under international law or to the marine environment, and
- (b) shall take all reasonable measures to abate existing continental sea-water pollution to such an extent that no substantial injury of the kind referred to in paragraph (a) is caused.

Apart from the opening words already mentioned and the area

articles prepared by the sub-group at a meeting at Rome in March 1968, and a revision of these articles made at a meeting of the Manner Committee at the Buenos Aires Conference in August 1968 (unpublished) (on file with the author).

89. Meeting of the Manner Committee at Rome, March 1970 (unpublished document, on file with the author).

90. NEW YORK REPORT-1972, *supra* note 77, at 98-106.

affected by the pollution, this Article differs from Article X of the Helsinki Rules in another respect: while paragraph (b) of the latter provides that states "should take all reasonable measures to abate existing" pollution, paragraph (b) of the former provides that states "shall" do so. This important innovation reflected the increasing concern in the early 1970s about the degradation of the environment, especially marine environments. It is doubtful, however, that this mandatory rule about abating pollution was a rule of customary international law.

It is necessary, then, to consider the question whether or not the 1972 Articles preserve the primacy of the principle of equitable utilization in the case of marine pollution of continental origin. As seen above, until 1970 there was a consensus in the Manner Committee that the new articles to be devised would be merely an elaboration of the Helsinki Rules on pollution. The record, however, shows some confusion among members on the extent to which the Articles adopted by the 1972 ILA New York Conference are such an elaboration.

The section of the report of the Manner Committee on the Articles presented at a working session of the Conference was written by Mr. Cuperus:

Apart from the decision to take the Helsinki Rules as a guide for the elaboration of new rules for pollution-control of coastal areas, it was decided to adopt, where appropriate, basically the same rules. . . . During the course of the studies, however, it became clear that, for various reasons, both of a technical and legal character, the Helsinki Rules could not be 'transposed' into rules for the protection of sea-water against pollution without some fundamental modification Sometimes this led to major modifications such as the abandoning of the concept of 'international drainage area' and . . . the redrafting of the Article concerning 'equitable utilization'.⁹¹

In the commentary to Article II a few pages later, the same view is reiterated: "As the principle of equitable utilization was not maintained in the present rules, the opening phrase of Article X of the Helsinki Rules had to be modified slightly."⁹² Again, in the commentary to Article III, it is stated:

Although this Article is in fact a replica of Article V of the Helsinki Rules, the principle of 'equitable utilization' has not been taken over. A majority of the Committee felt that it was yet too early to study and express an opinion on the question

91. *Id.* at 97-98.

92. *Id.* at 102.

whether States might claim an 'equitable share' of the beneficial uses of marine waters⁹³

When Mr. Cuperus introduced the report of the Committee at the Conference, however, he was still unclear on the matter. He said then that "the new rules are based on, and can be considered as an extension of, the Helsinki Rules."⁹⁴ But he immediately added that "a number of modifications . . . had to be introduced to these rules, partly owing to the developments in the field of environmental hygiene since the adoption of the Helsinki Rules . . . [stressing] the fact that all activities causing pollution to the environment will be considered as contrary to the principles of international law."⁹⁵

Following these statements at the working session, others expressed conflicting views on this question. Dr. Nagendra Singh remarked that "the great merit of the rules on flood control and marine pollution . . . is that both of them constitute a part of the Helsinki Rules. The Helsinki Rules have thus provided the pivotal point around which the new rules have been created."⁹⁶ On the other hand, Professor Teclaff asserted, without any qualifying reference to the principle of equitable utilization, that

it is doubtful whether these two duties [the duty of states to prevent pollution which will cause substantial injury to the marine environment as stated in Article II and the duty of formulating standards as stated in Article III] would have been considered as a requirement of international law even a short while ago, but there is little doubt that they are so today, and that they are as such correctly stated in the draft articles.⁹⁷

In 1972, this was a bold assertion of the law. As far as the duty to establish standards is concerned, the statement ignores the fact that Article III provides that states "should," not "shall," establish these standards.⁹⁸

Professor Teclaff justified his view that there was a legal duty to formulate standards, on the ground that it was inherent in the first duty "because, without such standards, the duty not to pollute would be

93. *Id.* at 102-03.

94. *Id.* at 27.

95. *Id.*

96. *Id.* at 31.

97. *Id.* at 32.

98. The version of Article 3 adopted did provide that states "shall" establish standards. In the final draft of the Articles included in the report of the Manner Committee and approved by the 1972 New York Conference, however, the word "should" replaced "shall." New York Report-1972, *supra* note 77.

largely meaningless."⁹⁹ This statement, taken at face value, would lead one to question the existence, in 1972, of even the duty to prevent new pollution, for a duty that is largely meaningless unless some future standards are established, presumably by negotiation, would be a shell without legal content.

Professor D. Rauschnig doubted that some of the provisions of the Articles were then existing rules of international law, in particular the rule to abate existing pollution; rather, in his view, the rule was "a very valuable and necessary proposal for the development of international law."¹⁰⁰ And Mr. Cuperus himself thought that the Draft Articles were largely *de lege ferenda*.¹⁰¹

The opinion of Dr. Manner on the question concerning the place of the principle of equitable utilization in the Draft Rules on Marine Pollution of Continental Origin is important, for it was he who first proposed the opening clause of Article II which makes no reference to the Helsinki Rules or to equitable utilization. His opinion, as stated by himself and Mr. Veli-Martti Metsalampi, who was the secretary of the Committee, is found in the introduction to the book published in 1988 by the Finnish Branch of the ILA on the record of the work of the Committee:

Thus the positions taken and the suggestions made by the Committee must be considered within the framework of a developing legal system, based upon the principle of coherence and the doctrine of equitable utilization"; and again, "The work [of this Committee] has, in fact, been based on the notable achievements of the former [Rivers] Committee, namely the Helsinki Rules . . . and the New York Resolution of 1958. The tests proposed by this Committee and adopted by the Association do not, in principle, deviate from the Helsinki Rules, but they can be regarded as corollaries to and clarification of or completion of those Rules."¹⁰²

These opinions about the relationship of equitable utilization to the Articles, of course, are not authoritative; at best they are only aids in interpreting the Articles. Even statements made in the commentaries on the Articles are not definitive, for in all of its resolutions on international water resources the ILA deliberately adopted only the Articles, not the commentaries.

The language of the Articles, however, supports Dr. Manner's opinion that the principle of equitable utilization was not abandoned and

99. NEW YORK REPORT-1972, *supra* note 77, at 32.

100. *Id.* at 34.

101. *Id.* at 27-29.

102. INTERNATIONAL WATER RESOURCES, *supra* note 76, at 10, 17.

that the reasonable and equitable use of a state's water resources was taken as the basis of the law on the subject. This may be deduced from Articles II, III, and IV. First, Article II, paragraph (b), requires states to take only "reasonable measures" to abate existing pollution. Second, as seen above, the obligations to prevent new pollution and to abate existing pollution are subject to the qualification that all relevant factors in Article III are to be taken into account; eleven factors are listed in this Article but the list is left open. Third, these obligations arise only when substantial injury is caused and, according to Article III, paragraph (b), until international standards are established, "the existence of substantial injury from pollution shall be determined by taking into consideration all relevant factors, including those referred to in paragraph (a)." Fourth, Article IV provides that, when it is contended that a state is in breach of its obligations under the Articles, that state shall promptly enter into negotiations with the complainant with a view to reaching a solution that is equitable under the circumstances."

This language justifies the conclusion that in this case the ILA did not abandon the fundamental principle of the Helsinki Rules and that the obligations under Article II, like those under Article X of the Rules, are subject to the principle of equitable utilization.

Articles IV and V should be noted. Under Article XI of the Helsinki Rules, a state is required to enter into negotiations with a state that alleges a failure to take reasonable measures to abate existing pollution. Article II of the Articles on Marine Pollution of Continental Origin adopts this provision but it also makes it applicable when the allegation is a failure to prevent new pollution. And whereas the Helsinki Rules, Article XI, requires only a state that has failed to prevent new pollution to cease the wrongful conduct and to compensate the injured state, Article V of the Articles on Marine Pollution of Continental Origin makes this provision applicable to both a failure to prevent new pollution and to abate existing pollution. At the working session of the 1972 ILA New York Conference, doubt was expressed about the legality of Article V. For example, Mr. Thomas S. Busha of IMCO said: "I agree with our German colleague [Professor Rauschning] and with Mr. Greenburgh that draft Article V, coupled as it is with Article II, is *de lege ferenda*. In this sense Article V certainly goes beyond any of the treaties prepared by I.M.C.O."¹⁰³

2. Water Pollution in an International Drainage Basin

The Rivers Committee had had difficulty in reaching a consensus

103. NEW YORK REPORT-1972, *supra* note 77, at 36.

on Articles IX, X, and XI of the Helsinki Rules dealing with pollution of the waters of an international drainage basin. As a result, these Articles contained only minimal rules. The need to supplement them was soon recognized, and the subject was placed on the agenda of the Manner Committee. When the Articles on Marine Pollution of Continental Origin were adopted, the Committee took up the matter, and the study was assigned to a sub-group under the direction of Professor C. B. Bourne of Canada.

