Report of the 48th Conference of the International Law association at New York, 1958.

NEW YORK UNIVERSITY CONFERENCE

The following resolutions were adopted :—

(1) THE USES OF THE WATERS OF INTERNATIONAL RIVERS

The 48th Conference of the International Law Association held at New York in September, 1958, adopts the Report of the Committee on the Uses of the Waters of International Rivers, dated September 6th, 1958, consisting of certain Heads of Unanimous Agreement, four Agreed Principles of International Law, and ten Agreed Recommendations (as set out below).

Heads of Unanimous Agreement

It is agreed that our immediate purpose is to put forward some principles and some recommendations on which there is unanimous agreement.

It is agreed that there are rules of conventional and customary international law governing the uses of waters of drainage basins that are within the territories of two or more States.

It is agreed that there may be issues not adequately covered by recognised rules of international law and also that there are rules as to which there exist differences as to their meaning.

As used in this statement, a drainage basin is an area within the territories of two or more States in which all the streams of flowing surface water, both natural and artificial, drain a common watershed terminating in a common outlet or common outlets either to the sea or to a lake or to some inland place from which there is no apparent outlet to a sea.

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 at the New York Conference have reached unanimous agreement.

Agreed Principles of International Law

1. A system of rivers and lakes in a drainage basin should be treated as an integrated whole (and not piece-meal).

1958

Comment : Until now international law has for the most part been concerned with surface waters although there are some precedents having to do with underground waters. It may be necessary to consider the interdependence of all hydrological and demographic features of a drainage basin.

2. Except as otherwise provided by treaty or other instruments or customs binding upon the parties, each co-riparian State is entitled to a reasonable and equitable share in the beneficial uses of the waters of the drainage basin. What amounts to a reasonable and equitable share is a question to be determined in the light of all the relevant factors in each particular case.

3. Co-riparian States are under a duty to respect the legal rights of each co-riparian State in the drainage basin.

4. The duty of a riparian State to respect the legal rights of a co-riparian State includes the duty to prevent others, for whose acts it is responsible under international law, from violating the legal rights of the other co-riparian States.

Agreed Recommendations

1. Co-riparian States should refrain from unilateral acts or omissions that affect adversely the legal rights of a co-riparian State in the drainage basin so long as such co-riparian State is willing to resolve differences as to their legal rights within a reasonable time by consultation. In the eventuality of a failure of these consultations to produce agreement within a reasonable time, the parties should seek a solution in accordance with the principles and procedures (other than consultation) set out in the Charter of the United Nations and the procedures envisaged in Article 33 thereof.

2. The action of the United Nations and its specialised agencies looking towards the assembling, exchange and dissemination of information concerning drainage basins is welcomed, and the hope is expressed that this work will be undertaken with the addition of the assembling, exchange and dissemination of legal information.

3. Co-riparian States should make available to the appropriate agencies of the United Nations and to one another hydrological, meteorological and economic information, particularly as to streamflow, quantity and quality of water, rain and snow fall, water tables and underground water movements.

4. Riparian States should by agreement constitute permanent or *ad hoc* agencies for the continuous study of all problems arising out of the use, administration and control of the waters of drainage basins. These agencies should be instructed to submit reports upon all matters within their competence to the appropriate authorities of the riparian States.

5. Since priorities in the kinds of uses of waters may differ from basin to basin and from one part of a basin to another, in case

of differences as to the proper order of priority, the advice of technical experts should be sought.

6. The appropriate authorities of the co-riparian States should endeavour to resolve by agreement all matters concerning which recommendations are made by technical agencies.

7. In view of the variety of conditions of climate, hydrological facts, demographic and economic conditions in the various drainage basins, and the varieties of possible uses and needs for water, it is observed that regional agreements may serve the needs of riparian States and communities in many situations and it is recommended that every effort should be made to reach agreements on a regional basis.

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.

9. It is desirable that there be further study of the hydrological, engineering, economic and legal matters bearing on the prospective operation of the existing and desired rules of international law relating to the uses of the waters of a drainage basin.

10. Funds should be sought from foundations likely to be interested in this subject, and it should be considered how, and to what extent, the work can be carried further in harmony with the similar work of the Institut de Droit International and of the Inter-American Bar Association.

(2) RECIPROCAL ENFORCEMENT OF FOREIGN JUDGMENTS

Resolution I

The 48th Conference of the International Law Association, held at New York University, thanks the Committee on Reciprocal Enforcement of Foreign Judgments for the work it has hitherto accomplished and resolves that the Committee continue its work, having as its aim the drafting of a Convention and model legislation both mainly based upon the principles stated in Appendix A of the Report with due regard to the views expressed at this Conference and in the French Report.

Resolution II

The 48th Conference of the International Law Association, held at New York University, approves without further reference to the Committee on Reciprocal Enforcement of Foreign Judgments the principle that recognition and enforcement of foreign judgments ought not to depend upon reciprocity.

(3) NATIONALIZATION

The 48th Conference of the International Law Association held at New York, 1958, having discussed at two sessions the First Report on Nationalization prepared by the Rapporteur of the Nationalization Committee, Dr. Ignaz Seidl-Hohenveldern, which comprises a collection of the views of members and the views of the Rapporteur,

1. *Expresses* its thanks to the Rapporteur General and the members of the Nationalization Committee ; and

2. *Declares* that the principles of international law establishing the sanctity of a State's undertakings and respect for the acquired rights of aliens require
   - (i) that, when a State takes the property of aliens, it must, among other things :
     - (*a*) show that the taking is necessitated by some dominating public purpose, and
     - (*b*) make payment of such full compensation to the alien thereby affected as may be determined by agreement between the State and the alien or, in the event of dispute, by an international authority possessing competence or jurisdiction in the matter ; and
   - (ii) that the parties to a contract between a State and an alien are bound to perform their undertakings in good faith. Failure of performance by either party will subject the party in default to appropriate remedies.

3. *Recognises* that this subject requires a thoughtful and informed study, including the continued examination of questions of public and private international law ;

4. *Requests* the Nationalization Committee to continue its study and to issue reports to the Branches ; and to submit and circulate to the Association not later than three months before its next Conference a second report, taking into account and reporting the comments, if any, of the various national Branches.

(4) AIR LAW

Resolution I

CRIMES ON AIRCRAFT

The 48th Conference of the International Law Association requests the Full Council of the Association to direct the Honorary

USES OF THE WATERS OF INTERNATIONAL RIVERS

WEDNESDAY, SEPTEMBER 3rd, 1958,

at 9.30 a.m.

Chairman : THE RIGHT HON. SIR PATRICK SPENS, K.B.E., Q.C.

PROFESSOR ARNOLD W. KNAUTH (Rapporteur) : The first impetus to our Association in the matter of the law on the uses of the waters of international rivers was given by Dr. Clyde Eagleton at Edinburgh in 1954.

There was immediate and lively interest which resulted in a first report at Dubrovnik in 1956, presented by Dr. Eagleton himself. From this there finally emerged a set of 8 texts which were accepted at the reconvened General Session. These texts are known as the " Dubrovnik principles " and are familiar to you.

The Dubrovnik story is told in the blue-covered booklet " Principles of Law Governing the Uses of International Rivers." :

> " *Decides* to continue the Committee on an enlarged basis and authorises it to re-examine these principles and to widen the scope of its work so as to cover all inland waters of international concern including artificial waterways, whether or not serving maritime navigation, and to cover all uses, including navigation, and to formulate rules of international law and to report thereon for the consideration of the next Conference of the International Law Association.
>
> *Requests* the Chairman, in consultation with the Executive Council and the respective Branches, to appoint to the Committee additional members of the Association expert in this field of enquiry with adequate representation from countries which show an interest in this matter.
>
> *Suggests* that financial assistance be sought from the Branches or other sources dedicated to the advancement of international law and the peaceful settlement of international disputes on a just basis so as to make it possible for the Committee, or sections thereof, to meet as frequently as required ; to maintain

> a research staff and secretariat ; to collect and publish awards, treaties and other evidences of general practice accepted as law and material manifesting general principles of law ; and otherwise to facilitate prompt and effective work by the Committee.
>
> *Requests* the Committee to issue interim reports to the Branches; to invite and consider their comments and the comments of others interested in the matter ; and to submit and circulate to the Association not later than three months before the next Conference of the Association its report together with the comments of the various national Branches."

The Institut de Droit International also went to work and named as its Chairman Dr. Andrassy of Yugoslavia, who has produced excellent materials. Yugoslavia is especially rich in bilateral agreements with its many neighbours : Italy, Austria, Hungary, Roumania, Bulgaria, Greece and Albania.

Subsequently, Dr. Eagleton obtained a grant, enlarged the Committee and called a meeting at Geneva in October 1957. To that meeting came Messrs. Sevette, H. A. Smith and Dr. Manner. It was decided at Geneva :

1—To leave aside the question of inter-ocean canals ;
2—To emphasize water uses other than navigation ; and
3—To deal with drainage basins as a whole rather than limiting the scope of study to rivers themselves.

Dr. Eagleton continued actively with his work until the end of January 1958, when his untimely death left our work leaderless, there being no " Vice President " to carry on his work.

In this situation, the Executive Committee of the American Branch asked me to carry on Dr. Eagleton's work, and the Executive Council in London passed the necessary resolution.

I examined Dr. Eagleton's drafts and voluminous correspondence, from which it was evident that many points were still under debate in his mind : (1) The essential definitions were not yet elaborated ; (2) Many statements were grouped into pairs and threes. I determined to cut these apart so that you could see each proposition separately.

From my work I could see that it was essential to hold a Committee meeting, which we did in May 1958 at The Hague. At this meeting many of us enjoyed the wonderful hospitality of the Peace Palace. Mr. Andrassy attended, to our great benefit.

I was soon convinced that there are at least two importantly divergent viewpoints. While many propositions had unanimous support, some vital propositions are matters of deep division. The

second report which I presented, therefore, states several alternative texts.

During the last week, the Committee has been meeting in New York since Sunday and has worked with remarkable devotion. It is evident that the law of the uses of the waters of river basins is a matter of deep concern in all the continents. As population and industry increase, the demand for water also increases. Water is essential to life, food, industry and transportation. We have here a universal physical subject of life and survival, a cause of deep-seated emotions and conflicts to which the rule of law must be applied in the interests of peaceful relations and orderly purposes.

The result of the Committee's meetings on Sunday, Monday and Tuesday is a mimeographed text stating what could be unanimously agreed upon. This is, surprisingly and happily, quite a long text. It is encouraging that there was no one who said " NO " to these propositions which I am about to lay before you. They might be called the New York Unanimous Minima.

Please understand, if even one man said " No", the proposition, word or phrase in a sentence was eliminated from the New York Unanimous Minima, of the Committee.

I now present, as Rapporteur of this Committee, this Committee's New York Unanimous Minima, to discover whether they are also the New York Unanimous Minima of the membership here assembled. If so, we can go on to look at the ideas as to which there are revealed differences of view.

Some differences are smaller minority views ; some of larger minorities. But the size of the group is not the point. The test of the validity of the idea is present or future law.

There is a remarkable freshness in this subject. Before 1914, the international affairs of the world were in the hands of about ten empires and some twenty-five republics and kingdoms. International rivers and basins matters were settled by a handful of chancelleries and other staffs. This situation changed greatly after 1919. Many new and mostly smaller nations then sprang into life, self-determination was the slogan of this period, the League of Nations numbered over 50 members.

The situation changed again after 1945, after the Second World War. The United Nations now numbers 85 nations and it is easy to count 6 existing nations which are not members — and maybe there are even more.

Thus, one can see that the problem of state boundaries cutting across river basins and waters is multiplied threefold since the days before the First World War. These new nations do not have the traditions of diplomacy developed over centuries in the older chancelleries of London, Paris, Vienna, etc. They are not bound by those traditions of international law which had been developed for

centuries and are more apt to take unilateral action to assert their newly found sovereignty.

Thus it can be seen that our subject is of great importance today, and the establishment of principles of law in this field will contribute greatly to the development of world peace.

It is with these sentiments that we proceed.

PROFESSOR MAXWELL COHEN (Canada): There is a fundamental divergence in the interests of the upstream and downstream States. In the past there had been a time factor in favour of the downstream State, but this is now shifting.

MR. A. W. WILCOX (United States) : While I have not had opportunity to poll the American Branch committee since the interim report became available this morning, I feel sure that I can speak for our committee in urging the Association to adopt this report as it stands or as it may be amplified in certain respects. There are two suggested additions of which I wish to speak briefly. I should like to propose the addition of the substance of principles III and V of the statement of the American Branch committee, which appear on pages XI and XII of the red book. I hold no brief for the particular wording that our committee has proposed, but I do wish to urge consideration by the International Committee and by the Association of the substance of these proposals.

Principle 4 of the interim report deals with the same subject matter as our proposed principle II. The first sentence reads : " Co-riparians are under a duty to refrain from unilateral acts or omissions that may affect adversely the legal rights of co-riparian States in the drainage basin."

This sentence, taken by itself, might lead to the same sort of impasse as some of the earlier statements which forbade changes in a river system without the consent of co-riparians. Perhaps it is implicit from the sentences which follow that this inhibition applies only so long as the co-riparians are willing to proceed, promptly and in good faith, with negotiation and the other means of peaceful adjustment envisaged by the Charter of the United Nations. I should prefer, however, to see this qualification made explicit, as is done in our committee draft, and I would therefore urge a change in the language of principle 4 to accomplish this.

The other point I wish to mention has to do with the interchange of technical information among co-riparians. It is difficult to formulate a requirement of such interchange as a principle of law without overstepping the bounds, but there are situations in which the admitted rights of a riparian can be frustrated by failure to make available to it information of this sort. It may be impossible even to determine its rights, let alone to enforce them, without such technical

data. I should hope that the International Committee might be able to find some form of wording which would recognize that in some circumstances an obligation to make information to a co-riparian is a necessary incident of the mutuality of substantive obligation which the interim report has recognized.

With these two possible additions, I hope that the interim report may be approved by the Association.