The sub-group began its work by surveying the considerable international activity of a legal nature concerning pollution in the period between the adoption of the Helsinki Rules in 1966 and the submission of the report of the Committee to the 1982 ILA Montreal Conference. This survey showed that, owing to the complexity of transboundary pollution problems, progress in developing new principles of law had been slow.¹⁰⁴ The sub-group, in its attempt to supplement and elaborate the Helsinki Rules on pollution, faced the same problems.

The Rules on Water Pollution in an International Drainage Basin (hereinafter the Montreal Rules) adopted by the ILA in 1982¹⁰⁵ do not contain a definition of water pollution because it was considered to be unnecessary; as stated in the commentary to Article 1, the definition in Article IX of the Helsinki Rules was deemed to embody "the essence of the matter and there seems to be no good reason for departing from it in a set of articles designed merely to bring up-to-date and to enlarge upon the provisions of the Helsinki Rules."¹⁰⁶

Article 1 of the Montreal Rules is a slightly modified version of Article X of the Helsinki Rules. It contains four substantive provisions. First, it establishes the primacy of the principle of equitable utilization, repeating the "consistent with" formula used in Article X of the Helsinki Rules. It thus makes the obligations of states under the Montreal Rules subject to the test of reasonable and equitable utilization. The other three rules are found in the following language of Article 1:

[S]tates shall ensure that activities conducted within their territory or under their control conform with the principles set forth in these Articles In particular, states shall:

- (a) prevent new or increased water pollution that would cause substantial injury in the territory of another state;
- (b) take all reasonable measures to abate existing pollution to such an extent that no substantial injury is caused in the territory of another state; and

104. See INTERNATIONAL LAW ASS'N, REPORT OF THE SIXTIETH CONFERENCE, Montreal, 1982, at 534-35 [hereinafter MONTREAL REPORT].

105. For the articles of the Montreal Rules and commentaries thereon, see *id.* at 535-46.

106. *Id.* at 535.

- (c) attempt to further reduce any such water pollution to the lowest level that is practicable and reasonable under the circumstances.

These provisions differ from those of Article X of the Helsinki Rules in only two respects: the obligation to abate existing pollution is now mandatory and the rather weak obligation to attempt to reduce the pollution to the lowest level is new. Given the overriding character of the principle of equitable utilization, these changes have little practical significance.

Article 2 of the Montreal Rules is an important innovation. It provides that "notwithstanding the provision of Article 1, states shall not discharge or permit the discharge of substances generally considered to be highly dangerous into the waters of an international drainage basin." This Article is based on the assumption that the discharge of these substances could not be deemed to be a reasonable use of the waters; in effect, it raises an irrefutable presumption that this conduct could not be justified under the principle of equitable utilization. The Article, of course, leaves open the question of whether the substance discharged is highly dangerous. The commentary to the Article refers to a number of documents identifying these substances, but in the last analysis the question in each particular case will be one of fact.¹⁰⁷

In the discussions of the Manner Committee leading to the final draft of Articles 1 and 2 of the Montreal Rules, the debate about the primacy of the equitable utilization principle or of the "no harm" rule inevitably was reopened. Some members argued that "an activity that resulted in 'pollution' was illegal and must be stopped even though the cessation of this activity would deprive the state concerned of its reasonable and equitable share of the benefits of the utilization of the waters."¹⁰⁸ In other words, the principle of equitable utilization was not applicable to water pollution and the mandatory rules in items (a), (b), and (c) of Article 1 were in accord with existing international law. The majority of the Committee, however, rejected this view. Accordingly, as stated in the commentary to Article 1, "the test of unlawful pollution is, therefore, twofold: first, does the polluting activity cause substantial injury; and, second, is it inconsistent with the equitable utilization of the waters of the drainage basin?"¹⁰⁹ Incidentally, the word substantial, rather than appreciable or significant, has been used in the other resolutions on water resources adopted by the ILA.

Article 3 of the Montreal Rules imposes a new obligation on

107. *Id.* at 538-39.

108. *Id.* at 536-37.

109. *Id.* at 538.

states. It provides that, "in order to give effect to Articles 1 and 2 above, states shall enact all necessary laws and regulations and adopt efficient and adequate administration measures and judicial procedures for the enforcement of these laws and regulations." Although this provision is cast in mandatory terms, it is hardly a rule of customary international law even today.

Article 4 imposes on states the duty to cooperate with the other states concerned in order to give effect to the provisions of the Articles. This duty was not mentioned in the Helsinki Rules, but, as seen above, it had been explicitly stated in the Articles on Flood Control adopted by the ILA in 1972. Its adoption in the Montreal Rules met with no opposition.

Articles 5, 6, and 10 of the Montreal Rules provide mandatory procedural rules for the regular exchange of all relevant and reasonably available data on the pollution of the waters of the basin, for notice in due time of any activities in their territories or of any sudden change of circumstances that may involve a significant threat of water pollution in another state, for consultation on actual or potential problems of water pollution in the drainage basin, subject to the important qualification that this consultation "shall not unreasonably delay the implementation of plans that are the subject of the consultation," and for negotiation when it is contended that the conduct of a state is not in accordance with its obligations under the Articles.

In the Helsinki Rules, the only mandatory procedure is negotiation with an injured state in the case of a failure to take reasonable steps to abate existing pollution.¹¹⁰ The other mandatory procedures provided for in the Montreal Rules are mentioned in the Helsinki Rules but only as recommendations. In this respect, then, the Montreal Rules reflect a marked advance in the ILA's views of international water resources law.

Two other articles of the Montreal Rules also reflect current thought on how states should behave in dealing with shared water resources. Article 7 provides that "basin states should set up appropriate administrative machinery for the entire basin. In any event, they should:

- (a) coordinate or pool their scientific and technical research programs to combat water pollution;
- (b) establish harmonized, coordinated, or unified networks for permanent observation and pollution control; and
- (c) establish jointly water quality objectives and standards for the whole or part of the basin.

This was wise advice but there was no suggestion that these provisions

110. INTERNATIONAL LAW ASS'N, REPORT OF THE FIFTY-SECOND CONFERENCE, Helsinki, 1966, at art. XI ¶ 2 [hereinafter HELSINKI RULES].

were anything other than recommendations.

The other Article referred to is number 8. It recommends that "states should provide remedies for persons who are or may be adversely affected by water pollution in an international drainage basin." In particular, it recommends that these persons be given access on a non-discriminatory basis to the judicial and administrative agencies of the state in whose territory the pollution originates. As is said in the commentary on this article, "the idea behind these recommendations is that the persons who are or may be affected by pollution which originates in another state should be treated at least equally with persons resident in that other state."¹¹¹ The principle of equal right of access and non-discrimination was not new in 1982; for example, it had been advocated by the OECD since the 1970s and had then found favor with the European Economic Community.¹¹²

Article 9 of the Montreal Rules repeats the substance of Article V of the Draft Articles on Marine Pollution of Continental Origin. It provides that a state shall cease conduct that violates its international obligations relating to water pollution and shall pay compensation for the injury resulting therefrom. This provision needs no comment here. As to Article 11, the final article, it incorporates by reference the provisions of the Helsinki Rules on the settlement of disputes.

C. Relationship of International Water Resources with Other Natural Resources and Environmental Elements

The ILA at its Conference at Belgrade in 1980 adopted two articles on the relationship of international water resources with other natural resources and environmental elements as follows:

Article 1: Consistent with Article IV of the Helsinki Rules, States shall ensure that:

- (a) The development and use of water resources within their jurisdiction do not cause substantial injury to the environment of other States or of areas beyond the limits of national jurisdiction; and
- (b) the management of their natural resources (other than water) and other environmental elements located within their own boundaries does not cause substantial injury to the water resources of other States.

Article 2: Articles XXVI to XXXVII of the Helsinki Rules shall apply to matters covered by Article 1.¹¹³

111. MONTREAL REPORT, *supra* note 104, at 544.

112. *Id.* at 544-45.

113. INTERNATIONAL LAW ASS'N, REPORT OF THE FIFTY-NINTH CONFERENCE, Belgrade,

Again, it will be recalled that Article IV of the Helsinki Rules establishes the governing principle of equitable utilization in international water law.

Dr. Guillermo J. Cano of Argentina took the initiative in the work that culminated in the adoption of these Articles. As early as 1968, he had prepared a report on the subject for consideration of the Manner Committee, and in 1970 he submitted a draft article on it to the Committee, an article whose substance, he has stated, was later adopted by the UN Stockholm Conference on the Human Environment (1972) as Principle 21.¹¹⁴ In this work, Dr. Cano was soon joined by Ambassador Julio A. Barberis, also of Argentina. When Professor Teclaff of the United States prepared another set of articles on the same matter, the Committee invited him and the two Argentineans to consolidate their proposals. In due course, after approval by the Committee, Articles 1 and 2 set forth above were adopted by the Belgrade Conference.

Article 1 resembles Article 1 of the Montreal Rules on Pollution in its basic structure. The former Article, however, is very wide in scope; it deals not merely with transboundary water pollution caused by the use of water but with substantial injury to the environment caused by the use of a state's water resources, and, vice versa, with substantial injury to water resources caused by the use of other environmental elements. The Article, then, is an attempt to render illegal substantial cross-media environmental injury.

In short, the Manner Committee and the ILA, in adopting Article 1, ventured beyond the field of international water law into that of international environmental law. This venture was adversely commented on by Professor Rauschnig at the working session on the Committee's report at the Belgrade Conference. He argued that the Conference should not adopt the Articles, saying: "These articles are very broadly worded, and I feel they try to solve all problems of transfrontier disturbances of the environment, which are, however, . . . complicated."¹¹⁵ As an example of the complexity of the problems, he mentioned acid rain. Moreover, he drew attention to duplication of effort, pointing out that an ILA Committee on Legal Aspects of the Conservation of the Environment already existed and that the Manner Committee itself was considering draft articles on transfrontier pollution.

A notable feature of Article 1 is that it incorporates the now familiar formula that requires the application of the mandatory provisions of paragraphs (a) and (b) to be consistent with the principle of equitable utilization as defined in the Helsinki Rules. The contribution of Article 1

1980, at 374-75 [hereinafter BELGRADE REPORT].

114. *Id.* at 398.

115. *Id.*

to the law on the subject, therefore, is problematic.

The Manner Committee's report on these Articles to the Belgrade Conference contains a puzzling section entitled "Comments on the Draft Articles," which is an updated version of the report submitted to the 1968 ILA Buenos Aires Conference by Dr. Cano. The opinions on the law expressed there are not justifications of the law stated in Article 1. They fly in the face of the explicit provision of Article 1 according priority to the principle of equitable utilization. For example, one finds these statements in the "Comments":

Both articles are a development of the rule of international customary law which forbids states to cause any substantial damage to another state or to areas located outside the limits of national jurisdiction According to international law, every state has the obligation not to cause damage to another. This damage must be 'substantial,' i.e., of a certain significance At present, there is no doubt that the obligation of not causing substantial damage is a rule of general International Law But, mainly since the Stockholm Conference, the rule has been extended to natural resources in general and to the environment The rules included in Article 1 are specific instances of that general rule of responsibility for environmental damage mentioned in [Principle 21 of the Stockholm Declaration]. They make explicit what is implied in that general rule.¹¹⁶

Another curious feature of these "Comments" is that they conclude with a lengthy discussion on the obligation of states to exchange information, including impact assessments, and to give notice of proposed activities that may affect other elements of the environment. The relevance of this section of the Comments is difficult to understand since the Articles make no reference to these matters.

Those who do not agree that the international law governing transboundary natural resources or the environment at large consists simply of the prohibition against causing substantial injury in the territory of other states, were undoubtedly pleased that this prohibition, though stated in Article 1, was made subject to the principle of equitable utilization. And they may take comfort in the fact that the ILA has not approved any commentary on the various articles brought before it by its committees dealing with international water resources.

116. *Id.* at 382-87.

D. Navigation

The Helsinki Rules contain nine articles on navigation.¹¹⁷ In 1974, the ILA at its New Delhi Conference adopted an additional article on the subject, namely Article XVIII *bis*.¹¹⁸ This Article, largely the product of a study by Dr. Henri Zurbrugg of Switzerland, is based on the assumption that, while there is no duty on a state under international law to engage in works to improve navigation, there is a general duty on co-riparian states to cooperate in the use of an international drainage basin. In the case of the improvement of navigation, this duty is procedural in nature.

Accordingly, Article XVIII *bis*, composed of three paragraphs, prescribes the procedures that a riparian state must follow when it proposes to undertake works to improve the navigability of the portion of an international river or lake in its territory. It must give notice of the proposed works to co-riparian states. If one of them requests consultation within a reasonable time, the proposing state must negotiate about the matter; and, if the proposal is that the whole or part of the works be undertaken in the territory of another co-riparian, the consent of that other state for the works is necessary, and that state is under the duty to negotiate about it.

The ILA Conference resolution approving Article XVIII *bis* expressly stated that it is "to be regarded as supplementary to the Chapter on Navigation of the Helsinki Rules . . ."; and, in the Report of the Conference, the text of the Article is reproduced along with that resolution, it being expressly stated, "The following is the text of these Articles, which are to be added to the Helsinki Rules as Article XVIII *bis*." This new Article, dealing only with procedures, therefore, provides another instance of mandatory procedural rules in the Helsinki Rules.

In its report to the New Delhi Conference, the Manner Committee cautioned about the effect of Article XVIII *bis*. It stated: "In order to avoid misinterpretation it must be kept in mind that the scope of this report is to complete and not to change the work already carried out in the matter of navigation by the former [Rivers] Committee The Helsinki Rules are the framework. This means that the substance of this report remains subject to any limitations or qualifications referred to in the different chapters of these rules. Particularly it is out of question to assume any priority to navigation over conflicting non-navigational uses."¹¹⁹

117. HELSINKI RULES, *supra* note 110, at arts. XII to XX.

118. INTERNATIONAL LAW ASS'N, REPORT OF THE FIFTY-SIXTH CONFERENCE, New Delhi, 1974-75, at xiii, 128 [hereinafter NEW DELHI REPORT].

119. *Id.* at 118.

E. Water Resources and Installations in Times of Armed Conflict

The Manner Committee submitted to the ILA Madrid Conference of 1976 for adoption a "Resolution on the Protection of Water Resources and Water Installations in Times of Armed Conflict."¹²⁰ The Resolution consisted of a preamble and eight articles. It did not contain any commentaries on the articles, but it was understood that the Intermediate Report that was prepared by Professor Berber and was included in the Committee's report to the ILA New Delhi Conference in 1974, in fact served that purpose.¹²¹

The preamble of the Resolution recalls the increasing demand for water and the growth in the number of water installations, the vital importance of water for the health and survival of people, the destructive power of modern weapons, and the lack of specific rules of international law for protecting water and water installations from damage or destruction in times of armed conflict. The Articles are not intended as rules of law but represent an attempt to promote the development of precise rules on the subject. As stated in the preamble itself, the Articles are "guidelines for the elaboration of such rules."

As Dr. Manner said at the working session of the Madrid Conference considering the report of his Committee, the Articles are designed to protect civilian populations and the ecological balance. Being only guidelines, however, the Articles are couched only in precatory terms; the word "should" rather than "shall" is used. The following prohibitions, therefore, are only recommended: water is not to be poisoned or otherwise rendered unfit for human consumption (Article I); water installations indispensable for survival of the civilian population are not to be cut off or destroyed (Article II); the diversion of water for military purposes, the destruction of water installations such as dams or dikes, and the causing of floods or other interference with the hydraulic balance are prohibited if they will cause disproportionate suffering or grave danger to the civilian population or substantial damage to the ecological balance (Articles III, IV, and V); and the above prohibitions are applicable in occupied enemy territory (Article VI). In addition, Article VII provides that treaties relating to water resources should not be terminated by the outbreak of war but only suspended, the suspension taking place only when military necessity "imperatively" demands it and "when the minimum requirements of subsistence for the civil population are safeguarded." And Article VIII applies similar prohibitions to the

120. INTERNATIONAL LAW ASSOCIATION, REPORT OF THE FIFTY-SEVENTH CONFERENCE, Madrid, 1976, at 237-39 [hereinafter MADRID REPORT].

121. *Id.* at 216, 237. For the Intermediate Report, see NEW DELHI REPORT, *supra* note 118, at 129-45.

provisions of a peace treaty and adds a new feature: this treaty is not to deprive a people of its water resources to such an extent that a threat "to the economic or physical conditions of survival is created."¹²²

In the discussion at the working session of the Madrid Conference, there was some criticism of these Articles. Professor Alfred P. Rubin of the United States thought that they were too broadly drawn and were in several respects in conflict with the law of war. He concluded: "Thus, without disagreeing with the object of the Draft, I suggest it be reconsidered with some eye to military exigencies and the current law of armed conflict. A less humane and less idealistic text may have some influence, but the existing text seems to me likely to be ignored by the States and participants in an armed conflict for whom it is intended."¹²³ His suggestion for reconsideration was not accepted by the Conference, but the force of this criticism seems undeniable.

Professor B. R. Chauhan of India, a member of the Manner Committee, objected to the fact that the Articles "bundled together" the concept of water resources and that of the environment, and that it was premature to deal with the environment as the Articles did while other work on the subject in the Manner Committee itself and in another committee of the ILA was still in progress. He also seemed to think that there was some conflict between the Articles and the principle of equitable utilization in the Helsinki Rules.¹²⁴

On the other hand, Professor Cecil J. Olmstead of the United States, formerly chairman of the Rivers Committee, found the Articles too narrowly limited by the concept of "armed conflict." He argued that "there are ways of damaging or destroying water resources and water facilities of a State in time of 'non-armed conflict'," for example, by the use of modern techniques for changing rainfall or water patterns.¹²⁵ He therefore suggested that the scope of the Articles be widened by the addition of some words to a clause in its preamble so that it would read as follows: "Considering the lack of specific rules of international law for the protection of water and water installations . . . in time of armed conflict or other conduct intended to damage or destroy the water resources of a State or area."¹²⁶

In the end, Professor Olmstead's suggestion had some effect, for, although the Preamble and Articles were adopted by the Conference without amendment, the resolution doing so stated that they were adopted "with the understanding that these Rules should be applied also

122. For the text of the articles, see MADRID REPORT, *supra* note 120, at 237-39.

123. *Id.* at 223-24.