DR. BIN CHENG (United Kingdom): I think the learned Chairman and Rapporteur is certainly right in extending the scope of the work of the Committee to the *river system* as such, rather than limiting it to the navigable waters of such systems. This is especially so since the work of the Committee is not intended to cover the law of navigation, but the law of the economic uses of binational or multinational rivers. But if I, who have come from both extremities of the Old World, may be permitted to say so, I am occasionally a little overwhelmed by the desire I have witnessed in the New World and in some of the previous speeches to redraw the face of the entire map. For my part, I shall limit myself to a few more timid and down-to-earth observations.

First, a matter of terminology. The present title of the Committee does not describe its work adequately. The scope of the Committee extends in fact to waters other than rivers, such as lakes. Moreover, the description *international* is liable to create confusion, particularly in the expression "international rivers." This expression has already been appropriated by those concerned with the law of navigation on such waters. It may, therefore, be more appropriate to call this Committee the Committee on the Uses of Plurinational Waters. It is also possible to speak of "binational and multinational" instead of "plurinational."

The use of the term "basin" is defended by the learned Chairman and Rapporteur on page 25 of the Report. But this term may be too narrow in some ways and too wide in others.

It is too narrow in that it is severely qualified by what is said on pages 3–4 of the Report, to which I will come back later.

On the other hand, it may be maintained that the concept of "basin" is too wide in other directions. Its use may involve encroachments on the rights of States unnecessary to the achievement of the objectives of the Statement of Principles which the Committee is trying to draw up. For instance, Section III. 3 gives "all riparian States" "a common interest in the beneficial uses and beneficial *control* of the *waters* of any particular basin "(italics added). The word "waters" in this context might well be interpreted as including also waters not connected with any binational or multinational system, merely by reason of their being situated in a particular basin. This interpretation appears furthermore to be confirmed by the

interim Report which has just been made available. Subject to what I hope to come back to in a moment, such an extension of the scope of the proposed regulation may be entirely beyond the present objectives of the Committee.

It is true that what has just been said can be adjusted by defining the word "waters" as meaning only binational or multinational waters. But this leads me to another point which, between parentheses, I hope I may make without casting any reflection on the high value of the Report before us. The point which I would venture to make is the multiplication of definitions. With the greatest respect to the learned Chairman and Rapporteur, it appears to me that many of the definitions are not very meaningful. Some seem superfluous. Yet others are not definitions at all, but enunciations of substantive rules and regulations.

After that digression, if I may come back now to the problem of the scope of the work of the Committee, I shall explain in what way I think that the present circumscription of the work of the Committee is too narrow. On pages 3–4 of the Report, "drainage-basin river waters" has been defined as follows:

> "The meaning of the phrase 'drainage-basin river water' should be limited to surface water flowing in a recognizable stream, stored in a lake, or flowing and stored in a swamp area.
>
> "This means, correlatively, that the *atmospheric* sources of water, as clouds, rain, snow, dew and the ice fields and snowfields, and the underground water-tables, the underground areas of water storage and supposed lines of subterranean water flow are not, in these texts, regarded as 'drainage waters' or elements of 'river systems'".

Incidentally, the word "atmospheric" might perhaps be more suitably replaced by the expression "natural." But, even then, it would appear that these limitations are unduly restrictive. They can easily provide loopholes whereby the purposes of the proposed Statement of Principles can be evaded. The effect of the word "drainage" has been completely nullified.

This brings me to the questions of the exact scope and purpose of the work of this Committee. As I have already suggested, the name of the present Committee which, from this point of view, constitutes its main term of reference may with advantage be changed to "Committee on the Uses of Binational and Multinational Waters." For the purpose of regulating the uses and abuses of such waters, it would appear essential to control all the sources of such waters, even though they may be in the form of ice or snow, on the surface of the land or under it. This is precisely where such regulation differs from the regulation of navigation which would be exclusively concerned with waters on the surface. On the other hand, as long as the con-

dition and the supply of the waters are not disturbed, there is no reason why the proposed regulation should be concerned with anything else which may happen on land. This is why earlier on I said we should drop the expression basin, but keep strictly to the water system.

My next and final point, which is submitted with due respect and in all humility, is that the precise objective pursued by the Committee is at present uncertain. Professor Cohen in his speech has also alluded to this subject.

Now, on page 11 of the Report, it is recognised that "by far the largest number of problems are presented by two-State rivers," or what I call binational rivers. It follows from this *datum* that the Committee may decide to pursue any of the following three objectives.

(1) *The establishment of a complete Statute* governing the uses of binational and multinational waters in the form of a multilateral international convention to which States can adhere. This would be similar, for instance, to the Barcelona Statute of 1921 in regard to International Navigable Waterways, or even something more elaborate than that because of the greater complexity of the problems raised by the use of waters.

(2) *Multilateral framework for bilateral agreements.* As an alternative to the more ambitious objective indicated above, the Committee may decide to restrict its efforts to producing a framework of what we may now call, after the General Agreement on Tariffs and Trade, bilateral-multilateral regulation, or what is also known as bilateral-multilateralism. Another instance of bilateral-multilateralism is the present international regulation of scheduled international air transport under the 1944 Chicago Convention on International Civil Aviation. The Chicago Convention leaves unregulated the details of bilateral exchanges of rights in respect of scheduled international air services. It limits itself to establishing a legal framework in which such services may be established and regulated by bilateral agreements.

(3) *Restatement of Governing Principles and Study of Treaty Standards.* A yet more limited objective can be divided into two parts.

(*a*) Restatement of the Governing Principles. On page 12 of the Report, it is recognised that, in the absence of specific and relevant treaties, the uses of binational and multinational waters will be governed by rules of international customary law and the general principles of law recognised by civilised nations. The learned Chairman and Rapporteur rightly points to the obscurity of the law in this regard.

It would appear that a restatement of the relevant rules of this unwritten law presents an eminently suitable task for an organisation like the International Law Association. The aim will be to

ascertain, systematise and formulate the existing rules of international customary law and the general principles of law governing the uses of binational and multinational waters. In this connexion, it would appear, for instance, that notwithstanding opinions to the contrary, the principle of good faith, a general principle of law (cf. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, 1953), Part II) which has been received into the corpus of international law, may yet have a great deal of relevance for our purpose.

(*b*) Study of Treaty Standards. The second limb of this more limited objective would be the study of relevant international treaty practice. I am glad to see that the Chairman and Rapporteur also regards this as one of the main tasks of the Committee, and to find among the documents distributed this morning what appears to be a most interesting paper by Professor Cano.

I would, however, like to say a word on what has been said on page 13 of the Report; for it may give rise to some differences of opinion. On the one hand, it is easy to agree with the proposition that "treaties can be adduced, not only as binding upon their signatories [the term "parties" may perhaps be more precise], but as evidence of the practice of States." In this sense, this statement is a truism. On the other hand, this statement cannot be accepted as saying that treaties can, therefore, be "adduced as evidence of the existence of a rule or principle of customary law," without further qualifications. It would be even more questionable to try to explain any differences of opinion in this regard by reference to divergencies in political ideology.

Treaties can be adduced as the opinion of States as to the existence and contents of rules of international customary law only to the extent that they have either been concluded in order to restate or codify what States consider to be the existing rules of international customary law, or when the parties expressly make clear what they regard to be the present state of international customary law which they seek to modify by means of the treaty. In other words, it depends on whether the treaties in question are declaratory or constitutive.

Subject to the above qualification, it may be said that the systematic study of the relevant treaty practice may serve one or more of the following three functions:

(i) Exemplary. The most obvious function of any such study would be their use as guides by States called upon to face similar problems in bilateral regulation by means of treaties.

(ii) Clarificatory. Such systematic studies may also have the results of encouraging settlements of any such problems. Very often States may be reluctant to seek a settlement because they are not sure of the best procedure in doing so. Rather than having a bad

settlement, they sometimes suffer no settlement. By systematising the standards and patterns of past and existing regulations and by analysing the function and implication of such procedures of regulation so that they are fully understood, such studies may well have the effect of encouraging States to commit themselves more readily than at present.

(iii) Unifying and Consolidating. Such systematic studies may also have the effect of gradually unifying the practice of States in their treaty regulation of problems arising from the uses of bi-national or multinational waters. Such uniform practice, while it would not be evidence of an existing rule of international customary law, as pointed out above, may, however, have the effect of gradually consolidating into a rule of international customary law in future. Many existing rules of international customary law, including those on the international minimum standard in the treatment of foreigners, have their ancestry in treaties (c.f. Schwarzenberger, *International Law* (London, 1957)).

Finally, it only remains for me to support the Chairman's motion as to the desirability of finding funds to further the above-mentioned researches (p. 13), both as regards the restatement of existing governing principles and in respect of the systematic study of patterns and standards in existing treaty practice.

MR. JOHN G. LAYLIN (United States) : I wish to pay tribute to the memory of Clyde Eagleton. The services that he rendered to the progress of the work of this Committee continued up to the very day of his death. His contributions to the further progress of this Committee's work did not stop with his death. The memory of his devotion and his practical idealism has continued to assist us toward achieving our goal. It has contributed to the unanimity in the report now before you.

I wish also to pay tribute to our Chairman-Rapporteur, Professor Arnold Knauth. I was a witness to the difficult task he had in taking up the reins, but thanks to his energy and leadership the pace of the Committee's work has been maintained.

I wish also to pay tribute to my friend from Canada, Professor Maxwell Cohen. It is largely owing to his initiative and persuasiveness that our Committee has been able to come here with this unanimously agreed-to minimum statement. You appreciate that this statement does not purport to cover the whole area as to which unanimity may be achieved. The report covers only those items as to which we have had time thus far to express agreement. With Mr. Cohen's continuing leadership and that of our Chairman-Rapporteur, I hope that we may, at this Conference, report agreement over an even larger area.

I wish to pay tribute also to my friendly opponent, Dr. Berber. He came on this Committee at my suggestion. He is legal adviser to a country that is having a water dispute with a country to which I am legal adviser. But I was sure that in our Committee he would act as a scholar. This he has done ; and this I have tried to do.

At the meeting of the Committee held in Geneva last October, we had the benefit of the participation of Judge Bagge and Professor H. A. Smith. Professor Smith, you will recall, is the author of the leading work on this subject and might be called the father of international waters. Both Judge Bagge and H. A. Smith stressed the importance of procedural arrangements in the avoidance or settling of international river disputes. This, it was felt, should have as much attention from the Committee as the substantive law.

In this connection I was struck by one of the statements by the Attorney General in his opening address to this conference. He said :

> " It is important too to bear in mind that the mere fact a court is open for dealing with disputes and that the parties may be compelled to appear before it, is often enough to spur parties into settling their differences amicably out of court."

It is certainly true that when parties know that their contentions, if not resolved by agreement, must go before a court for determination, they will be much more likely to be reasonable and accommodate themselves to one another. A fair settlement, they feel, is better than running the risk of losing more through third-party determination.

The existence of a compulsory arbitration treaty between the United States and Mexico was an important factor in inducing a fair solution of our water disputes with Mexico by agreement.

In a similar manner, the knowledge on the part of your Committee that it must submit its views for the judgment of this Conference has contributed in a large measure to the success of the efforts that have produced this Interim Report with its minimum statement of law and recommendations that nevertheless has been unanimously agreed to by the members of the Committee present at this Conference.

MR. S. M. SIKRI (India) : I would first like to say something about the Interim Report of the Rivers Committee. It was at the Geneva meeting in October last that the idea of the integrated development of a river basin was, at the instance of the late Professor Eagleton, mooted and adopted. This is a significant advance on the Dubrovnik principles. The members of the Committee felt that existing law was not in line with the great advances that had taken place in engineering. The engineers ought to be enabled to get the most out of the water resources of a river basin. I must say that I am still of the opinion that strictly speaking the Harmon Doctrine is still

law, and my opinion is reinforced by the material collected in the book written by Major Bloomfield of the Canadian Branch. But, as pointed out by Mr. Cohen this morning, our task is not only to develop law but to make the relations of States more viable, and accordingly, as a member of the I.L.A., I am willing to assent to this principle. If neighbouring States enter into a joint venture of developing the resources of a water basin it is inevitable that they will come nearer to each other.

The second advance on Dubrovnik is that the principles have been made more flexible. The great contribution, if I may say so, that Professor Knauth has made to the work of the Committee, is that at the Hague meeting in March he shook us out of the grooves into which we were getting. He pointed out the great differences between the historical and economic background of various river basins and he stressed the point that the Dubrovnik principles were too rigid. The Committee has drafted the articles in the light of the above ideas and I commend the acceptance of these to you.

Coming now to the actual draft, I wish to point out that Article 4 was arrived at as a compromise late last night at the Committee Meeting. We had agreed to the other articles and the members felt that it would be a pity to spoil unanimity of the draft. The Committee had four drafts before it and Article 4 was accepted as a compromise. Unfortunately, after the meeting was over we were informed that a different version of Article 4 — a version which had been rejected by the Committee — would be introduced at the Conference by an associate of Mr. Laylin. At this, some members withdrew their assent and consequently Article 4 should not be treated as an agreed recommendation. This morning Mr. Wilcox has already said that he would introduce an amendment to Article 4 in this respect.

Mr. Laylin has suggested this morning that the draft needs improvement and he would have compulsory arbitration and compulsory jurisdiction of the International Court of Justice. This is, in my opinion, a very wide subject. It has been pending before the General Assembly for some time and at the Conference on the Law of the Sea at Geneva, compulsory arbitration was introduced as a *quid pro quo* for enabling States to give up some of their rights. The States were not willing to give up their rights in fisheries unless they were assured of a quick decision of their complaints. This has no relevance to our subject. Moreover, river disputes, as has been pointed out by the Supreme Court of the United States, are not a fit subject for the Courts. Our aim should be to encourage States to enter into agreements and the articles have been drafted keeping that in view.

Dr. Cheng has pointed out the need for considering in detail all the relevant unwritten laws of International Law. For this purpose a great deal of research work is necessary. The late Professor Eagleton had started collecting material — historical, physical and economic — and he had promised to circulate it by the end of February. But unfortunately his untimely death stopped the progress of the work of the Committee in this respect. You cannot spell out customary rules of International Law unless all the basic material is first collected. For this purpose the Committee has already asked for funds and further research.

MR. L. M. BLOOMFIELD, Q.C. (Canada) : Mr. Sikri stated that the American draft had been considered by the Rivers Committee and had been rejected. In fact part of the American draft had been incorporated in the Interim Report of the Committee which was presented this morning in discussion.