124. *Id.* at 224.

125. *Id.* at 122.

126. *Id.* at 222 (emphasis added).

with respect to other conduct intended to damage or destroy the water resources of a State or area."¹²⁷ These words presumably were intended to influence the interpretation of the Articles in a manner to widen their scope beyond cases of armed conflict. That they will achieve this objective, however, is very doubtful; after all, as the title to the Preamble and Articles unequivocally states, their purpose is the protection of water resources and water installations in times of armed conflict.

F. Administration of International Water Resources

While it is generally accepted that states are under a duty to cooperate in their utilization of the waters of an international drainage basin, there is no agreement on the manner of this cooperation. If an activity by one basin state causes or threatens to cause substantial damage to another basin state, for example, the states are under a duty to deal with problem by negotiation. However, if the case does not involve any such activity but only a desire on the part of a basin state to formulate plans jointly with co-basin states for the exploitation of the waters of the basin for the benefit of all these states, there is no duty to negotiate or to take any step, such as establishing joint institutions for planning or administering the implementation of plans. The manner of this cooperation is entirely voluntary.

This was the conclusion reached by Dr. D. A. Caponera of Italy who was chairman of the sub-group that drafted the Articles on International Water Resources Administration and who prepared the section of the Manner Committee's report presented to the 1976 ILA Conference at Madrid. He reached this conclusion reluctantly, for, as he said: "[T]he need for an institutionalized co-ordination of competitive and concurrent needs and interests is deeply felt by the international community and is evidenced by the considerable number of agreements concluded in this respect. Such a need for co-operation may also be evidenced in more detailed way in the light of the principles deriving from the Helsinki Rules."¹²⁸ And again: "Since diplomatic negotiations are often not sufficient for an effective implementation and for an adequate control of the various activities involved, such a co-operation may reasonably take place only through the institutionalization of some form of administrative machinery."¹²⁹

In the light of this view of the law, the four articles on the subject prepared by Dr. Caponera, and accepted by the Committee and ultimate-

127. *Id.* at xxxiv. For the text of the resolution adopted at the working session, see *id.* at 230.

128. *Id.* at 246; see also *id.* at 218, 249.

129. *Id.* at 249.

ly by the Conference, impose no obligations on states; they are merely guidelines.¹³⁰ Article 1 defines "international water resources administration" in the widest terms; it covers any form of institutional or other arrangement dealing with the conservation, development, and utilization of the waters of an international drainage basin. Article 2 contains the main provision for achieving the desirable administrative arrangements, namely, that "the basin states concerned and interested should negotiate in order to reach agreement on the establishment of an international water resources administration." Article 4 sets out a list of subjects that should be dealt with in an agreement of the sort mentioned in Article 2 and adds that the lengthy list of guidelines in an attached annex should be taken into account when an international water resources administration is to be established.

Article 3 turned out to be controversial. It provides that "members States of an international water resources administration in appropriate cases should invite other States including non-basin States or international organizations, which by treaty, other instrument or binding custom enjoy a right or have an interest in the use of the waters . . . to participate in the activities of the . . . administration." That a non-basin state or international organization should have the right to share in the decisions about the utilization of these waters was seen by some as being far too radical an idea. At the working session at the Madrid Conference, the Article was criticized by Professor Todor Dzunov of Yugoslavia and Dr. Turde Iluyomade of Nigeria. For them, the Article raised visions of "some bad examples from the past concerning interference of third countries in the affairs of the riparian States."¹³¹ Professor Dzunov suggested that the Article be deleted, but, alternatively, that the "may invite" should replace "should invite."¹³² Dr. Iluyomade supported the change of "should" to "may," but this was opposed by Professor Rubin.¹³³ These proposals, however, were rejected and the Articles as originally drafted were approved by the Conference. In defense of Article 3, Dr. Caponera referred *inter alia* to the increasing participation of the World Bank in developments for the utilization of the waters of international drainage basins, for example in the case of the Mekong River.¹³⁴

Although the provisions of the Articles on Administration are by

130. For the text of the articles with commentaries in the Manner Committee's report, see *id.* at 248-52. For the text of the articles adopted by the Madrid Conference, see *id.* at xxxvii.

131. *Id.* at 228.

132. *Id.*

133. *Id.*

134. *Id.* at 252.

their language only recommended guidelines, their influence should not be discounted. In his commentary on Article 2, Dr. Caponera recalled a statement made by Professor Berber in his report on flood control to the following effect: "[T]he weight of the term 'should' must not be underrated; it does not express merely an inefficient wish, but points to the urgent necessity of the creation of such a legal rule and to its existence already as a rule of international morality as well as of the comity of nations."¹³⁵ Dr. Caponera and others, among them Professor R. D. Hayton, would characterize the Articles as *de lege ferenda*.¹³⁶

G. Regulation of the Flow of Water

The Articles on the Regulation of the Flow of Water of International Watercourses were first presented to the 1978 Manila Conference of the ILA¹³⁷ and, after slight revision, were discussed and approved at the 1980 Belgrade Conference.¹³⁸ They were produced mainly by Dr. Manner with the assistance of Mr. Metsalampi, but, of course, were discussed, refined, and approved by the Committee.

The scope of these Articles is defined by Article 1. They apply only to "continuing measures intended for controlling, moderating, increasing or otherwise modifying the flow of the waters in an international watercourses for any purpose; such measures may include storing, releasing and diverting of water by means such as dams, reservoirs, barrages and canals." The Articles, therefore, do not apply to any unintended interference with the flow of water or, it would seem, to intended interferences of short duration, such as temporary diversions, since continuity is made an essential feature of regulation.¹³⁹

The application of the Articles to the waters in an international "watercourse" rather than of a "drainage basin" is noteworthy. The ILA in its work on international water resources has emphasized the drainage basin approach to the utilization of these resources. It did, however, depart from this in two cases in the Helsinki Rules: in chapter 5 on timber floating, the word "watercourse" is used, and in chapter 4 on navigation, the words "rivers and lakes" are used. And in the 1974

135. *Id.* at 251.

136. *Id.* at 218-20, 226, 247.

137. INTERNATIONAL LAW ASS'N, REPORT OF THE FIFTY-EIGHTH CONFERENCE, Manila, 1978, at 219-47 [hereinafter MANILA REPORT]. The resolution adopted by the Conference stated that the Conference "welcomes and appreciates the Report [of the Manner Committee], particularly the Articles on the Regulation of the Flow of Water of International Watercourses contained therein." *Id.* at 3.

138. BELGRADE REPORT, *supra* note 113, at 4, 362-73.

139. See the comment on Article 1, *id.* at 362-63; see also MANILA REPORT, *supra* note 137, at 227.

Articles on the Maintenance and Improvement of Navigation, the words "rivers and lakes" are again used. At the working session at the Manila Conference, Mr. Metsalampi explained that the expression drainage basin applies to a geographical area determined by the watershed limits of the system of waters including underground waters, whereas a watercourse "means primarily a channel for water, i.e. a river or at most a system of rivers and lakes."¹⁴⁰ Even so, it is difficult to understand why any interference with the flow of the waters anywhere within the drainage basin should be excluded from the regulation provided for in the Articles. What is the relevance of the location of the interference?

Article 2 starts with the familiar formula, "Consistent with the principle of equitable utilization"; thus, the Articles are brought within the embrace of this fundamental principle of the Helsinki Rules. The Article merely restates the duty of basin states to "co-operate in a spirit of good faith and neighborliness" in the matter of regulation, adding that, "when appropriate, the regulation should be undertaken jointly." In the commentary on the Article, it is mentioned that, although there was some doubt about whether the duty to co-operate then existed in international law, the Committee's view was that it did so exist.¹⁴¹ In fact, the legal duty to co-operate was asserted in the Articles on Flood Control (Article 2) in 1972.

Article 4, which provides that "unless otherwise agreed, each basin state party to a regulation shall bear a share of its costs proportionate to the benefits it derives from the regulation," caused some concern. For example, at the working session at the Belgrade Conference Professor J. G. Lammers asked whether a state that, after consultation with a co-basin state proposing to undertake a project for regulation, finds the project acceptable, would be a "party" to the regulation and thus be legally obliged to share in its costs.¹⁴² An answer to this question is found in the commentary to Article 4. It is stated there first that "Article 4 has been amended to make it quite clear that this rule is not obligatory."¹⁴³ But if this is so, why is the word "shall" used? Next, it is stated that "the provision in Article 4 is intended to apply only to *basin states* who are *parties* to a regulation. This implies that there must be some kind of agreement among the states concerned."¹⁴⁴ In other words, contrary to the first statement of the commentary, Article 4 does impose an obligation to share in the costs of a regulation, but this obligation arises only when the states concerned have entered into an agreement to

140. MANILA REPORT, *supra* note 137, at 240.

141. *Id.* at 229-30.

142. BELGRADE REPORT, *supra* note 113, at 397.

143. *Id.* at 366.

144. *Id.*

undertake the project. As is stated in the commentary, "a state which remains passive or opposes the regulation should not be obliged without its consent to bear a share of its cost . . . even though it may have derived some benefit from the undertaking."¹⁴⁵ The purpose of the Article, then, is to raise an irrefutable presumption that the costs of a project for regulation will be shared when there is an agreement for the project and that agreement is silent on the matter of costs. The wording of the Article could clearly have been improved.

Article 5 also deals with sharing the cost of regulation. It provides that works required for regulation by a basin state in the territory of another state may only be done by agreement of the states concerned; if there is such an agreement, the cost of the works and their operation must be borne by the parties to the agreement unless they have agreed otherwise. In the earlier draft of Article 5 in the report of the Committee to the Manila Conference in 1978, the rule was the opposite, providing that, in the absence of an agreed provision on the sharing of costs, the entire cost would be borne by the state requesting the works in question.¹⁴⁶ The reason for this about-face is simply given in the commentary to the version of Article 5 adopted at the Belgrade Conference stating that "it would however appear to be a less just and equitable arrangement and not in conformity with the provision of Article 4 if the requesting state had to pay the expenses of the other beneficiaries, unless this was previously agreed on."¹⁴⁷ The issue is not a big one since the work can proceed only with the agreement of both parties and, therefore, each state has the opportunity to protect its own interests.

Article 6 deals with a basic issue in international water resources law, namely whether a state may ever proceed with the utilization of the waters of a drainage basin when its doing so will cause injury to a co-basin state. This Article deals with it as follows: "A basin state shall not undertake regulation that will cause other basin states substantial injury unless those states are assured the enjoyment of the beneficial uses to which they are entitled under the principle of equitable utilization." According to the commentary, the intent of the drafters of the Article was to reject an absolute prohibition of the substantial injury rule and instead to establish a flexible rule under which a basin state would, in certain circumstances, have the right to act unilaterally to implement a project. The reasoning for rejecting the absolute rule was that the rule "could hamper the progress of endeavors to promote joint undertakings and cooperation among basin states."¹⁴⁸

145. *Id.*

146. MANILA REPORT, *supra* note 137, at 233-34.

147. BELGRADE REPORT, *supra* note 113, at 366.

148. *Id.* at 367.

The circumstances in which the right of unilateral action can lawfully be exercised are indicated by the concluding clause of Article 6. On its face, the clause protects the rights of a basin state to a reasonable and equitable share of the beneficial uses of the waters of the basin from encroachment by the unilateral regulation of another basin state. Beyond these rights, a basin state has no claim to protection from the unilateral acts of another. In other words, a state that proposes to undertake a measure of regulation of the flow of the waters of a drainage basin, may implement it unilaterally even though doing so might cause substantial damage to another basin state, provided that the regulation does not deprive this other state of its share of the beneficial use of the waters. The rule under Article 6, then, may be taken to guarantee not only the rights of a state that may be injured by a unilateral act of a co-basin state, but by implication the equal rights of that co-basin state to a reasonable and equitable share of the beneficial uses of the waters of the basin. This result is in accord with the principle of equitable utilization as defined in the Helsinki Rules.¹⁴⁹

Nevertheless, the wording of Article 6 was criticized at both the Manila and the Belgrade Conferences. At Manila, some participants proposed that the concluding clause of the Article should be deleted, thus establishing an absolute prohibition against causing substantial injury.¹⁵⁰ At Belgrade, opinion was still divided. Participants from India in particular proposed the addition of words either to Article 6 or Article 8 that would make clear the right of a state to proceed with a project unilaterally when negotiations with objecting basin states do not produce agreement within a reasonable time, provided that in doing so it complies with the principle of equitable utilization. They pointed out that in fact the Manner Committee had agreed at its Rome meeting in June 1979 to add these words as paragraph 2 to Article 8.¹⁵¹ Professor Chauhan was one of those who supported this addition, saying that if this addition were not made, "then Article 6 makes these rules one-sided which are likely to impose more burden on the initiating State and give the appearance of conferring a veto upon the objecting state."¹⁵²

On the other hand, there was support for the Article as worded. For example, Professor Lammers said: "I believe that on the whole the

149. HELSINKI RULES, *supra* note 110, at arts. IV-VIII.

150. See, e.g., the comments of B.M. Abbas of Bangladesh, MANILA REPORT, *supra* note 137, at 247.

151. BELGRADE REPORT, *supra* note 113, at 395-97. The report of the Committee to the Belgrade Conference shows that the addition of a new paragraph to Article 8 was discussed at the Rome meeting of the Committee, but Dr. Manner, in preparing the report, decided to reject the proposal. See *id.* at 370-72.

152. *Id.* at 397.

Articles properly reflect present international law. I am particularly happy with Article 6 which has contained the flexibility which is so much required in these matters."¹⁵³ In the end, the Belgrade Conference ignored the criticism and approved the Articles as set forth in the Committee's report.

Articles 7 and 8 prescribe certain procedures to be followed by basin states in their regulation of the flow of waters, namely to furnish relevant and reasonably available information about the waters of the drainage basin, to give notice and information about a proposed project, and to negotiate with objecting states in an endeavor to reach an agreement. These procedures are only recommended in the Helsinki Rules, Article XXIX of which is specifically mentioned in Article 7; by these Articles on regulation, they are made mandatory. They are now commonly accepted as rules of customary international law.

Article 7, paragraph 2, provides that, when appropriate, the basin state should invite other basin states concerned to participate in the regulation. And Article 8 recommends that, if the states fail to reach agreement about a proposed regulation within a reasonable time, they should seek a solution in accordance with chapter 6 of the Helsinki Rules which sets forth recommended procedures for the prevention and settlement of disputes.

As mentioned above, Professor Chauhan and other participants from India at the Belgrade Conference proposed that a paragraph should be added to Article 8 to make clear that if the states failed to reach agreement in a reasonable time, the state initiating the regulation had the right "to take such measures for the accomplishment of the regulation as may be consistent with the principle of equitable utilization."¹⁵⁴ This amendment was rejected by the Conference. The amendment, however, was superfluous. For, as interpreted above, Article 6 already contains what was sought by it; this was also the view expressed in the report of the Committee to the Belgrade Conference.¹⁵⁵

H. Complementary Rules

At the Seoul Conference in 1986, the ILA adopted Articles entitled 'Complementary Rules Applicable to International Water Resources'.¹⁵⁶ These Articles, it is stated in the report of the Committee to the Conference, "may be regarded as guidelines for the application of

153. *Id.*

154. MANILA REPORT, *supra* note 137; BELGRADE REPORT, *supra* note 113.

155. BELGRADE REPORT, *supra* note 111, at 370-72.

156. INTERNATIONAL LAW ASS'N, REPORT OF THE SIXTY-SECOND CONFERENCE, Seoul, 1986, at 21, 275-94, 298-303 [hereinafter SEOUL REPORT].

the 1966 Helsinki Rules They are intended neither to change nor to supersede the provisions of the Rules, but are, however, complementary to them, answering some questions the Rules have left more or less open."¹⁵⁷ In short, the Articles result from an attempt to give more precision to the imprecise principle of equitable utilization and thus to make it easier to apply this principle in practice.

The Articles deal with three issues: substantial injury to co-basin states; the installation of works or the use of water resources in the territory of co-basin states; and notification procedures. On the first issue, Article I states that "a basin State shall refrain from acts or omissions within its territory that will cause substantial injury to any co-basin State, provided that the application of the principle of equitable utilization as set forth in . . . the Helsinki Rules does not justify an exception in a particular case" This provision accords with the provisions of earlier ILA resolutions concerning substantial injury; that is to say, the rule that prohibits this injury must yield to the rule of equitable utilization. In each case, therefore, the objective must be a reasonable and equitable solution, but the burden of justifying the substantial injury undoubtedly would fall upon the state causing the injury.

The reason for the first part of Article II of the Complementary Rules is obscure, for it merely restates an elementary proposition of international law, namely that a state cannot execute works in the territory of another state, in this case works to utilize water resources there, without the agreement of that state. The second part of the Article is more significant; it imposes an obligation on the states concerned to "use their best endeavors to reach a just and reasonable arrangement in accordance with the principle of equitable utilization." Negotiation, therefore, is obligatory.

Article III, paragraph 1, provides that "when a basin State . . . proposes to undertake, or permit the undertaking of, a project that may substantially affect the interests of any co-basin state, it shall give such State or States notice of the project," including "information, data and specifications adequate for assessment of the effects of the project." The duty under this paragraph arises only when a project may substantially affect the interests of a co-basin state. As stated in the report of the Committee, "the threshold of probability of causing substantial injury is meant to be lower and less concrete than that contemplated in Article I," which prohibits acts that will cause substantial injury.¹⁵⁸

While the substance of paragraph 1 has appeared in some of the earlier ILA resolutions discussed above, the other paragraphs of Article

157. *Id.* at 275.

158. *Id.* at 287.