As a member of the Committee, I confirm Mr. Sikri's statement that the Interim Report had been agreed upon unanimously by all members present at the meeting the previous evening, on the understanding that no further amendments would be introduced by, or on behalf of, members of the Committee, and that, while amendments from the floor were certainly desirable, the fact that an amendment had been proposed this morning which the Committee had been advised last night would not be presented, changed the situation to the extent that the unanimous consent of the Committee to the Interim Report could, therefore, not be extended to Article 4, which was the subject of the amendment.

I wish to stress the importance of regional agreements and treaty practice between riparians, which have enabled Canadian-American boundary waters problems to be peacefully and successfully resolved for almost half a century through the intermediary of the International Joint Commission.

I wish to remind the Conference that Professor Knauth has stressed the importance of further study on the subject of International Rivers being most necessary. I should therefore like to call for research funds in order to enable full time scholars to be put to the task of determining just what the law on the subject of International Rivers really was.

DR. K. KRISHNA RAO (India) : I was a member of the Sub-Committee of the ILA Committee on ' International Rivers', which recommended a text to the full Committee. The full Committee agreed to the text in a spirit of compromise. In that spirit and in good faith, I agreed to the compromise text although I had introduced my own text. Every member of the Committee, including Mr. Laylin was a party to the compromise text. Now Mr. Laylin made a new proposal, contrary to the agreed text, thus violating the spirit of good faith in which the compromise text was recommended. In

the light of this, I feel free to introduce my own amendments to the compromise text, and as a first step in this direction, I intend to introduce an amendment to transfer the present Article 4 from the heading " Principles of Law " to the heading " Recommendations ". Further, the pacific means enumerated in Chapter VI. are, under the Charter, merely ' recommendations ' to the Member States. Consequently, we should follow the same in our text also. If this Association were to make recommendations to governments not already covered by the provisions of the Charter, it should be assured that the recommendations would obtain general acceptance from the States concerned. The present proposal is not of that kind.

In regard to the proposal by Mr. Laylin and Mr. Wilcox concerning compulsory adjudication by the World Court, the concept of compulsory adjudication of all legal disputes was rejected by the San Francisco Conference in 1945. Instead, Article 36(2) providing for optional jurisdiction was adopted at that time. The " determination " by the State of " matters of domestic jurisdiction " was introduced in 1946 by the Unites States Government in its declaration under Article 36(2) of the Statute. There are many who feel that such a reservation was contrary to the provisions of the Statute of the World Court. The United States Attorney-General had declared, only yesterday, that the United States was re-examining that exception. Consequently, States are making progress towards the acceptance of the jurisdiction of the Court in relation to a number of legal problems. If a particular State desires that a particular category of disputes should fall under the compulsory jurisdiction of the World Court, Article 36(1) and 36(2) of the Statute provide the machinery for such action by the individual states. It would be premature for this Association to make a recommendation in this regard. If they do, such a recommendation would go the way the principles proposed by the Institut de Droit International on International Rivers in 1911 had gone.

I have no objection if the Association desires to start a new item concerning " adjudication of all legal disputes by the World Court." That would be the proper item under which this question may be considered. Water disputes cannot be isolated from other disputes which deal with peace, security and the right of individual and collective self-defence of the members of the United Nations and the legality of the exercise of such right. I would be prepared to discuss it under that item and not in an indirect manner in regard to the item on ' international waters.'

If any amendments were introduced by members of the Committee or on their behalf I feel free to introduce my own amendments at the next meeting of the Conference, since the Chairman announced that amendments could be introduced only at the next meeting.

PROFESSOR MYRES S. MCDOUGAL (United States) : It would be a great public misfortune were we to allow immediate issues and considerations of short-term expediency to dominate our deliberations upon the important problem before us. As a newcomer to the discussions, I do not know, or care, what particular interests are most immediately at stake. The perspective I propose to take is that of a responsible citizen of the larger community of States addressing himself to other responsible citizens of the same community.

My only knowledge of your problem comes from having taught for a number of years the water law of the United States, including the controversies between the states. From that background I had thought that what you did at Dubrovnik was a wonderful achievement. In your conclusions at Dubrovnik you recognized the common interests of States in the great sharable resource of international rivers and began to clarify the appropriate principles and procedures for the development of that resource in common advantage. But this proposed report before us today is something completely different from Dubrovnik. It contains only the most halting recognition of common interest. The procedures it recommends are the most minimal. It is distinct retrogression from Dubrovnik. It is both blind and halt.

It is urged that this step backward is required by the distinction between *lex lata* and *lex ferenda*. The law, it is argued, is only what officials have decided in the past ; the law does not include what officials will do in the future, or it must be assumed that they will only do in the future what they have done in the past. This argument reminds me of the famous goofus bird. The goofus bird, you will remember, always flew backwards. Though deeply concerned for where he had been, he didn't give a damn where he was going. It is reliably reported that he had inscribed upon his tail feathers the words " lex lata only."

From a perspective of realistic description, it is clear that though decisions about international rivers are just in their beginning, we do have a very rich heritage of experience about sharable resources upon which officials may rationally draw for future decision. It is, I assume, our task to explore this heritage and to attempt to clarify the fundamental policies which will, and should, guide future decision about the potentially productive resources of international rivers.

The past experience of greatest relevance to our problem includes both the individual experience of our various States in the internal regulation of rivers and watersheds and the common experience of all States in the inclusive regulation of such great shareable resources as the oceans and the air space over the oceans.

The lesson to be derived from the experience of the United States in the development of its own internal water law is that of the

imperative necessity of the unified administration of drainage basins and drainage basin systems. From primitive and absolutistic rules of capture (over-protecting the upper riparian) and of " natural flow " (over-protecting the lower riparian), our courts moved slowly through doctrines of prior appropriation and prescription to wide acceptance of concepts of " reasonableness " and " equitable adjustment ". With the acceptance of these concepts of reasonableness and equitable apportionment it became clear that judicial decision alone, the simple resolution of particular controversies, was not adequate to serve the public interest. Courts had neither the expertise nor staffs either for the best solution of particular controversies or for continuous supervision. Hence for some decades we have been slowly developing new modes of administration.

Looking quickly at the common experience of States in regulating the oceans, we may recall the familiar history how for several centuries these great sharable resources have been effectively internationalized for the benefit of all mankind. Unlike the land masses, the oceans have admitted of shared use, through appropriate accommodation of competing uses, and the necessary accommodation has been achieved through the international law of the sea. It is only in very recent years that this achievement has become critically threatened by national policies of unilateral grab.

A full examination of the relevant facts might, I believe, demonstrate that international rivers, like the oceans, both admit of shared use and require shared use for the fullest production and widest distribution of common values. Experience within our various countries indicates that every particular river basin has its own peculiar unities and interdependences — unities and interdependences in the physical interrelations of land and water and different kinds of waters, in the technology of necessary control, and in the reciprocal impact of different uses upon each other — and that the effective, conserving, and productive regulation of any particular basin requires that all these unities and interdependences be taken into account. The physical, technological, and utilization unities of an international river basin can scarcely be expected to abide by the national boundaries of States, established in accordance with political factors. On occasion a particular State may of course be able to secure special advantage by assertion of exclusive claims which ignore the common interest, as determined by drainage basin unities, but in the great run of instances, the interest of a particular State must in the long run be the same as that of the general community of States. Had your inquiry not excluded navigation, this interdependence of the upper and lower riparian might, for example, have been more apparent. While the upper riparian may have the effective power to assert a primitive rule of capture, the lower riparian may have the effective power to monopolize navigation. The States which border upon an international river are, thus, commonly bound together in a network of potential retaliations and promised reciprocities and the greatest reciprocal promise of all is of course in the tremendous expansion in the production of all values made possible by co-operative, integrated development.

From this perspective, it follows 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. Perhaps I might, with deference, call your attention to the provisions for compulsory settlement of disputes included in the recent Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas. This convention would seem to provide a much more appropriate model. The argument has been made that States should not be expected to submit to disinterested decision-makers in controversies about rivers until compulsory jurisdiction has become universal, but this argument ignores the peculiar common interest which States have in sharable resources, and the attendant potentialities of retaliation and reciprocity, which make these controversies peculiarly urgent.

The mere settlement of occasional disputes is not, further, adequate to effect integrated river basin development across State lines. The need, in Professor Maxwell Cohen's eloquent words, is not for mere " connection " across lines but for an organic, comprehensive, and rational integration. The official who thinks he can regulate one side or one end of a stream without affecting the other side or end, or who thinks that he can regulate streams without considering inter-relations with surface or ground waters, or who thinks he can concentrate upon " water systems " without calculating policies in terms of effects upon land activities, but deludes himself. I hope that you will go forward, in your clarification of fundamental policies and rational procedures, to consider not only better modes for settling disputes but also new modes of administration. For one possible model may I be so provincial as to recommend our own eminently successful Tennessee Valley Authority.

THURSDAY, SEPTEMBER 4TH, 1958, AT 2.30 P.M.

MR. W. L. GRIFFIN (United States) : I would like to speak briefly in support of the Committee's final report although in one respect, which I shall mention in a moment, I believe it retrogresses from the Committee's interim report.

Both the interim and the final report are a great step forward because they recognize that there are rules of customary international law governing the uses of international drainage basins, and that one such rule is that each co-riparian State is entitled to a reasonable and equitable share in the beneficial uses of the waters of a common basin.

The interim report also recognized as an existing rule of customary international law that co-riparian States are under a duty to refrain from unilateral changes that may affect adversely the legal rights of others, and to seek a solution by consultation or third party process. This paragraph of the interim report was not as carefully drafted as it might have been and so it was criticized at yesterday's session as seeming to give a veto over a proposed change.

I am sure that anyone who has studied this matter would admit that there is no rule of law giving such a veto, and I am sure that the Committee did not intend to state 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 for compulsory arbitration nor give a veto ; and it is fair to both parties because it insures that neither can have unilaterally imposed upon it the views of the other as to its substantive rights. Unfortunately this procedural principle, which the Committee in its interim report regarded as existing law, is now relegated to the status of a recommendation.

As a member of the American Bar Association's committee on international rivers, I have taken the position that my country should not unilaterally increase its diversion from Lake Michigan over the objection of Canada because I believe this principle is existing law. I believe that it is one of the " involuntary obligations " of which Professor Maxwell Cohen spoke at Dubrovnik in 1956.

As Professor Cohen pointed out : We are living in a time which is seeing an increase in the volume and variety of the control of international law over the behaviour of States. The adherence of States to the United Nations Charter and other treaties has led to situations in which, on the basis of principal treaty obligations, new subsidiary obligations are imposed on States. The positivist description of sovereign consent as the source of international law cannot explain the involuntary nature of obligations assumed by States simply through membership in the international community.

Under the United Nations Charter, except for self-defence, a co-riparian must refrain from forceful self-help remedies inconsistent with the purposes of the United Nations. If a co-riparian is willing to negotiate or to submit to third party process the validity of its objection, is it to have no legal protection in the interim ? I submit that its protection lies in the duty of the proposing riparian temporarily to refrain from its proposed change pending settlement of the matter.

MR. A. G. DONALDSON (Northern Ireland) : There is an underlying theme which can be seen in several subjects under discussion at

this Conference. This is the relation between technical developments and the growth of international law to deal with the situations produced by these developments. One example was provided by the session on nuclear energy ; another is to be found in the report of the Committee on Nationalization ; and a masterly survey of this subject was given by Professor Jessup in his speech at the luncheon given by the American Foreign Law Institute and the American Society for International Law. In the same way, our Committee is working in a field where technical developments play a great part. The problems to be grappled with are of such importance and complexity that solutions, though urgent, cannot be easily found. Conversely, technical solutions may help in the task of providing a legal framework for the problems of international rivers. If I may refer again to a topic which I mentioned at two previous Conferences, the co-operation on water problems between Northern Ireland and the Republic of Ireland continues despite fundamental disagreement on other problems.

Turning to the interim report which has been produced by the Committee for discussion at these sessions, I would like to stress that it represents the outcome of lengthy and detailed discussions. At the meetings of the Committee held in Geneva last October, and at the Hague last May, the bedrock of international law was touched in the discussions on *lex lata* and *lex ferenda*. This doctrinal dispute, and the evaluation of the material examined by different scholars, naturally led to considerable contention among the various members of the Committee. Yet the document which has been produced shows that the area of disagreement has been narrowed and the area of agreement correspondingly widened. The result may not be large in scope, but its very existence represents considerable progress.

I would like to suggest that the Interim Report is not the kind of document suitable for parliamentary debate. Naturally, the Committee would welcome views and suggestions, but I myself do not feel that our work has yet reached a stage when it can be submitted to the Association as anything approaching a final statement. Yet I hope that the Committee will have a future opportunity to produce a document worthy of inclusion among the Association's positive achievements. Therefore, for the second Conference in succession, I find myself commending to the session a document which, whatever its shortcomings, could provide the basis of further work.

DR. G. F. FITZGERALD (Canada) : At luncheon, Professor Jessup stated that he is a gradualist insofar as developing international law is concerned. In other words, he believes that developments must come about through the gradual emergence of improvements to existing legal principles, or to the cautious preparation of

new legal principles where no rules on a particular subject have hitherto existed. This thesis of gradualism only serves to confirm the validity of remarks made by Professor Cohen yesterday morning, when the latter indicated that the Association, in attempting a statement of legal principles, must first carry out a scientific survey to ascertain the *lex lata*, and then try to fill in the gap between the *lex lata* and what was considered to be desirable by a process of understanding and goodwill. But it might not always be possible, I feel, to fill in that gap. This does not mean that I favour a pessimistic approach, but rather a cautious one, since it is only on the solid foundation of scientific research that a durable structure of legal rules can be based.