III introduces important innovations. The essence of its paragraphs 2, 3, and 4 is as follows: the state that has received a notice under paragraph 1, has not less than six months to evaluate the project and communicate its reasoned objection to the proposing state; if no objection is made within six months, the proposing state may proceed with the project; on the other hand, if an objection is made, the states concerned shall make every effort expeditiously to settle the matter consistent with the procedures set forth in chapter 6 of the Helsinki Rules; and if these efforts are "unduly protracted" or an objecting state has refused to have resort to third party procedures for settlement of differences, the proposing state may, on its own responsibility, proceed with the project. According to paragraph 5, the notice and other communications referred to in Article III shall be transmitted through appropriate official channels unless otherwise agreed.

The provisions of paragraph 4 dealing with the case in which there has been an objection to a project, deserves closer scrutiny. First, as provided in paragraph 2, an objection must be "reasoned." Thus, a mere veto to the proposed project is not an objection. "The opposing State must present objectively reasonable grounds for its position." Second, a state wishing to undertake a project is protected against the passivity or dilatory tactics of an objecting state by the provision requiring efforts to reach an agreement expeditiously and by the provision against unduly protracted proceedings. And, third, the provision referring to resort to third party procedures for settlement of differences is widely drawn. As indicated in the commentary, the terms used are "not to be understood as meaning only procedures of binding character but as referring also to other means of pacific settlement, in which the contribution of a third party is essential."¹⁵⁹

While Article III thus confers upon a basin state the right to proceed with a proposed project under the circumstances outlined above, the Article does not deal with the legal rights and duties of co-basins after a state has exercised this right. Will the works and activities implementing the project be lawful? Will the failure to raise objection to the project within six months of the receipt of the notice about it result in the loss of all legal rights to claim for damage suffered as a result of its implementation? In other words, is silence equivalent to acceptance of the project and its consequences? An answer to these questions is indicated in the commentary to Article III. There, it is stated: "Finally, it must be emphasized that when the proposing state takes unilateral action under this paragraph 4 it acts at its own risk Furthermore, it is provided that the unilateral action taken must be in full compliance with

159. *Id.* at 292.

the provisions of Article III and with relevant international law."¹⁶⁰ Although the meaning of this statement is not altogether clear, it seems to reflect the opinion that a failure to comply with Article III by either the proposing state or the affected state has no legal effect on their rights and duties. If this is so, the Article fails to provide any incentive for states to comply with its requirements.

In reviewing the Complementary Rules, one is struck by the similarity between their provisions and those that were being considered by the International Law Commission (ILC) in the 1980s in its work on the law of the non-navigational uses of international watercourses, in particular the proposals of Mr. Stephen M. Schwebel, the Special Rapporteur, in his Third Report to the Commission.¹⁶¹ It is perhaps not idle speculation to say that the ILA's 1986 Complementary Rules influenced the final draft of Article 7 adopted by the ILC in 1994 dealing with the relationship of significant harm and equitable utilization, for the ILC was well aware of the work of the ILA on the subject.

I. International Groundwater

Groundwater is referred to only once in the Helsinki Rules; in Article II, an international drainage basin is said to include "surface and underground waters, flowing into a common terminus."¹⁶² Thus, groundwater is made subject to the same rules as surface waters; that is to say, it is governed by the principle of equitable utilization. Nevertheless, the Helsinki Conference placed groundwater at the head of the list of subjects that it recommended for further study by the ILA.¹⁶³

This study was undertaken by a sub-group of the Manner Committee under the chairmanship of Professor R. D. Hayton of the United States. The Committee received and discussed several reports on the subject from Professor Hayton. His final report, approved by the Committee, was presented at the Seoul Conference in 1986.¹⁶⁴ The report consists of two parts. The first is a paper on the law of international groundwater, setting out its background, the traditional groundwater law, and the emerging law, and pointing out the timeliness of restating

160. *Id.*

161. *Third Report of the Special Rapporteur to the International Law Comm'n*, U.N. Doc. A/CN.4/348, at 104-06 (1982) in [1982] 2 Y.B. Int'l L. Comm'n 65; see also other reports to the ILC, U.N. Doc. A/CN.4/367, at 45 (1983) in [1983] 2 Y.B. Int'l L. Comm. 155; U.N. Doc. A/CN.4/381, at 38-39 (1984) in [1984] 2 Y.B. Int'l L. Comm. 101.

162. INTERNATIONAL LAW ASS'N, REPORT OF THE FIFTY-SECOND CONFERENCE, Helsinki, 1966 [hereinafter HELSINKI RULES].

163. See the resolution adopted by the 1966 Helsinki Conference, *id.* at xi.

164. See SEOUL REPORT, *supra* note 156, at 238-74.

this law. The second part contains four articles with extensive commentary on each. These articles were approved by the Seoul Conference.¹⁶⁵

Article 1 of the Rules on International Groundwaters defines the waters to which the Rules apply, namely the waters of an aquifer that is intersected by the boundary between two or more states. But what is an aquifer? This term is not defined in the Article itself but in an attached note indicated by an asterisk. There an aquifer is said to include "all underground water bearing strata capable of yielding water on a practicable basis, . . . including the waters in fissured or fractured rock formations and the structures containing deep, so-called 'fossil waters'."¹⁶⁶ Article 1 also contains the significant provision that states that share the waters of an international aquifer "are basin States within the meaning of the Helsinki Rules whether or not the aquifer and its waters form with surface waters part of a hydraulic system flowing into a common terminus." The effect of this provision is twofold. First, it makes clear that these states are subject to the law governing international drainage basins as set forth in the Helsinki Rules. And, second, it abandons the "flowing into a common terminus" requirement of the Helsinki Rules. Article 1, therefore, extends the application of these Rules to international aquifers of all sorts, even to those that have no connection with surface waters. In the Helsinki Rules, the ILA took the novel step of treating some groundwaters as part of the waters of an international drainage basin. By the extension provided for in Article 1, the ILA has taken another important step. As stated in the commentary on the Article, it clearly augments the Helsinki Rules.¹⁶⁷ It does so, however, by widening the area of application of the Rules and not by altering or contradicting them in any way.

Paragraphs 1 and 2 of Article 2 appear to duplicate the substance of Article 1 that an aquifer is part of an international basis if its waters are connected with the surface waters of an international drainage basin, and that it is equally an international drainage basin if it is intersected by an international boundary and its waters are not connected with surface waters. Paragraph 3, on the other hand, adds something new; it provides that "basin states, in exercising their rights and performing their duties under international law, shall take into account any interdependence of the groundwater and other waters, including any interconnection between aquifers, and any leaching into aquifers caused by activities in areas under their jurisdiction." The effect of this provision is doubtful. It is unlikely that it does more than add another factor to the relevant factors listed in Article V of the Helsinki Rules, to be considered in

165. *Id.* at 21.

166. *Id.* at 251.

167. *Id.* at 252, 255, 266.

applying the principle of equitable utilization. But the reference to leaching caused by activities in areas under the jurisdiction of states seems to introduce the notion of the relevance of cross-media pollution, a subject not then touched upon directly by the ILA.

The law, both substantive and procedural, provided for in the 1986 Rules on International Groundwaters is found in Article 3. It echoes the ILA 1982 Montreal Rules on Water Pollution in an International Drainage Basin. In short, while it does not set out all of the provisions of the Montreal Rules, it extends their main provisions to pollution of international groundwaters. The Article does contain a new provision to the effect that states shall give special consideration to the long-term effects of the pollution; another relevant factor is thus added to those to be taken into account in dealing with the waters of an international drainage basin. As noted in the commentary to Article 3, impact statements are not provided for, but the obligation of the states concerned to exchange information and to consult at the request of one of them is likely to fill this gap.¹⁶⁸

Article 4 recommends that "states should consider the integrated management, including conjunctive use with surface waters, of their international groundwaters at the request of any one of them." This was recognized to be desirable but idealistic and impractical. As Professor Hayton wrote in the commentary on the Article:

Obviously, general international law cannot mandate groundwater management even in general terms. Nevertheless, it can articulate the need, supported by experience and by many professional studies But the integration of groundwater into the broader context of optimal utilization of the aggregate water resources does not dispose of the facets of management peculiar to aquifers: 'The techniques for the developing of surface water cannot . . . be directly transposed to subsurface water'.¹⁶⁹

The chief accomplishment of the Rules on International Groundwaters, then, was bringing international aquifers whose waters are unconnected with surface waters, within the ambit of the principle of equitable utilization. This was a significant contribution to international water resources law. Moreover, the scholarly paper and commentaries on the Articles in the report of the Committee to the Seoul Conference laid the foundation for further developments of this branch of international

168. *Id.* at 270.

169. *Id.* at 272, 273-74.

law.¹⁷⁰

IV. THE COMMITTEE ON INTERNATIONAL WATER RESOURCES (WRC), 1990-

In its final report to the Seoul Conference, the Manner Committee listed a number of remaining significant problems in the international water resources field that might profitably be studied in the future under the auspices of the ILA.¹⁷¹ The Conference took note of this statement and recommended that the Executive Council of the ILA consider the matter.¹⁷² After consultation with several persons who had served on the Rivers and Manner Committees, the Executive Council established the existing Committee on International Water Resources (referred to hereafter as WRC) in November 1990 under the chairmanship of Professor C. B. Bourne.

The WRC now has 22 members and 6 alternates, who are citizens of 20 states in every region of the world. In addition, the WRC is served by seven consultants, adding representation from another three states. In the selection of members, alternates, and consultants, an effort to involve women and younger scholars met with some success; the WRC now has two members, one alternate, and two consultants who are women. These numbers may seem small in a body of 35. In fact, however, since attendance at WRC meetings has on average been 14 or 15, of whom four have usually been women, the numbers may be misleading. Of the 35 persons who are members, alternates, and consultants of WRC, only 17 have attended any of its meetings, a state of affairs that is not unusual in the case of other ILA committees.

The WRC so far has held seven meetings: at The Hague (1991), Cairo (1992), Berlin (1993), Rome (1994), Buenos Aires (1994), Jerusalem (1995), and at Edinburgh (January 1996). At Edinburgh, it reached agreement on the content of its report to the ILA Conference at Helsinki in August 1996, dealing finally with certain aspects of its work.

At its first meeting, the WRC established working groups to study four topics: cross-media pollution; estuarine zones; remedies; and water transfers from and into international drainage basins. It also established a small group to monitor the work of the International Law Commission (ILC) and the Sixth Committee of the United Nations General Assembly insofar as this work relates to international water resources. Considerable progress has been made in the work on

170. See Robert D. Hayton & Albert E. Utton, *Transboundary Groundwaters: The Bellagio Draft Treaty*, 29 NAT. RESOURCES J. 663 (1989).

171. SEOUL REPORT, *supra* note 156, at 236-37.

172. *Id.* at 21.

cross-media pollution and remedies, and draft articles on these subjects will be submitted to the ILA Helsinki Conference in August 1996. The topic of estuarine zones has not yet been considered. As for water transfers, as will be explained below, the topic has been removed from the WRC's agenda. And a draft resolution concerning the work of the Sixth Committee of the UN General Assembly relating to the ILC's Draft Articles has been approved by the WRC.

A. Cross-Media Pollution

The work on cross-media pollution has been difficult. The initial report of the working group on the subject, prepared by its co-chairman, Dr. Harald Hohmann of Germany, proposed a set of draft articles that incorporated the most recent notions of environmentalists.¹⁷³ Some of these notions are reflected in recent treaties, but few of them could yet be regarded as customary international law. Moreover, in adopting the concept of no appreciable harm, the report went contrary to the position uniformly taken by the ILA, which has always maintained the primacy of the principle of equitable utilization in international water resources law.

The WRC has struggled with the drafting of new articles on cross-media pollution. The subject is extremely complex, involving problems of land use, air pollution, industrial activities, and so forth. The WRC's focus is necessarily on water resources aspects, but it recognizes the interdependence of the various elements of natural resources, as the Manner Committee and the ILA did when they adopted the Articles discussed above on the Relationship of International Water Resources with Other Natural Resources and Environmental Elements in 1980.

The tentative draft articles on the subject prepared by the WRC at its Rome meeting in January 1994 were discussed critically later that year at the ILA Conference at Buenos Aires.¹⁷⁴ As a result, the WRC reconsidered the articles and at Edinburgh settled on a new version of them, which will be presented to the 1996 ILA Helsinki Conference for approval. The Articles read as follows:

1. In using the waters of an international drainage basin, States shall, consistent with the Helsinki Rules and the rules on international water resources subsequently

173. The content of this initial report may be seen in Harald Hohmann, *Cross-Media Pollution and International Environmental Law*, 34 NAT. RESOURCES J. 535 (1994).

174. For the report of the WRC to the Buenos Aires Conference and the comments on this report at a working session of the Conference, see INTERNATIONAL LAW ASS'N, REPORT OF THE SIXTY-SIXTH CONFERENCE, Buenos Aires, 1994, at 229-42 [hereinafter BUENOS AIRES REPORT].

- adopted by the International Law Association; individually or jointly take all reasonable measures to prevent or minimize significant transboundary pollution of another environmental medium.
2. Consistent with applicable international rules and standards, States shall, insofar as technically and economically feasible, ensure that waste, pollutants, and hazardous substances are handled, treated, and disposed of in the manner that produces the least transboundary environmental harm.
 3. In using the waters of an international drainage basin, States individually or jointly as appropriate shall ensure prior assessment of the impact of programs or projects that may have a significant effect on the environment or on the sustainable use of the waters.
 4. States shall use their best efforts to achieve integrated management of the water resources of their international drainage basins.

At its Edinburgh meeting also decided not to refer to cross-media pollution in the title to these Articles; if adopted by the ILA, they are to be known as "Supplemental Rules on Pollution." The reason for this is that the Articles do not deal with all aspects of cross-media pollution but in substance merely add to the Montreal Rules on Water Pollution in an International Drainage Basin adopted by the ILA in 1982. The Montreal Rules are discussed above.¹⁷⁵

B. Remedies

The work on remedies has not been as controversial as that on cross-media pollution, but it has not been easy. It was soon recognized that the ILA could do little on remedies in the field of public international law under the present circumstances. In the field of private international law, however, it was thought that the ILA could make a contribution. Accordingly, the WRC tentatively approved at its Rome meeting in February 1994 a set of articles produced under the direction of Mr. K. W. Cuperus of the Netherlands and Professor Alan Boyle of the United Kingdom. These articles were included in the WRC report to the ILA Buenos Conference and were discussed there.¹⁷⁶ In the light of that discussion, the articles were redrafted and were approved by the WRC at its Edinburgh meeting for submission to the 1996 ILA Helsinki

175. See *supra* notes 101-07, and accompanying text.

176. BUENOS AIRES REPORT, *supra* note 174.

Conference.

These articles, entitled "Articles on Private Law Remedies for Transboundary Damage in International Watercourses," reflect developments in the environmental law of European substance, they impose on states the obligation to make available prompt, adequate, and effective administrative and judicial remedies for persons in another state who suffer or may suffer damage arising from the inequitable or unreasonable use of the waters of an international drainage basin in their territories.

The text of these Articles is as follows:

Article 1

- (1) For the purpose of these articles, "damage" includes *inter alia*:
 - (a) loss of life or personal injury;
 - (b) loss of or injury to property;
 - (c) the costs of reasonable measures to prevent or minimize such loss or injury.
- (2) For the purpose of these articles, "damage to the environment" means:
 - (a) harm to the environment of the drainage basin, the costs of reasonable measures to prevent or minimize such harm, and any further loss or damage caused by such measures; and
 - (b) the cost of reasonable measures of reinstatement or restoration of the environment of the drainage basin actually undertaken or to be undertaken.
- (3) Except where these articles otherwise provide, "persons" means any natural or juridical person.

Articles 2

- (1) States, individually or jointly, shall ensure the availability of prompt, adequate, and effective administrative and judicial remedies for persons in another State who suffer or may suffer damage arising from the inequitable or unreasonable use of the waters of an international drainage basin in their territories.
- (2) For the purposes of giving effect to these articles, States shall ensure cooperation between their component courts and authorities, and shall take measures to ensure that any persons who suffer or may suffer damage resulting from the use in another State of the waters of an international drainage basin shall have access to such information as is necessary to enable them to exercise their rights under these articles in a prompt and timely manner.

Article 3

- (1) Any person who suffers or may suffer damage resulting

from the use in another State of the waters of an international drainage basin shall be entitled in that State to the same extent and on the same conditions as a person in that State:

- (a) to participate in any environmental impact assessment procedure;
 - (b) to institute proceedings before an appropriate court or administrative authority of that other State in order to determine whether the damaging use or activity should be permitted;
 - (c) to obtain preventive remedies;
 - (d) to obtain prompt and adequate compensation; and
 - (e) to obtain information necessary to establish such claims.
- (2) Public bodies and non-governmental associations established in a State that are or may be affected by damage, including damage to the environment, caused by the use of the waters of an international drainage basin in another State shall be entitled on condition of reciprocity to initiate proceedings or participate in procedures in that other State to the same extent and on the same conditions as public bodies and non-governmental associations established in that State.

C. Water Transfers

The legality of water transfers from and into an international drainage basin was disputed when the Helsinki Rules were being considered in 1966.¹⁷⁷ This led the WRC to try to clarify the issue. The working group on this topic was composed of Dr. Dante Caponera and Ms. Marcella Nanni of Italy. As a result of their study of the matter, the WRC concluded at its Edinburgh meeting that water transfers were not governed by special rules but were subject to the same general principles of the 1966 Helsinki Rules that are applicable to any other use of the waters of an international drainage basin. The WRC, therefore, decided to remove the topic from its agenda.