I should now like to touch upon a particular aspect of the Committee's report to the Conference. That report, like Professor Knauth's report, recommends the establishment of agencies, whether permanent or *ad hoc*, to study waters problems. In Professor Knauth's report, particular reference is made to the existence of the half-century-old International Joint Commission between Canada and the United States. The Canadian Branch has carried out a certain amount of study on the experience of the Commission, and I should like to place before you three valuable lessons which may be drawn from this study :

1. Out of the 72 cases that have come before the Commission, very few have resulted in disagreement or have been left unsettled. As you know, the Commission has certain *judicial* powers in relation to boundary and trans-boundary waters. Thus, the Commission is empowered, under the Boundary Waters Treaty of 1909, to pass upon certain cases involving the use or obstruction or diversion of waters. In effect, the two countries concerned have, in respect of the judicial powers of the Commission, abdicated their sovereignty and vested judicial powers in that body. Here is the remarkable record in regard to the 47 applications involving judicial jurisdiction of the Commission : orders of approval were issued in 39 cases ; 3 applications were withdrawn ; 2 were postponed and not taken up again by the applicants. In two cases the Commission decided that it had no jurisdiction, while one application has not yet been completed.

In regard to the *investigative* jurisdiction of the Commission, 16 out of 23 references have ended in joint recommendations to the two Governments ; work on 6 out of the remaining 7 references has not yet been completed — one of these cases being, of course, concerned with the Columbia River ; while in the seventh reference there was disagreement within the Commission.

The Commission may have its critics, but none of them can deny that it has played a useful role in preventing and settling differences between two neighbours whose conflicts arising in regard to the use

of common drainage basins are no less serious than those arising elsewhere.

2. The 3,500-mile border between Canada and the United States, and the further 1,450-mile border between Canada and Alaska, provide an amazing laboratory for the development of experience in relation to boundary and trans-boundary waters, since along these borders every conceivable type of waters problem arises — and very often in major proportions. It is not surprising, then, that the orders and recommendations of the International Joint Commission, faced — as this body has been — with such a variety of waters problems, carefully take regional and local requirements into account. A fertile field of research lies open for the student who would investigate this facet of the Commission's experience, paying particular attention to the *techniques* used by the Commission in solving the problems before it.

3. Even though the Commission has operated under a Treaty— the Boundary Waters Treaty of 1909 — containing certain carefully drafted substantive legal principles, it has not always found it easy to apply these principles to the wide variety of common drainage basins shared by the two countries. It follows that, if the two countries concerned, with their highly developed techniques for the handling of problems related to common drainage basins, have had such difficulty, any attempt to draft multilaterally acceptable legal principles must be carried on with caution.

In view of the foregoing, it is fair to state that the establishment of agencies to study and discuss waters problems is better than the endless arms-length negotiations through diplomatic and political channels. It is not enough to draw up legal principles on international rivers. Provision must also be made for the application of these principles by appropriate agencies. I feel that a substantial part of the solution to present difficulties in the field of international rivers will be found in the encouragement of such agencies, in the hope that more frequent contact between the authorities responsible for the administration of common drainage basins will, one day, flower into such co-operation as now exists between Canada and the United States under the Boundary Waters Treaty.

I have earlier indicated the need for scientific research. Such a programme will cost money and let us hope that such money as may become available will be used on a world-wide basis. I cannot too strongly insist on this point, since, if further effective progress is to be made, research funds must be forthcoming. I endorse most heartily the recommendation of the Committee in this regard.

In closing, I wish to state that the draft before us constitutes an acceptable basis for further work. It represents arduous effort on the part of the Committee and a sacrifice on the part of some of its members, of some cherished ideas. The Committee is to be congratulated in having carried out such a difficult task.

MR. K. W. CUPERUS (Netherlands) : With the increase of the world's population and the expansion of its industries, the scarcity of water will be felt more and more, and this scarcity will lead — and has in some cases already led — to conflicts between States. The solution of these conflicts is difficult because of the lack of international rules in the matter. The establishment of principles and recommendations for settling questions relating to the use of international waters is therefore a great and urgent practical need. I regret in these circumstances that at this Conference the subject has been what I might call telescoped.

In Dubrovnik the Commission worked out eight principles ; the author of the second report undertook the difficult but extremely useful task of giving these principles a practical meaning. In this lively stream of practical wisdom a dam has now been erected ; it consists in the opening phrase of the interim report which states that the immediate purpose is only to put forward some principles and recommendations. This policy of the greatest common denominator has slowed down progress. For what has happened is that the eight principles of Dubrovnik have been drawn up which, in fact, have very little to do with international law and in which those who have to solve international problems in this field will hardly find anything of practical value for their guidance. Let me illustrate this with a few critical remarks : In principle 1 it is stated that a drainage basin should be treated as an integrated whole. No indication, however, is given as to the form this treatment should take. Must all the legal questions be dealt with at the same time as all the economic problems ?

In paragraph 2 the principle is laid down that each co-riparian is entitled to a reasonable and equitable share in the beneficial use of the waters except as otherwise provided by international instruments. Does this mean that certain international instruments may contain a clause according to which one or more co-riparians are entitled to an unreasonable share or perhaps to no share at all in the use of the available waters ?

Principles 3 and 4 mention the legal rights of the co-riparians without defining them. Very little is said about their obligations.

As to the recommendations, I think that they are much too vague. For example, in recommendation 3 mention is made of constituting agencies for the continuous study of any problem that may arise. When should these agencies be of an *ad hoc* character and when of a permanent character ? Moreover, would it not be useful to go into greater detail with regard to the functioning of such agencies ?

With regard to recommendation 4 I think it necessary that the various kinds of uses of water should be listed in order to be able to establish priorities.

Recommendation 5 is, in fact, no more than a repetition of principle 4 ; and lastly in recommendation 7 reference is made to the problem of water pollution without defining what water pollution is.

We have been asked to submit suggestions as to how the present interim report can be improved. Here are some of my suggestions.

I think it highly desirable that the work on the uses of international waters should be continued, taking as a basis the definition of its purpose given by the author of the second report : " The purpose is to develop principles and recommendations for the guidance of conciliation committees, arbitrators, courts, negotiators and draftsmen of bilateral and multilateral agreements with reference to problems of the uses of the waters of international river-basins ". With this purpose in mind, I think that the following questions should be further examined :

1. The priorities for water uses should be listed systematically.
2. Definitions should be drawn up for the terms needed in legislation concerning the use of international rivers ; if necessary, with the help of technical experts.
3. It should be shown more clearly how the principle that a river basin should be treated as an integrated whole is to be implemented. For instance, whether the agencies should deal with all or only certain kinds of water uses from a legal and economic point of view, and due regard should be given here to those rivers for which international commissions are already in existence.
4. An effort should be made to define more precisely the legal rights and obligations of the co-riparians. This will not be easy and will be even more difficult if we start discussions on the subject with a certain *parti-pris*. This question could perhaps be tackled piecemeal to see, for instance, whether it would be possible to reach unanimity on certain kinds of water uses, as for instance, navigation, pollution, recreation.
5. Studies should be made also of the rights of non-riparians. For instance, whether they have the freedom to navigate on international waters.
6. Studies should be undertaken to see whether differences between States should be solved in accordance with Article 33 of the Charter of the United Nations or whether it is possible and advisable to establish rules for a more practical arbitration machinery.
7. Studies should be undertaken to see whether it is right and in the interests of the basin as a whole that all decisions concerning all problems should be taken unanimously, thus creating the right to veto.

DR. DANTE A. CAPONERA (Italy) : As a member of the International Committee on the utilization of international rivers, I feel it to be my duty to state a few explanatory words in order to clarify the reasons which have led our Committee to shift from the conventional concept of International River to that of drainage basins common to two or more States.

These remarks are even more necessary since I have to confess my paternity of this drive within the Committee and I feel that the new concept may undergo destructive criticism, as it already has, by some of my distinguished colleagues.

It seems to me that these explanations are indispensable particularly for those who have not had the opportunity to deal in detail with the specific responsibilities assigned to our Committee.

As for the new idea, I would like to state that it finds its justification in the light of the physical-hydrologic factors, in the development of new engineering techniques, in modern economic theories, and, last but not least, in a closer analysis of the legal water law principles. However, since most of the other speakers of the Committee will presumably illustrate the legal aspects of this subject, I shall confine myself to dealing especially with the physical, technological and economic incidence on our problem.

It is evident that the pattern followed by nature in distributing water resources does not necessarily follow or consider the political, administrative, economic and legal boundaries created by man.

Rivers have always been the centre and the heart of all civilizations, and the idea of considering them as merely bordering or crossing States has evolved with the development of subsequent legal thought and under the pressure of new technological achievements.

It has always been considered as a part of the indispensable qualities of a lawyer to understand at least, if not to be an expert on, the various basic non-legal aspects of the subject that he is called to deal with, either as a legislator, or as an interpreter, or as a judge. A lawyer who does not try to understand the real nature of the facts regarding his immediate concern fails in his purely legal approach to the question.

As Mr. Kaekenbeeck, an authority on River Law, puts it, " . . . if an International Congress attempts to deal with the question of international rivers, he will have to grapple with many technical problems for which a close collaboration of experts and jurists is requisite. The work will not in any case be satisfactorily performed by simply framing a beautiful proposition signed and sealed by a score of governments, be it ever so free from the plague of amendments and reservations."[1] To this sentence I would like to add that

[1] G. Kaeekenbeeck, *International Rivers*, Grotius Society publications, No. 1, 1918, Page VII.

river and water resources questions are a matter of concern of such experts as hydraulic engineers, geologists, economists, sociologists, agriculturalists, hydrologists, public health officers, *etc.*, and that water, as one of the few indispensable but limited resources of humanity, involves the interests and indeed the very life of all nations.

The question to be asked is why we should deal with drainage river basins instead of rivers. Well, an illustration of the physical facts may contribute to the understanding of this issue. By water cycle or hydrological cycle, the hydrologists mean the endless circulations of the earth's moisture and water. It is an endless gigantic system operating in and on land and oceans of the earth as well as in the atmosphere. Water, from the surface of the oceans, reaches the atmosphere by evaporation. That moisture, as clouds, is directed by winds into various directions and whenever the moisture is condensed it falls back to the earth's surface as precipitations in the form of rain, hail, dew, snow and sleet.

Some of the precipitation runs off over the surface into the ocean through a variety of streams, torrents, creeks, *etc.*, combining all together eventually in a major river or water course which flows into the ocean or into an inland lake, swamp, or other location without apparent outlet to the sea. It is the water that provides life for the vegetation but which also causes soil erosion and floods. Of the precipitation that soaks into the ground, some is available for growing plants and for evaporation, some reaches zones more or less deep into the ground forming underground water acquifers according to the geological composition of the soil and serving as a precious reserve for later uses. Portions of these slowly percolate through the earth to maintain the springs during dry periods or supply artificial wells.

This precipitation, both from the surface or underground, eventually leads back to the oceans where water originated. From this point, the hydrological cycle starts again.

On the surface, it is the topographical configuration of the land which determines the natural network of the river system.

The horizontal projection of this area in which a river or an internal lake, swamp, or other location without apparent outlet to the sea, receives surface water originating as precipitation is commonly called river basin, or drainage basin.[2] The line which follows ridges or summits or other points of higher elevation forming exterior boundary of a drainage basin is called watershed or drainage divide. Finally, the portion of the total precipitation or melted snow within a drainage divide is called " run-off " by the hydrologists and the engineers. This is the surface run-off as opposed to underground water run-off.

[2] E.C.A.F.E. Document, Glossary of Hydrologic terms used in Asia and the Far East, Sales No. 1956 : II.F.7.

It must be obvious to us as lawyers that any diversion of water at any location within a drainage basin and not only on the main resulting river interferes directly with the hydraulic regime of the whole system. In the case of a drainage basin located within the territories of two or more States, such utilization or any misuse may affect the natural flow of the waters in another part of the basin, and in this case an international river dispute is likely to occur.

The reasons given by economists and hydraulic engineers in justifying the development of water resources by drainage basins taken as a unit provides a further reason to the lawyers to help them find legal measures, both national and international, to solve the various problems of a legal nature involved.

Until recent years, man's attempt to harness or utilize rivers has been limited mainly to one purpose on one river. The law followed the same pattern, and in international law the river was used as a boundary, or as a means of navigation. International River Law evolved around the studies for fixing the boundary between riparian countries, and for attempting to introduce the principle of free navigation.

With the appearance of hydro-electric power production, a number of international agreements have been signed concerning the production, distribution and use of this water resource. At the same time, municipal water laws had to be either amended, or supplemented with the inclusion of power legislation.

This manner of planning water projects to meet the immediate demands of particular groups or regions served their purpose, but did not always constitute wise planning as viewed from present standards. In some cases, rivers serving for navigation purposes were rendered useless for that purpose as a result of withdrawal of water for irrigation. Under this practice the fulfilment of one scope would often sacrifice another one, either present or future.

But during the last few decades it has become increasingly apparent, that "... such a disorderly, unintegrated, treatment of water problems, however natural and useful it may have been in earlier days, should no longer be encouraged ..."[3]

The idea has progressed from single purpose emphasis to hydraulic planning to comprehensive multiple-purposes development This latter entails the need, when planning, of considering various water utilizations at the same time such as navigation, flood control, irrigation, power production, and so on.

It is with pleasure that I report that the fundamentals of this concept were laid down in 1908 by the President of the country of which we are now guests : Theodore Roosevelt.[4]

[3] U.N. Multiple-Purpose River Basin Development, ECAFE, Part I, p. 7, Sales 1955. II.F.1.

[4] Preliminary Report of the Inland Waterway Commission, U.S. 60th Congress, First Session, Senate Document 325 (1908) Page IV.

This multiple-purpose idea was later recognized as applying particularly well to the entire river basin, which has now been recognized as an integrated whole.

The economists have reached the same conclusion. Choice among purposes of utilizations and degrees of development is a question of economics which provides a planner with tools to select among other alternatives, those which better maximize benefits over time. Such an approach automatically solves the legal problem of order of priorities, in water utilizations, since these are taken into account by the planner in the light of the overall development of the drainage basin taken as an economic unit.

Although at the present stage the legal and institutional aspects both at the national and international level directly affect any water plan, and too often their set-up handicaps the carrying-on of most economic projects, it should be our scope to reverse the situation and try to study our problem in such a way as to help solve the already complicated field of integrated river basin development.

Finally, the importance of integrated drainage basin development has become the major concern in the work of the United Nations and of its specialized agencies.[5]

The ECOSOC adopted various resolutions in this direction ;[6] the other United Nations specialized agencies are undertaking programmes in water resources development and some of their recommendations have stressed the importance of the legal problems connected with international river basins.

On a purely legal approach, while it is recognized that international water law lacks definite principles concerning the right of co-riparians to utilize waters for purposes other than navigation, the basic principles underlying municipal water law in the various legal systems of the world may be a source of great inspiration. Roman Law, drawing a distinction between *res in patrimonio*, i.e. things which admit private ownership and *res extra patrimonium* i.e., things which do not admit private ownership, classified, according to Justinian *res extrapatrimonium* under four heads : *res communes* (common to all), *res publicae* (which are public), *res universitatis* (belonging to a society or a corporation), and *res nullius* (belonging to no one). Running water was considered *res communis* together with the air, the sea and the sea shore.[7]

[5] Integrated River Basin Development, U.N., E/3066, 1958.

[6] 346 (XII) adopted in 1951, 417 (XIV) of 1952, 533 (XVIII) of 1953, 599 (XXI) of 1956 and E3114 of May 1, 1958.

[7] *Et quidem naturali jure communia sunt haec : aer, et acqua profluens et mare ...*" Justinian Institutes 2. I.S.1.

The common law of England always retained the ownership of waters to the Crown, while leaving the *right of use* to the owner of the land.

Thus, Blackstone expresses himself " Water is a movable wandering thing and must of necessity continue to be common by the law of nature; so that I can only have a temporary transient, usufructuary property therein ; wherefore if a body of water runs out of my pond into another man's, I have no right to reclaim it."[8]

The Civil Code systems have made a distinction between public and private waters, limiting these latter to those, the utilization of which was of a local interest not affecting large communities or national responsibilities of public interest.[9]

The Soviet system of Law has declared all water as belonging to the whole people and therefore under direct state control. Water planning on a river basin level is the basis on which water economics is based.

In the Hindu system of law, since the Laws of Manu up to recent codifications, the restrictions imposed on the individuals on water utilization show a continuous concern for maintaining the characteristic of *public things* of water and considered the same as belonging to the community of the people rather than to individuals.

The fundamentals of Islamic law, laid down in the Holy Koran, endeavour to ensure to all members of the Moslem community the right to water. In this respect one tradition " declared that water. should be the common entitlement of all Moslems . . ." On the basis of later traditions, some authors considered that the prophet had established a community of water use among men.[10]

One tradition states, " To the man who refuses his surplus water, Allah will say : I refuse thee my favour, just as thou refused the surplus of something that thou hadst not made thyself."[11]

The Mejelle Code, enacted between 1870 and 1875 in the Ottoman Empire has been the basis from which the principles of most of the modern legislation have been taken. Article 1234 of this code defines water as a non-salable commodity to which all men have a right. Ground waters do not belong to any individual (Article 1235).

Modern water legislation in most Moslem countries has followed these principles and declared all water to belong to the State or to the public domain. This principle is found in such countries as Algeria, Egypt, French West Africa, Indonesia, Lebanon, Libya, Morrocco, Pakistan, Somalia, Tunisia, and Turkey.

[8] Blackstone, 2 p. 18.

[9] See particularly : Arts. 538 and 640-645 of Napoleonic Code and French water law of 8 April, 1898 and October 17, 1919. Art. 407–408 of the Spanish Civil Code of May 11, 1888 and the basic water law of June 13, 1879. Art. 910–912 of Italian Civil Code and basic water law of December 11, 1933.

[10] Dante A. Caponera, *Water Laws in Moslem Countries*, FAO Publication Rome 1954, pp. 17 and 18.

[11] *Ibid.*, p. 16

Water laws of Iraq and Jordan, in conferring full powers to the water departments for their distribution render as purely theoretical the principle of private water ownership included in them. In Iran, although private water ownership has been recognized, the heavy servitudes imposed upon it almost deny such right.[12]

Finally, in the Chinese legal system the basic concept of water law deriving from the combination of the legalists and the Confucian theoreticians, stresses the supremacy of the collective interests over the private ones and while private ownership of water cannot be traced in its long legal history, the principle of *water equalization* among all co-riparians was the base on which this hydraulic civilization had its roots for almost 5,000 years. The provisions set forth in modern water law codifications have maintained the same ideas.[13]

All of these basic water law principles seem to suggest the primacy in water questions of the public interest over the private one, as a means of achieving a better individual welfare.

In international law, it is realized that the legal problems involved are not so simple due to the lack of adequate precedents. However, it may be said that no State may claim unrestricted right to use the waters as it wishes, without concern as to the harm it would do others, under its sovereign right. The explanation for the contrary view which is the one generally accepted, may be sought in justice or natural rights ; at any rate, the principles found in all legal systems of the world must necessarily reflect a universally accepted feeling which cannot be denied as existing in international law.

It is my belief that the work which we, as lawyers, are called to perform in the field of international water law, must be carried out taking constantly into consideration not only the legal, but also the physical, hydrological and technical aspects just mentioned. While it is true that we are bound by a number of generally accepted or argued legal principles, by the common practice of States and by other relevent considerations characteristic of our legal technology, it is also true, as Professor Jessup has so vividly expressed to us, that it is our duty to go along with technological achievements and develop legal doctrines consonant with the requirements of natural factors discovered by scientific research. I venture to say that this is within the aims of such scholarly bodies as this Association.

DR. CHARLES BOASSON (Israel) : It has been argued that we have gone backwards by relinquishing the Dubrovnik text which attempted to get some kind of code on International Water Law.

[12] *Ibid.*, ps. 125, 129, 137 ;

[13] Dante A. Caponera, *Water Laws Principles in the Chinese Legal System*, 1958. Particularly for the relevant articles of the Chinese, Japanese, Korean, Viet-Namese and Thai water law principles.

It is precisely in this respect that I think we have advanced from the rigid view that it is possible to lay down hard and fast rules for such a complicated problem which varies so much from place to place. Whilst it is true that what we have submitted before us here is not enough, it shows the insight that the use of rivers depends on the populations and geographical situations involved.

We have heard at this Conference that science is progressing so much that one day, perhaps, the waters of the sea can be turned into drinking water. I feel that we should not take this optimistic attitude. There is a terrible waste of water going on. It is one of the series problems of mankind to provide one day a greater supply of drinking water and, in the meantime, the nuclear tests may, for a considerable time, pollute such water resources as are, at present, available.

MR. C. B. BOURNE (Canada) : I come from an area where one of these troublesome rivers is—the Columbia River in British Columbia. This fact undoubtedly colours my view of the various drafts of statements of principles of law governing international rivers. And I find myself asking how these principles would operate if they were applied to the particular case of the Columbia River (I may say that this is an abstract study on my part, for the Columbia River is subject to the principles set out in the Boundary Waters Treaty of 1909).

The invariable answer until the present Interim Report which we now have before us, has been that they have not been satisfactory. Ambitious statements of principles are almost certainly doomed to failure because the problems of a river system are complex, and those of one river different from those of another. Without a vast amount of study of a particular river, it is little more than guesswork to suggest a set of principles for resolving a conflict of interests about it.

Now, I support most heartily the Interim Report before us. It asserts a principle of fundamental importance, namely, that international rivers are under the rule of law. As you know, there are still some who say that a State may do do as it pleases with the waters within its territory and pay no heed to the consequences across its borders of what it does. This interim Report, unanimously adopted in the Committee, refutes them. That is a point of supreme importance, I submit.

What law is it that governs International Rivers ? The Report wisely refrains from outlining in detail an elaborate statement of legal principles. It simply states that International Rivers must be shared reasonably and equitably. The merit of this principle is that it provides a base on which a regime for each river may be worked out. It is flexible. It makes it clear to the parties that they have legal rights and obligations in dealing with their international rivers.

It is an important step forward if that principle is accepted by States. In practice, it will be useful, for I believe that once States recognize the duty to share the waters of their international rivers, they will then proceed to work out solutions acceptable to themselves and their co-riparians. It is my opinion, therefore, that the principles proposed in the Interim Report, although not as ambitious in scope as those of Dubrovnik, are more realistic and will prove more useful.

I shall comment on one point in the report. It is the definition of " drainage basin." It is confined to natural drainage basins. I would suggest that, in view of present engineering skill which makes it possible to transfer the waters of one river basin to another, one has to consider the use of waters of an *area* rather than of a particular natural drainage basin. In determining what is an equitable share in the waters of a river, a most relevant factor is the use that can be made of it by the riparian States, and so diversions to or from a river system ought to be embraced in this definition.

DR. E. J. MANNER (Finland) : The discussion here today shows that there is really not reason enough to be content with the results of the work of the Committee on International Rivers. Its interim report is not very positive. I am convinced that there should have been much more to say about the already existing principles of international water law. There are too in this report statements and definitions which are not quite correct. I only mention the terms " drainage basin" and " legal rights", both of which are not clear enough. I imagine that most of us here are not very pleased with this draft as a whole. It cannot be considered as a final result of the Association's work on this important field. But on the other side we must remember that this report is a result of a very difficult work, which has been carried out by Professor Knauth's sub-committee in a relatively short time. Despite its shortcomings this draft is still better than nothing. Unanimously accepted by the Rivers Committee it could be accepted by the Conference too and be a basis for an advanced study of the matters concerned in future. I doubt if we could make it very much better in the few days which this Conference lasts. Therefore it may be best to recommend this draft to the Conference as it is and only include in it a recommendation concerning the further work in this field. The work of the Rivers Committee should continue, based on this interim report.

MR. MANZUR QADIR (Pakistan) : I would not like to make any comments at this stage, but may I take this opportunity of stressing one point. We meet here as lawyers, and not as negotiators sponsoring the separate and individual interests of the countries from which we come.

The agreed proposals of the Committee on International Rivers represent that limited field in which we on the Committee, having diverse and conflicting interests at heart as we do, find ourselves in agreement.

A conference like this, which is not a law-making body, has influence on the development of international law, by lending moral weight to the opinions of those who have a special capacity to form opinions on the points involved. That moral weight is especially effective if there is unanimity between those who have conflicting interests in view.

I submit that there is a distinct advantage in adopting unanimously that on which there is unanimity, leaving the disputed points to be studied further and settled later on the lines that this Conference has already adopted at its earlier meeting.

With these words, I would commend the report of the Committee to be unanimously adopted by this Conference.

DR. F. J. BERBER (Germany) : In our Western civilization, in which every progress beyond what has ever been before is in itself regarded as a virtue, whilst caution, tradition, historical values are regarded as almost a vice, it is an easy task to plead the case of ideal principles even if they lead us into a fool's paradise ; it is an ungratifying task to plead the case of realism against Utopia, to preach the truth of the saying of Goethe :

" Leicht beieinander wohnen die Gedanken,
Doch hart im Raume stossen sich die Dinge."

In such a situation, it is more than ever our task as lawyers and scholars to follow the advice of Bacon as to the indispensable prerequisites of every fruitful research, *i.e.* :

" The desire to seek, the patience to doubt,
fondness to meditate, slowness to assert,
readiness to reconsider, carefulness to
dispose and set in order."

What does this mean in the context of our present discussion ? We were admonished on Wednesday to get rid of the age-old distinction between *lex lata* and *lex ferenda*, to forget the rotten past and to look only into the golden future. This thesis forgets that *lex lata* is not historical past, but actual present from which the future grows organically. We cannot talk scientifically about *lex ferenda* unless we have a very precise knowledge of the law actually in force, of *lex lata* on whose organic growth rests each progress. It is often asserted that the international community should follow the progress made in constitutional law in the last few centuries as a model. But the attempt to obscure the distinction between *lex lata* and *lex ferenda* is at the same time an assault on the constitutional progress made under our municipal law in the last two centuries, an assault

on the principle of the separation of powers, an assault on the distinction between the functions of a court and the functions of legislation. Since Montesquieu, this distinction is believed to be the very safeguard of human liberty. This distinction is, therefore, necessary not only for logical and practical reasons, but also for ethical, political and even wider reasons.

I agree that the problems of *lex ferenda* are much more important for us of the ILA than the problems of *lex lata*. The problems of legislation are much more important for us than the problems of the interpretation of existing law. Legislation in international relations means treaty-making, not decision by a court. Even under municipal law, it is admitted that a court is not an appropriatee organ for the solution of a water dispute. The United States Supreme Court in *Colorado* v. *Kansas* made the following statement :

> " The reason for judicial caution in adjudicating the relative rights of states in such cases is that, while we have jurisdiction of such disputes, they involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement pursuant to the Compact Clause of the Federal Constitution. We say of this case .... that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power."

The German Supreme Court has expressed itself in almost the same terms on the occasion of the well-known case of the Danube. This international legislation by treaty has been extremely intensive and extremely successful. Several hundred international water treaties have been concluded in the last few decades. In the same period, only very few decisions of international tribunals have been rendered on water problems, and they are all expressly restricted to the interpretation of existing water treaties. This is so not because there were not available means of compulsory adjudication between most of the countries concerned for most of them had some sort or other of compulsory arbitration or adjudication clause. But these parties were treating legislative problems by legislative procedures, *i.e.*, by treaty-making, and these treaties appear to be such good law that it has been necessary only in very few cases to resort to international adjudication for the interpretation of such law. The few remaining river systems which are not yet covered by international legislation, *i.e.*, by a treaty, as, for instance, the Indus system of rivers, may, it is hoped, soon be regulated also by treaty.

What is needed for these remaining problems is legislation, *i.e.*, the application of principles that ought to be, not adjudication, *i.e.* the application of rules that are ; these rules are much too scarce to solve the disputes, and these rules will not be augmented by our dissatisfaction with such scarcity nor by our attempt to *invent* rules of existing law when we feel there are too few existing rules.

Our task can only be to help the dynamic side of water law, the legislation, the treaty-making. But for this purpose we need to know much more. We need much more research and time. We need the close co-operation of engineers, and we even need the assistance of bankers for these very far-reaching research tasks. The Committee in the last two years has come to the conclusions which are contained in the interim report of our Committee. This Interim Report, as has been rightly stated by the representative of Israel, is real progress over the so-called Dubrovnik principles, first, because the Dubrovnik principles were only a working hypothesis, whilst now we have come to the real thing ; and secondly, because the Dubrovnik principles were in the air, whilst now we are on firm ground which is, perhaps, more modest but in any case safer. I would therefore beg all of you to maintain now in its integrity the Interim Report of the Committee and to hand to the Committee all suggestions, proposals, amendments for the consideration of the Committee not during the next two days, but for its consideration during the next two years, as provided for in the very important research clause of our Interim Report.