D. The ILC's Draft Articles

At Edinburgh, the WRC considered a draft resolution concerning the consideration of the ILC's Draft Articles on the Law of the Non-Navigational Uses of International Watercourses by the Sixth Committee of the UN General Assembly. The resolution was prepared by

177. See, e.g., *supra* notes 72-72, and accompanying text.

Dr. Shabtai Rosenne of Israel and Dr. Stefano Burchi of Italy, members of the group of WRC monitoring the work of the ILC and the Sixth Committee. Under this resolution, the ILA, recalling that the ILC, in its report to the General Assembly on the work of its forty-sixth session, had recommended the presence and participation of jurists, diplomats, and technical experts at the forum to be convened for the adoption of the proposed framework convention based on its Draft Articles, would recommend:

1. that the States participating in the forum called by General Assembly Resolution 49/52 ensure that, in the composition of their respective delegations, adequate representation be given to technical experts, including, in particular, lawyers expert in the law of the non-navigational uses of international watercourses;
2. that participation in the forum mentioned above be extended to include representatives of United Nations Agencies possessing expertise in the disciplines related to the law of the non-navigational uses of international watercourses; and
3. that participation in the forum be extended to include representatives of qualified non-governmental organizations that have engaged in the study of the topic, and also of the International Law Association and the Institute of International Law.¹⁷⁸

The WRC decided to submit the resolution to the forthcoming Helsinki Conference for adoption.

V. CONCLUSION

The ILA began studying the law on international water resources in 1954 and, with the exception of the years 1986 to 1990, this study has gone on continuously. It is now being pursued by the ILA's third committee on the subject, the WRC. This prolonged attention to international water law is a testimony not only to the complexity of the problems involved and the undeveloped state of this branch of the law, but in particular to the perceived urgent need of legal rules in a world in which water is becoming increasingly scarce as population increases rapidly.

By 1966, in the Helsinki Rules, the ILA had identified the basic rule on the subject—the principle of equitable utilization. In the intervening years the ILA has based its work on the proposition that this

178. Apart from the report of the WRC to the Buenos Aires Conference, none of the WRC documents have been published.

principle is the fundamental law, the more detailed rules subsequently adopted by it being merely more precise expressions of the principle and subject to it. The principle, requiring the reasonable and equitable sharing of the benefits of the waters of an international drainage basin is seen as the best suited for achieving the rational management of these waters.

The Helsinki Rules and the later Rules and Articles have the substantial backing of the ILA; they were adopted by consensus in its Committees and at its Conferences. This is not to say, however, that there was no opposition to them. For example, the Helsinki Rules did not in fact have the support of all members of the Rivers Committee. Count Edmund Hartig of Austria, in a memorandum dated August 5, 1965, informed the chairman of the Rivers Committee that the Austrian committee studying the matter rejected the Articles on the ground that they were too vague. This dissent was sustained at the Helsinki Conference by Dr. A Weiss-Tessbach of Austria who spoke there as follows: "The Austrian Branch River Committee . . . cannot support the Report of the [Rivers] Committee The reason for this . . . is that the circumstances in every drainage basin are so different that, at least until now, no international laws have developed which could be applicable to all circumstances."¹⁷⁹ Likewise, Dr. Nagendra Singh of India submitted a lengthy paper rejecting the notion of equitable utilization on the grounds that "the ideas regarding the concept of equitable sharing are not clear," and that "states must be free to develop their uses in accordance with their needs."¹⁸⁰

Mr. Laylin also disagreed with the principle of equitable utilization but on quite different grounds. He too had submitted a memorandum to the chairman of the Committee in which he underscored his "objection to any formulation that condones a change in an international river system by one riparian over the objections of a co-riparian which has demonstrated its willingness to seek a solution without delay by peaceful means, including . . . submission of the validity of its objection to third party determination"¹⁸¹; and, although at Helsinki he acquiesced in the adoption of the Helsinki Rules by consensus, he made it clear that he interpreted them as not denying the absolute protection of existing uses.¹⁸² The issue for him was not that there was no law on the subject, but that the Rules were contrary to the established law prohibiting injury to existing uses. The issue of the

179. HELSINKI RULES, *supra* note 162, at 462.

180. Report from Dr. Nagendra Singh, member of the ILA's Rivers Committee, to the chair of the committee (unpublished paper) (on file with the author).

181. Memorandum from John Laylin, member of the ILA's Rivers Committee, to the chair of the committee (unpublished paper) (on file with the author).

182. HELSINKI RULES, *supra* note 162, at 453-54.

priority of, and injury to, existing uses clearly had not been put to rest, as later events would confirm.

Professor Berber supported the Helsinki Rules, but he was lukewarm about it. He qualified his support by saying that he did not regard the Rules "as regulations meant to bind a judge."¹⁸³ He considered that the Rules were a compromise between very divergent views, a delicate balance, as he put it.

These denials and equivocations did not dampen general enthusiasm for the Helsinki Rules. Before long, the Rules were widely regarded as law. This was the view of the Rivers Committee which it expressed in Article I where the Rules proclaim themselves to be "the general rules of international law . . . 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."¹⁸⁴ It is also the opinion of the two subsequent ILA Committees.

There is other evidence that the Helsinki Rules were soon accepted by the international community as customary international law. For example, Dr. Manner reported to the 1970 ILA Hague Conference in referring to the acceptance of the Helsinki Rules that the Argentinean government had approved them.¹⁸⁵ In 1975, the governments of the four states composing the Mekong Committee adopted a Joint Declaration of Principles for Utilization of the Waters of the Lower Mekong Basin; the principles were fashioned on the Helsinki Rules, Article V of the Rules being reproduced in the Declaration word for word.¹⁸⁶ Another example is the adoption by the Asian-African Legal Consultative Committee in 1973, of Articles IV and V of the Helsinki Rules in its Proposition III, paragraphs (a) and (b) respectively, on The Law of International Rivers.¹⁸⁷ The Helsinki Rules have also been applied by tribunals in India in adjudicating interstate water disputes.¹⁸⁸

The best evidence of the influence of the Helsinki Rules and of their status as international law is seen in the work of the ILC on international watercourses. Special Rapporteurs Schwebel, Evensen, and

183. *Id.* at 462.

184. *Id.* at 465.

185. INTERNATIONAL LAW ASS'N, REPORT OF THE FIFTY-FOURTH CONFERENCE, The Hague, 1970, at 922.

186. Mekong Committee Doc. E/CN.11/WRD/MKG/L.405, at 19. The Mekong Committee was established in 1957 by Cambodia, Laos, Thailand and Vietnam.

187. For the text of these Propositions, see Dante A. Caponera, *The Law of International Water Resources*, Background Paper No. 1/Rev. I, at 45-46 (1978). The Propositions are also reproduced in [1974] 2 Y.B. Int'l Comm'n 339-40, U.N. Doc. A/CN.4/274.

188. For a discussion of these disputes, see B.R. CHAUHAN, SETTLEMENT OF INTERNATIONAL AND INTER-STATE WATER DISPUTES IN INDIA 230-34, 248-50, 319-20. For Professor Chauhan's own view and that of others referred to by him, see *id.* at 71.

McCaffrey concluded after intensive studies that the principle of equitable utilization was a rule of customary international law.¹⁸⁹ And their opinion was accepted by the ILC in its 1994 Draft Articles. In its commentary on Article 5, the ILC states that "a survey of all available evidence of the general practice of States accepted as law, in respect of the non-navigational uses of international watercourses . . . reveals that there is overwhelming support for the doctrine of equitable utilization as a general rule of law for the determination of the rights and obligations of States in this field."¹⁹⁰

The last item on the list suggested by the Manner Committee listed in its final report to the 1986 ILA Seoul Conference as being worthy of further consideration by the ILA, was the "Consolidation of the Helsinki Rules with the subsequently adopted rules and, where appropriate, harmonizing them in view of technical and legal developments."¹⁹¹ At its Edinburgh meeting, the WRC decided to include this project on its agenda and assigned the task of preparing such a consolidation to Professor Boyle of the United Kingdom and Professor Dellapenna of the United States.

The need for this consolidation is urgent. At present, the law on international water resources as propounded by the ILA is not readily available. It is contained in many documents, not only in the Helsinki Rules but in the ten sets of articles subsequently adopted by the Manner Committee, a number that will be increased by the articles expected to emerge from the WRC. By way of contrast, the ILC's version of this law is set out in a single document, namely the Draft Articles on the Law of the Non-Navigational Uses of International Watercourses and Commentaries Thereon, adopted by the (ILC) in 1994.¹⁹² The relative inaccessibility of the ILA's work on this branch of international law is bound to affect the extent to which this work is used and thus its influence. Unless this handicap is removed, the Helsinki Rules and their ILA off-shoots may soon be eclipsed, perhaps totally, by the ILC's Draft Articles. This would be a regrettable fate for a substantial set of rules that are based on the proposition that the law governing the utilization of international water resources must be such as to lead to reasonable and equitable solutions of disputes.

189. For their respective views, see [1982] 2 Y.B. Int'l L. Comm'n 82; [1983] 2 Y.B. Int'l L. Comm'n 170-71; [1986] 2 Y.B. Int'l L. Comm'n 130.

190. *Report of the International Law Commission on the work of its Forty-sixth session*, 2 May-22 July 1994, U.N. GAOR 49th Sess., Supp. No. 10, at 222, U.N. Doc. A/49/10 [hereinafter *ILC Report*].

191. SEOUL REPORT, *supra* note 156, at 236-37.

192. U.N. Doc. A/CN.4/L.493. The articles, with commentary, are reproduced in *ILC Report*, *supra* note 190 at 197-326.