MR. W. HARVEY MOORE, Q.C. (Secretary General) : I only want to express in a few words what has already been said at this Session. The Committee has shown an amazing desire to find agreement on the present draft which is before you, and I am happy to tell you that the present draft has been resolved upon by all of the members of your Committee as acceptable.

We have heard a great deal of the suggestion that these principles could not possibly work. I do not think we should be too discouraging. I am sure that at the signing of Magna Carta, there were men who were saying the same thing. I think that the Committee should also keep in mind the great work which Professor Clyde Eagleton has done in this field, and which work gave the International Law Association the lead in this matter, though, perhaps, Eagleton would not agree with all of the present draft resolutions, I am sure that he would heartily approve of it had he seen the work which has been done by the present Committee. We should pass these resolutions for Eagleton, and it would have made him, I am sure, very happy. As Secretary General, I would like to bring to your attention the motto of this Association, which is " Multis Melior Pax Una Triumphis ". In the present case, I think

we should translate this as " Better one agreed text than many amendments ".

MR. OSCAR R. HOUSTON (President) : I should like to say a few words in support of the resolution as drafted by the Committee. The problems of international rivers or the waters of international basins are very intricate and difficult and they affect the vital interests of many nations. They affect the future industrial growth of some nations and the lives of millions of citizens of various nations. Their solution is naturally difficult. Canada and the United States have concededly progressed further toward a solution than any other countries. This is natural, because Canada and the United States start with the same system of law and more important still their development and population have grown *pari passu* with the development of the law of international waters as administered by the Joint Commission. Even this Commission, as you have heard today, considers that much more detailed research on the subject is needed, and that they are far from ready to formulate any rules that they will apply to specific cases. It would be gratifying if we could compile a book of regulations so that when a controversy arose over the waters of the Columbia River, we could thumb through the book and say : " Ah ! this problem is governed by Regulation 817," and the controversy would end. However, this is far from practicable. It seems to me we must appreciate that these enormous problems can only be solved by a gradual process of evolution. We must approach each individual disagreement over a river basin in the spirit of good will and seek the fairest solution that we can find for the specific problem. This, I think, is the spirit of the resolution drafted by the Committee and I think it offers greater hope for the future than any of the more definite amendments that have been suggested.

Let me say one more thing, and that is to pay a tribute to the work of the Committee. I sat in on part of their deliberations and I want to say in all sincerity that I have never seen a body of men who approached a difficult problem with fairer minds or with a greater willingness to subordinate personal views to the goal of achieving an acceptable solution than did this Committee. The members of the Committee represented many different systems of law and each of them was interested in a different set of problems relating to rivers. I was amazed and gratified to find how willing they were to subordinate personal views to the ultimate goal. I think the result of their labours fairly represents the maximum of agreement that can be reached at this time. Let us adopt their recommendation and go on from here, I hope, to ultimate solutions.

SATURDAY, SEPTEMBER 6th, 1958,

at 9.30 a.m.

MR. MUJIBUR RAHMAN KHAN (Pakistan) : Following the Dubrovnik principles formulated by the International Law Association, the Committee has, in its Interim Report, stated that each riparian State is entitled to a reasonable and equitable share in the beneficial uses of the waters of international rivers. The soundness of this principle can be judged by the consensus of eminent jurists and legal institutions in its support. I think none of us here can, with conviction, deny the soundness of this principle. We thus find that each riparian State has rights to the waters of international rivers. Once the principle recognizing the rights of a riparian State is accepted, the question then at once arises what further principles should be stated for the safeguard of such rights and for remedy in the event of violation of those rights by a co-riparian State. The Committee has, after careful consideration, stated those principles in paragraphs 3 and 4 of its Interim Report.

It is a matter of regret that some learned members of the Committee with whose consent the Interim Report was adopted have since thought it fit to restate in so general a form the principles expressed in paragraphs 3 and 4, particularly paragraph 4.

Our immediate purpose here is to state some principles of international law concerning international rivers. In this meeting of the International Law Association, we are to express our views on the subject as individuals and not as representatives of any Governments. This is also the requirement of the constitution of the International Law Association. Therefore, it is essential that we should examine this subject on a rational and scientific basis, without allowing ourselves to be influenced by any extraneous consideration and without having regard to the attending circumstances of any particular water dispute in any region. If we proceed on this basis, we will find that the principles as originally expressed in paragraphs 3 and 4 of the Interim Report bring out our opinion more clearly. Since the adoption of the Dubrovnik principles, two years have passed. During this long period, the Committee studied all aspects of the question and has now been successful in producing a unanimous report stating some salient principles of international law concerning international rivers. If we have the conviction that the Interim Report states clearly certain sound principles, and I think it does, we should not hesitate to accept them merely because others prefer to express them less clearly. Let not anyone say that we suffer from indecision. Those who are now opposed to the adoption of the principles as stated in paragraph 4 of the Interim Report might be labouring under the impression that the adoption of that

principle would give rise to the compulsory jurisdiction of the International Court of Justice in the event of a water dispute between riparian States. Such impression, if any, is not correct. Paragraph 4 properly read means this : If an upper riparian or a lower riparian objects to an action by the other on the grounds that it interferes with its legal rights, it must not presume to be the sole judge of the validity of its objection. The party proposing a change is required to refrain from making the change only if the objecting riparian is willing to submit the validity of its objection to third-party determination.

The Interim Report is not without its de-merits. The Report is not comprehensive ; it is inadequate. It does not state all the principles relevant to the question. It states the bare minimum principles and no more. Unlike Dubrovnik principle V, the Interim Report has left vague the factors that should be taken into consideration in determining the reasonable and equitable share of co-riparian States in the waters of international rivers. There are other omissions and commissions. However, when the Interim Report states the salient principles and when these principles are sound, I would commend the acceptance of the Interim Report as it is.

PROFESSOR J. G. CANO (Argentina) : The problem of international rivers is of particular concern to my country — the Argentine Republic — because some 80% of its fresh waters form part of international drainage basins. With the single exception of Cuba, the same is true of all the countries of the three Americas — Northern, Central and Southern — all of which share international rivers and lakes.

This was no doubt the reason why the Tenth Conference of the Inter-American Bar Association, held at Buenos Aires in November 1957, adopted a Resolution on the subject. At the Buenos Aires Conference, the Inter-American Bar Association also set up its own permanent committee, and it is desirable that our activities should be co-ordinated with those of that Committee, as it has been recommended should be done with the work of the Institut de Droit International.

I came here with the hope that some scientific progress would be achieved on the subject before us, but I must confess that I feel disappointed and that I am in agreement with the remarks made by Professor McDougal, and by my fellow-Committee member, Mr. Manner of Finland. This is perhaps due to our having lost sight of the fact that we are not here to defend the interests of governments, interests which are eminently respectable, but for the defence of which there are other and more suitable places than this. We have heard spokesmen for the views of certain countries defend these

views with ability, determination and eloquence, but I feel it would be preferable if they agreed to take their case to an arbitral tribunal or to the International Court of Justice.

Here, in the International Law Association, instead of pursuing the search for unanimity, which is of doubtful value when it is reached over a text of such a general character as the one before us, we ought to try and go forward with our research on the relevant legal principles and formulate those principles which, legally and morally, should in our opinion govern human relations.

And I have said "human relations" and not "relations between States because I feel, like Richard Witmer, the learned writer on United States Water Law that, where waters are concerned, it is men and not countries that are the subjects of the impact of treaties and decisions made by governments. Professor Murdock, in an informal conversation, said the other day something along the same lines, namely that our Association should work from the ground upwards and begin with research into factual realities, instead of doing the opposite, which is to formulate theoretical principles and then try to adapt the facts to those principles.

In the 47 years since the Madrid Declaration, a Declaration which constitutes the first attempt ever made to deal with this problem as a whole, eminenthy qualified international lawyers have met many times, but progress made has been very slow. In fact, all that we have done is to achieve unanimity on four or five very general declaratory principles. Every word included in our report has necessitated prolonged hours of discussion and the result is that anyone reading our report who is not already familiar with the subject matter of it would need literally volumes of clarification.

Little or no contribution will be made to the progress of international law by writing cryptic sentences where most of the meaning lies unwritten between the lines. Worse still: what has been left unsaid is more important than what has been expressed.

In my submissions, which Professor Knauth adopted in part in his Report, I gave a detailed list of all the topics we should deal with, many of them not exclusively legal in character, such as the Administration of International Waters. Some of these topics have not even been mentioned in our discussions. I suggested the formulation *de lege ferenda* of recommendations on all the topics concerning which *lex lata* rules do not exist or are not agreed upon, or concerning which there is insufficient relevant information, or even none at all. Of course, such a formulation would have to be the outcome of an exhaustive examination and classification of all treaties and agreements entered into with respect to international rivers.

I have also submitted to this Congress a study of relevant material, in which no analysis of the law is attempted, and which is solely aimed at showing that there is a vast experience here in the United States, in India, in Australia, in Switzerland, and increasingly in my own country, concerning relations between quasi-sovereign states or provinces forming part of a federation, with regard to the management of inter-state or inter-provincial waters. From these inter-state compacts and treaties, I have drawn a few rules which could serve in the formulation *de lege ferenda* of recommendations regarding international rivers. Dean Niles explained to us at our last meeting that this experience must be taken into consideration.

Another factor which perhaps contributes to prevent any greater results from being achieved by meetings of international lawyers is that we are speaking different tongues, not in the language sense, but in the legal sense. English, Canadian or United States jurists trained in the common law consider that legally binding rules can be established by judicial precedent or custom, while jurists from civil law countries consider that such rules can only be established by explicit legislation. And it may be worthwhile mentioning that our host, the N.Y.U. Law School, is doing an admirable work to bridge the gap between the two systems. I believe that we jurists of civil law countries when dealing with international law, where there is no other law-maker than the agreement of governments, should, for compelling moral reasons, come closer to the other system and accept as fully binding an international common law.

I believe we must adopt new procedures, because in the 47 years to which I have referred, technical and economical developments have outpaced legal progress and we lawyers are being left behind by the engineers and the economists.

When the Declaration of Madrid was formulated in 1911, Governor Gifford Pinchot of Pennsylvania expressed an idea which has since been elaborated upon by geographers, economists, engineers and conservationists, an idea to which we jurists have only just given recognition, half a century later, namely the idea that all natural resources (water, land, forests, etc.) are interdependent. Also, that the various natural forms of water (surface waters, underground waters, rain, snow, ice, etc.) are similarly interdependent. From these two phenomena of interdependence, it follows that drainage basins constitute physical and economic units and must be treated as such. Only engineers and economists have so far acknowledged this fact, and acted accordingly. If you turn to the Yellow Book, you will see my recommendations Nos. II. and V. at the Buenos Aires Conference of 1957, to the effect that we jurists should also adopt this principle, so as not to be left behind by the progress of events. Fortunately, this principle has been included in the recommendations we are adopting: its acceptance is, in my opinion, the only real progress we have achieved here.

I feel certain that the New York Declaration of 1958 will become known in the history of international water law as the one in

which this fundamental and invaluable idea was first formulated. It is to be hoped that governments and peoples will comprehend its profound philosophical significance. Mankind has to face a progressively increasing need for water and the full recognition of this principle, not merely on paper, but in actual fact, would contribute—as Pinchot said—to place water, as well as other natural resources, at the service of humanity in its pursuit of happiness.

MR. A. M. HIRSCH (United States): The discussion of the Interim Report of the Committee on the Uses of International Rivers, which took place last Thursday afternoon, made all of us aware that a great deal has been achieved by the hard work of the International Committee. I hope that it would not be presumptuous on my part to join in congratulating the members of the Committee on what they have achieved.

The adoption of the phrase " drainage basin " to define the unit which serves as the norm for discussions of legal rights, of administrative setups, and as the determinant of who shall have the right to participate in discussions on the hydro-economic development of a river system, is a great step forward in adjusting our growing body of legal principles concerning international rivers to the great strides which the technology of economic development has made.

This is not to say that there is not a great deal of further study which must be undertaken concerning the legal and administrative implications which grow out of the adoption of a *hydrological* term — drainage basin—to serve as a *legal* definition. One of the problems has already been pointed out by one of last Thursday's speakers. There may be situations in which both the basin of a river and adjoining basins can profit more from a trans-basin diversion than from development confined to the basin alone. I am very pleased at the adoption of the " drainage basin " definition, I hope however that further study on our part, undertaken after the adoption of the principles which the Committee has recommended, will explore the implications of the drainage basin definition with a view towards further clarifying what we mean here today, by our " drainage basin definition." It would certainly be a pity if any one who reads the principles which I hope will be adopted today, would understand them as indicating that we mean to see in the watershed line an artificial legal barrier in the same manner as in the past some would have seen the boundary as a line which waters were not to cross.

My point refers primarily to arid areas in which there may be considerable areas which, though lying outside a basin, require for development waters from a basin. If technology makes it possible to bring waters from one basin to another, such diversion should, of course, be subject to *all* the principles which are contained in the

Committee's report. However, to my view, while we should designate the basin as the normal unit of hydro-economic development and organization, we should not recommend away all reasonable possibilities of trans-basin development.

Another problem raised by the " drainage basin definition," and deserving of further study, is the criterion whereby States in a drainage basin receive equitable treatment because they share the waters of the basin, while preventing a State, which occupies only a small unimportant segment of the basin, from achieving equality of decision with the basin's major tenants.

I am glad that this much has been achieved — that a set of principles has been worked out on which the members of the International Committee have reached agreement despite the strongly divergent views which many of them brought to its meetings. Much further study is required on the legal principles here proposed, and on the ways and means whereby they can more sharply be focused. In these studies, it may be useful to enlist the active help of economists and engineers who may provide the Branch committees, and even the International committee, valuable technical data which may influence the drafting of legal principles.

I believe that the principles which we have been asked to adopt represent a major step forward. At the same time they should be viewed as only the first step. They are the platform on which the Association can build.

PROFESSOR ARNOLD KNAUTH (Rapporteur) then moved a new Rivers Resolution which he explained was a unanimous report from the Committee.

The 48th Conference of the International Law Association held at New York, 1958, having considered the third Report[1] of its Committee on the Uses of the Waters of International Rivers and Drainage Basins within the Territories of Two or More States, and the statement of principles and recommendations contained therein as revised by the Committee in the light of the comments of the Committee members, certain members of the Association and certain Branches and the deliberations of this Conference.

Commends the Committee for its work and adopts the following statement:

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 at the New York Conference have reached unanimous agreement. *Decides* to continue the Committee on the same or similar basis and

[1] See Annex 11 on page 11

authorizes it to continue the examination of the recommendations, and to seek further clarification and agreement as to the existing law and the desirable principles of law and desirable recommendations respecting the law of the uses of the waters of drainage basins of international concern, and to report thereon for the consideration of the next Conference of the International Law Association.

Requests the Chairman, in consultation with the Executive Council and the respective Branches, to keep the Committee adequately staffed with Members of the Association expert in this field of inquiry and with adequate representation with countries which show an interest in this matter.

Renews the suggestion made at Dubrovnik as to financial assistance, inasmuch as some of the arrangements made as a result of the Dubrovnik Resolution were interrupted or terminated by the untimely and unexpected death of the Chairman, Dr. Clyde Eagleton.

The Committee submits in its third Report a revised statement of principles and recommendations which represent the maximum area of *unanimous* agreement among the members of the Committee. It is emphasized that the third Report does not contain any statement of principle or recommendation as to which any member present at the protracted Committee meetings held before and during the New York Conference expressed any disagreement whatever. The third Report is verily the maximum of unanimous agreement that could be arrived at.

It is therefore submitted that the statements in the third Report form a rock bottom and solid basis on which further statements of principle and recommendations may in future be erected, if not unanimously at a future day, then perhaps upon the view of a large majority. Nothing is submitted at the 48th Conference which represents merely the view of a majority. This Report represents unanimity.

The Committee hopes later, subject to approval by the Association, to study further the proferred statements of the rules of international law and to make recommendations as to their implementation and the administrative machinery required. Such study, as the first Report said, may lead into the preparation of model bilateral treaty material or a model for regional arrangement, to administrative or technical assistance by the United Nations and by other international organizations, or into further elaboration of the means for settlement of disputes.

Mr. S. Khambatta, Q.C. (United Kingdom), seconded this Resolution.

DR. D. W. VAN SANTEN (Sudan) : The new version of the resolution has just been laid before us. Some major alterations have been made. Though I do not like the rather loose wording, I shall vote for it but I should like to see one small and easy alteration in the following order of the first " recommendations ".

Recommendation No. 1 was the former " agreed principle number 4 ". I think there is no real meaning in putting this rule, unless accompanied by a duty of all riparians to make available all data as mentioned in " recommendation 3 ". Without these data no riparian could protest against " unilateral acts or omissions " of the other party. Such protest should, of course, be possible. Therefore, the " recommendation 3 " should immediately follow, if not precede, " recommendation No. 1 ". This can easily be done insofar as " recommendation 2 " really should be linked with " recommendation 9 ". I hope this slight alteration will be made, in order to make the proposed resolution somewhat less untidy.

SIR PATRICK SPENS (Chairman) : Under the circumstances and with your permission, I shall not treat your suggestion as an amendment. Every lawyer in this room would have some alteration to make in any document put before him; of that I am quite sure.

SIR PATRICK SPENS (Chairman) : The interest which now prevails in this subject among our colleagues all over the world is in no small measure attributable to the work of this Association and the initiation of this Committee by Professor Clyde Eagleton at the Edinburgh Conference.

A good deal has been done and as conference succeeds conference we will do much better. All look forward to the happy resolution of these problems. And now I am going to place the report which you have before you for an expression of your opinion.

The report was unanimously accepted.

PROFESSOR A. EL-ERIAN (Egypt) was given permission by the Chairman to explain his vote : : I voted in favour of the report. I did so, however, with the understanding that the report constitutes but an interim report and contains a preliminary set of principles and recommendations for the guidance of the future work of the Committee. Some of the principles and recommendations need more definition and elaboration. I would only cite one example. In paragraph 2, page 2, of the report it is stated that " Except as otherwise provided by treaty or other instruments or customs binding upon the parties, each co-riparian State is entitled to a reasonable and equitable share in the beneficial uses of the waters of the drainage basin ". The report does not contain any indication of the

criterion to be followed in determining what constitutes " a reasonable and equitable share ". The members of the Conference may recall that Principle No. V of the Dubrovnik Conference mentioned that among the factors to be taken into consideration in the use of international rivers are the extent of the dependence of each State upon the water of the river, the comparative social and economic gains acoming to each and to the entire river community and pre-existent appropriation of water by one State. I hope that our Association will be able in the future to adopt more definite and elaborate principles and recommendations on this important topic. In voting in favour of the present report I wish to make it clear that I approve it as a tentative set of rules which are preliminary and are meant as guidance for the Committee in its future work towards a definite codification of customary international law on this subject and a development of the system of international rivers.

MR. A. M. HIRSCH (United States) : I have asked for the floor for the second time this morning in order to introduce a motion which is largely self-explanatory. All of us here interested in international rivers have during these meetings constantly missed the guidance which Dr. Eagleton, if he could have been with us, would have given to these discussions. In achieving what we have achieved, we have been helped in a major way by the work which he did, in the years before his death, on this subject.

After discussing this matter with the President of our Association, I would like to introduce the following motion :

" This Conference, wishing to honour the late Professor Clyde Eagleton, for his contributions in the field of international river law, requests the Executive Council of the Association to initiate steps which will lead towards the publication of a volume dedicated to his memory. Such a work should include selections from his writings on the subject of international law relating to river development, as well as contributions on this subject from members of the Association."

JUDGE BOEG (Denmark) seconded this resolution, which was approved unanimously.

MR. W. R. VALLANCE (United States) : I wish to draw attention to the last sentence of the Rivers Resolution and ask that the name of the Inter-American Bar Association be added as a co-operating association in the future study of this subject. The 10th Conference of the Inter-American Bar Association at Buenos Aires in November, 1957, adopted a Resolution on this subject which, together with related material, is printed in the pamphlet with the yellow cover. A committee of distinguished lawyers under the Chairmanship of Dr. Martinez Paz of Buenos Aires has been appointed and will present a report on the subject at the 11th Conference of the Inter-American Bar Association at Miami next April. On behalf of the Inter-American Bar Association I invite those attending this meeting to attend the 11th Conference.

MR. CARLILE BOLTON-SMITH (United States) : Speaking as an individual but with the experience of a federal career civil servant, I pay tribute to the usefulness in preparation of materials for Senate Debate, of such reports as the one which you have just adopted.

The earlier reports on this subject of the International Law Association, of the Inter-American Bar Association and of the Committee on Uses of International Waters of the American Bar Association were referred to in connection with the recent consideration in the Senate of H.R.2, the Chicago Water Diversion Bill, which, after spirited debate, failed of passage upon the close of the 85th Congress, August 24, 1958.

Of course, one of the prominent issues in the debate was the position of the proposed diversion under the international law relating to international waters. The Committee on Uses of International Waters, of which our colleague, Mr. William Roy Vallance, an experienced water law expert of Washington, D.C., is Chairman, opposed the Bill — on the basis of the reports of your Association and of the Inter-American Bar Association.

Thus, there was another instance of the practical immediate importance of such reports, as well as the long-range theoretical assistance which they contribute to a study of the subject.

MR. BLOOMFIELD (Canada) then moved a vote of thanks and appreciation to Professor Knauth.

ANNEX I

SECOND REPORT

OF THE RAPPORTEUR OF THE COMMITTEE ON

THE USES OF THE WATERS OF INTERNATIONAL RIVERS

Chairman and Rapporteur: Professor Arnold W. Knauth, New York University Law Center, Vanderbilt Hall, 40 Washington Square, New York 3

The Committee:
Hon. A. M. Atabani, Attorney General, Sudan
Judge Prof. Algot Bagge, Sweden
Dr. F. J. Berber, Germany
Louis M. Bloomfield, Q.C., Canada
Guillermo J. Cano, Chile
Dr. Dante Caponera, Italy
Prof. Maxwell Cohen, Canada
Prof. Charles de Visscher, Belgium
A. G. Donaldson, Northern Ireland
Maître Léopold Dor, France
Prof. Isi Foighel, Denmark
Dr. H. Fortuin, Netherlands
Prof. Paul Gieseke, Germany
Count Edmund Hartig, Austria
Dr. Werner Hecht, Israel
Dr. B. Hellstrom, Sweden
Sayed Hosni, Sudan
John G. Laylin, United States
Dr. Jovan Paunović, Yugoslavia
Manzur Qadir, Pakistan
Shabtai Rosenne, Israel
P. Sevette, Switzerland
S. M. Sikri, India
Prof. H. A. Smith, England
L. Villars-Dahl, Norway

The First Report of the Committee was brought to the 47th Conference of the International Law Association at Dubrovnik in August, 1956, under the chairmanship of Dr. Clyde Eagleton and resulted in the Dubrovnik text of eight Principles. These are reproduced in the 47th (Dubrovnik) Report at pages 241, 242. Also in the American Journal of International Law, vol. 51, page 90.

The ideas for the Second Report were discussed at a meeting in Geneva in October, 1957, with the following eleven (11) members of the Committee: Judge Algot Bagge, A. G. Donaldson, Esq., Dr. Clyde Eagleton (Chairman), Dr. H. Fortuin, Prof. Paul Gieseke, Dr. B. Hellstrom, John G. Laylin, Esq., Mr. P. Sevette, Mr. S. M. Sikri, Prof. H. A. Smith and Mr. L. Villars-Dahl. By invitation Dr. Eero J. Manner of Finland was present and took part in the discussions.

Unhappily, Dr. Eagleton died suddenly at the end of January, 1958, leaving his work partly drafted, but subject to change. The task of completing the report was accordingly given to the present Chairman.

A second meeting of the Committee was convened to consider ideas for this Report, at the Peace Palace at The Hague, on May 28-29-30, 1958.

The following eight (8) Committee-members were present: Dr. F. J. Berber, Louis M. Bloomfield, Q.C., A. G. Donaldson, Esq., Dr. H. Fortuin, John G. Laylin, Esq., Shabtai Rosenne, Esq., S. M. Sikri, Esq. and Prof. Arnold W. Knauth, Chairman-Rapporteur.

By invitation, Dr. Juraj Andrassy, of Yugoslavia, and Mr. K. Krishna Rao, of India, were present and took part in the discussions. Communications were received from committees of the American and Yugoslav Branches of the Association, from Dr. F. J. Berber, Dr. H. Fortuin, Mr. Guillermo J. Cano, Dr. Dante Caponera, Prof. H. A. Smith and Mr. L. Villars-Dahl. These are mentioned in the Bibliography.

INTRODUCTORY

A resolution adopted at the 47th Dubrovnik Conference, 1956, approved eight Principles there reported by this Committee as "a sound basis upon which to study further the development of rules of international law with respect to international rivers," and authorized the Committee "to re-examine these Principles, and to widen the scope of its work so as to cover all inland waters of international concern including artificial waterways, whether or not serving maritime navigation, and to cover all uses, including navigation, and to formulate rules of international law and to report thereon for the consideration of the next Conference of the International Law Association."

By the same resolution the membership of the Committee was widened, and for its meetings invitations were extended to Dr. Manner, of Finland, and to Dr. Juraj Andrassy, of Yugoslavia, the latter being Rapporteur on this subject for the Institut de Droit International.

In this way a considerable Bibliography was collected, several Reports and collections of material were obtained from various Branches, and more were promised for consideration at the 48th (New York) meeting.

The Committee has, in accordance with the Dubrovnik resolution, made further study, and this study shows that the subject has wide ramifications, reaching into or affecting almost all human activities. This wide range, though it thoroughly justifies the study of all the terms of reference given to it at Dubrovnik, makes it impossible to cover them all in this Second (1958) Report.

ASPECTS OF THE SECOND REPORT

The scope of this Report is limited because of a decision made at the Geneva 1957 meeting and in part also by the unhappy death of the first Chairman-Rapporteur, Dr. Clyde Eagleton. The decision taken at Geneva under Dr. Eagleton's guidance was " to omit the topic of Navigation except insofar as it is related to other uses of water " (the phrase is that of Dr. Eagleton) ; to omit Interoceanic Waterways which are almost entirely matters of Navigation, and, to some extent, to defer considerations of " Methods of Administration ", by which is meant the erection and operation of technical administrative bodies to administer agreements relating to rivers and waters. These matters are not foreclosed ; they remain open for further discussion. However, the topic of Interoceanic Waterways will not be discussed at the sessions of Section A relating to Rivers, and if a separate discussion is desired, those so desiring should address the Chairman and ask for a separate place on the agenda.

It would seem to be the greatest common denominator that, for purposes of river law and river problems currently settled or in course of discussion, the meaning of the phrase " drainage-basin river water" should be limited to surface water flowing in a recognizable stream, stored in a lake, or flowing and stored in a swamp area.

This means, correlatively, that the atmospheric sources of water, as clouds, rain, snow, dew and the ice fields and snowfields, and the underground water-tables, the underground areas of water storage and supposed lines of subterranean water flow *are not, in these texts, regarded as " drainage waters " or as elements of " river systems."* This Report does not consider the underground waters which are frequently included in the broad term " usufructuary rights in waters."

Dr. Eagleton was of the opinion that certain distinctions, which readily spring to mind, would not affect the validity of the Principles stated at Dubrovnik which he not merely supported, but which he expected the general membership to approve after hearing the New York debates. He, therefore, did not give special consideration to the following distinctions :

up-stream and down-stream rights or duties ; " contiguous " or " successive " rivers ; consumptive or non-consumptive uses of the water.

The present Rapporteur, however, feels that the views which he has heard, personally and by correspondence, indicate that some of these distinctions should be touched upon.

This report, circulated some eight weeks in advance of the New York meeting, necessarily does not consider those Branch reports which are not yet ready. Reports are promised, but not yet available, from the Canadian, Israel and Indian Branches. A German report has been received.

Persons who intend to participate in the New York discussions are warned that there will be some material offered at New York which is not listed with the Report, and not considered by the Rapporteur.

The attention of delegates is directed to such further materials, which will as far as possible be circulated, and will at all events be made available to delegates upon arrival at New York.

INTEGRATED DEVELOPMENT

One result of the Committee's study is the definite conclusion that a " river system " or " basin " should be treated as an integrated whole.[1] This view has been stated by practically all who have studied the matter objectively, uninfluenced by national desires or policies. It was voiced by H. A. Smith in 1931, in his book on *The Economic Uses of International Rivers*, which remains a most authoritative study of the subject. It is to be found in reports of technical bodies such as have studied the Nile, or the Jordan, or the Helmand. The Economic and Social Council of the United

[1] The distinction between a " river system " and a " river basin " seems to be that a *system* is the tracing of the course of stream-flow, such as one ordinarily see on a flat map or chart, resembling the outline of a tree, with its roots, with stem and branches, spinning out to their sources or tips ; whereas a *basin* is an expression of the " relief " aspects of map-making, and extends from one " divide " in elevation to another " divide ", or from crest to crest of mountains, hills and mere elevations. In many deltas, the concept of a basin is not geographically or politically apt. For example, the political boundary distinction between Belgium and the Netherlands, dealing with the deltas of the Maas (Meuse) and the Rijn (Rhine) is not aided by the concept of a basin, whereas it is clarified by the concept of a system.

Nations has adopted several resolutions looking toward such treatment, and set up a Panel of Experts on Integrated River Development which met in November, 1957, and whose report became available in March, 1958. It includes a reference to the Dubrovnik principles, of which it reproduces the text with the following comment :

> Pending establishment of an accepted international code, it is suggested that the Dubrovnik draft statement of principles affords a sound basic philosophy for planning and executing a project for integrated river development in an international river basin. The fifth principle, in particular, should be useful in furnishing a guide for the solution of disputes with respect to the use of such waters, recognizing as it does the pertinence of all equitable and historical circumstances in the resolution of such disputes.

The Dubrovnik Principle No. V reads as follows :—

> " 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 in consideration:
>
> (*a*) the right of each to a reasonable use of the water ;
>
> (*b*) the extent of the dependence of each State upon the water of that river ;
>
> (*c*) the comparative social and economic gains accruing to each and to the entire river community ;
>
> (*d*) pre-existent agreements among the States concerned ;
>
> (*e*) pre-existent appropriation of water by one State."

The reasons for the above conclusion are to be found in the interdependency of the many factors : the various beneficial uses ; the control of water against disasters such as floods, the numerous factors affecting the supply of water, which range from surface dew and ice to underground waters and to the clouds above. Technical study of these factors is required. They are all so interrelated that an isolated single economic development operation (such as is usual today) may prevent or make more costly other or later operations. On the basis of technical knowledge, decisions must be foreseen as to which use of several possible uses should be given priority in a particular situation ; and this involves provision of an authority to make such decisions. An old or a new political boundary drawn across a river system does not alter this interdependency. But a political boundary adds to the complexity of the problem by bringing in the usually conflicting needs or desires of the States concerned and the arrogant attitudes of " sovereigns ". The past lack of formulated legal principles and of authorities capable of making decisions, with regard to international rivers, makes their problems more difficult than those of domestic rivers and emphasizes the importance of this effort of the International Law Association.

The overwhelming technical and impartial view is that all co-riparian States stand to profit economically by joint planning for integrated development of a common river basin system, so as to provide full utilization of its waters, and the greatest total of benefits to all States. This must at present be regarded as an ideal, in the face of unreasoning national feelings.[2] It is an ideal which has been taken for guidance by the Committee and its Rapporteur. However, some less ideal attitudes are expressed in the texts which are reproduced.

It chances that one such administrative body, that created in 1909 by Canada and the U.S.A., has been in successful operation for 50 years, and the Canadian Branch has made such progress in its Report on the operation of that Boundary Waters Commission as to make it safe to say that its Report on this aspect will be available for study before the 48th New York meeting. It is thus possible that a fuller consideration of the administrative aspects may become possible. However, there seems no prospect that any Branch will similarly report on other great examples of administration, such as the Rhine, the Danube, or the Congo, and Niger.

It should be said that administration of La Plata (Parana, Paraguay and connecting waters) has been a favourite subject of study by legal scholars of South America. The Bibliography lists numerous works, in Spanish and Portuguese.

Standard passages relating to administration of " waterways of international concern " are found in the Barcelona and Geneva " Statutes " of 1921 and 1923.

"LEX LATA" OF RIVER USE LAW IN THE LEGISLATIVE AND TREATY SENSE

Neither the League of Nations Covenant of 1919 nor the United Nations Charter of 1945 states any legislative norm respecting the

[2] However, we find in some treaties at least an approach in the direction of the ideal : The Geneva General Convention and Statute concerning the Régime of Navigable Waterways of International Concern (Transit and Communication Section of the League of Nations, Barcelona, 1921), for example Articles 4 and 10. The Convention for the Navigation of the Rhine, Mannheim, 1868. Germany-Poland, 27 June, 1923, 26 LNTS 471. Norway-Sweden (1905), Article 2, 120-121 LNTS 5277.

law of the uses of rivers. Nor did previous general conferences, such as Vienna, 1815, or Paris, 1856, do so. It can be reported that, as to non-navigational uses of rivers, there is no *lex lata* in the sense of an international statute.*

The League of Nations' Section of Communication and Transit put forward Statutes

" concerning Freedom of Transit," Barcelona, April 20, 1921, in force since October 31, 1922, with 37 ratifications and adherences.

Citations: LNTS vol. 7, No. 171; Doc. C.479, M.327, 1921, VIII.
Hudson: International Legislation, Nos. 41, 41a.
Dor: Revue de Droit Maritime Comparé Tome, 5, page 565.
Knauth's Benedict on Admiralty, 7th ed., vol. 6, page 225.

" concerning the Régime of Navigable Waterways of International concern," Barcelona, April 20, 1921, in force since October 31, 1922, with 21 ratifications and adherences.

Citations: LNTS vol. 7, page 35. No. 172; Doc. C.479, M. 327, 1921, VIII.
Hudson: International Legislation, No. 42.
Dor: Revue de Droit Maritime Comparé, Tome 5, page 571.
Knauth's Benedict on Admiralty, 7th ed., vol. 6, page 337.

" concerning the Development of Hydraulic Waterpower affecting more than one State," Geneva, December 9, 1923, in force since June 30, 1925.

Citations: LNTS, vol. 36, page 75; No. 905
Hudson: International Legislation, No. 109.
Hartig: Internationale Wasserwirtschaft (1955), page 97.

Work of the United Nations. The International Law Commission has not yet taken up the problem of the Law of Rivers. The well-known work which it has done with respect to the Law of the Sea is limited on the landward side by "the low water line along the coast" (Article 4).

Citations: U.N. General Assembly, Official Records, 11th Session Supplement No. 9 (A/3159).
American Journal of International Law, vol. 51, January, 1957.

* *Lex lata* (*de jure condito*) refers to settled law, statute law, legislation, undisputed law, general treaties of wide acceptance.
Lex ferenda (*de jure condendo*) refers to proposals, drafts under discussion, legislative bills under debate, reforms.
Texts which are accepted by some States but are still under discussion by others have been spoken of as *lex penumbra*.

Knauth's Benedict on Admiralty, 7th ed. vol 6, page 367.

Thus we find lacking a previous effort by the League of Nations or the United Nations to express in a " Statute " a statement of principles covering the field which our Committee has been authorized by the International Law Association to study.

The reason why the problem of a " statute " for *river uses* has not been earlier undertaken may be due to the late development of various needs and pressures. In 1920 the League of Nations was prompt to realize the need of several " Statutes ", among these the Statutes for the Régime of Ports, for Freedom of Transit, and for the Régime of Navigable Waterways of International Concern. Great need was felt in the field of Labour Law, and the International Labour Organisation—I.L.O.—has responded to urgent demands and has formulated more than 100 standard-type Labour Conventions and more than 75 Labour Recommendations since 1919.

Great progress has also been made in matters of Fisheries, of Health, of Safety at Sea, of Commercial and other Aviation.

But prior to 1919 when the League of Nations appeared, the problems of Rivers had been chiefly a matter of Navigation. The régimes of several of the great rivers which traverse differing national areas had been solved by a series of well-known multilateral acts or treaties or agreements, as for the Rhine (Mannheim 1868), the Danube (1856, 1883, 1922), the Congo and Niger (1885). National boundaries had been relatively static for half a century before 1919. The national interests in the régimes of various Rivers had not been matters of the sort of international, multi-State legal interest which, since 1919 and still more since 1945, has pressed upon the modern world.

The redivision of many land territories since 1919 and especially since 1945 among an increasing number of States possessing new independence or a greater degree of independence, has caused many new political boundaries to be drawn. Many of these cross or touch the courses of rivers, lakes and swamp areas. Each such boundary creates a problem.

Surprising population changes have occurred, and others are anticipated.

Great changes in technology have occurred, especially in hydro-electric powers, influencing the demands for water.

The technology of this twentieth century makes possible diversions and uses of water not heretofore possible. The demand for water increases; the supplies have a limit.

For hydro-electric power purposes, great underground works have been constructed in northern Sweden, in the Alps, in the Canadian and United States Rockies. Entire upland basins have been turned from one natural flow into another. To the engineer, a

number of dramatic possibilities are now open to possible accomplishment, especially in mountainous areas.

The power of atomic explosions may make possible some dramatic changes in hills, valleys and stream flow, not hitherto capable of accomplishment. These have stirred the imaginations of planners, and their plans may stir up controversies not previously foreseen as serious possibilities.

The need for orderly consideration and peaceful solution of water problems is therefore becoming greater than before.

Flood Control. Flood control has become an increasingly important aspect of the development of river works. This is associated with the creation and management of water-storage areas, of spill-ways for the control of surplus waters. The integrity and reliability of systems of dams, barrages, dykes and levees has become a most important problem of the engineering authorities. With increases of population, more and more dwellings, factories and agricultural enterprises must be located on lowlands subject to flooding conditions.

Floods are no respecters of political boundaries. The control of flood waters is a problem for each river basin, regardless of divisions of sovereignty. It would seem important and proper to state some propositions as to flood control, for some co-operation in the management of flood waters, with some responsibility for mismanagements and failures of co-operation.

Navigation. The present Reporter regrets that Navigation aspects are laid aside. It would seem likely that the navigational uses may be of a very different character in the future ; mechanically driven barges will predominate, instead of sailing vessels and canal-boats drawn by animal power. Light hydro-foil motor-driven vessels may appear in quantities. In the U.S.A., some 6,000,000 small motor-driven vessels have come into existence, mostly on inland streams and natural and artificial lakes.

In this century there is a growing problem of priorities among the choices of uses of available water-supplies. Some areas have abundant water. But many have or foresee demands exceeding even very abundant water-supplies. And other areas have been semi-arid and totally arid for centuries. The order of precedence should be based upon the relative importance of the different uses to various communities served by any particular river basin system under study.

Priorities of Water Use. Modern water-uses may usefully be classified. In the past, the priorities of water uses have sometimes been stated as follows :

1. Domestic uses — drinking water, sanitation — a consumptive use ;
2. Navigation — a non-consumptive use ;
3. Stock watering — a consumptive use ;
4. Irrigation. A new irrigation project sometimes stops the downward flow for a period of time ; but when the project is well-established, there may be a permanently greater downward flow than before.
5. Industrial washings — a non-consumptive, but frequently a pollutional use.

For the future, there must be added :

6. Chemical process uses — consumptive and polluting ;
7. Flood control — a storage and release problem ;
8. Hydro-electric power use — non-consumptive, and not polluting ;
9. Atomic processes — non-consumptive, but polluting in a new and special sense.
10. Some would add : recreational uses.

Diverted waters can sometimes be " recaptured " and further utilized before being returned to the main stream.

CLASSIFICATION OF RIVER PROBLEMS ACCORDING TO SOVEREIGNTY

Rivers and basins can be classified geographically as being subject to one sovereignty, divided between two sovereignties, divided between three, four, and more sovereigns. It may be useful to do this. We see at once that only a very few rivers are divided between four or more sovereigns. The Danube concerns seven States. The Parana-Paraguay-Plata basin concerns four States. The Rhine flows through or past four States. On the federal scale, the Mississippi-Missouri-Ohio basin concerns 26 of the 48 federated States of the U.S.A. The Volga-Don river system touches 14 of the Soviet States.

The 3-State rivers are not many : The Nile is, perhaps, the greatest. The Congo, Niger and Zambesi touch three States. The Elbe at present flows through three States. The Mekong and Bramaputra touch three States.

By far the largest number of problems are presented by two-State rivers. Thus we see that the greatest number of difficulties are of a bilateral nature. The greatest task is to bring a large number of two-State groups into bilateral agreement.

In this year 1958 the chief disputes are bilateral : Pakistan/India as to the Indus System of Rivers ; Israel/Jordan as to the Jordan ; U.S.A./Canada as to the Columbia-Kootenai.

It is fair to remark that a majority of the earth's rivers do not cause any "international" problems or disputes simply because these rivers are located wholly within one State or nation. Or to put it in another way, many rivers have not "international" status because mankind and our politicians have so arranged the political boundaries that those rivers are not intersected by those boundaries.

This remark suggests that these problems are not caused by the nature of rivers; they are caused by the desires of men to separate themselves into States and nations, each with its own lands and shores and continental shelf. So the cause of the modern problem is the urge of mankind to live in a system of constantly increasing independent States, nations, federations, commonwealths, sovereignties.

River law, water law or the law of "basins"—call it what you will—is not alone or unique in feeling the impact of what President Wilson called the right of all peoples to self-determination of their form of governments. That impact is felt in all phases of modern political life. Our river-use law problem is merely one of many aspects. It is important and well worth our attention. Like most other problems, it can be solved if properly analyzed and approached.

This is an area in which the law is lagging behind the engineers and the bankers — especially the World Bank. The Bank has completed a river-and-valley-taming project on the Pacific Slopes of Mexico. It has an engineering team in the Lower Mekong Valley, which can be made to serve Laos, Cambodia, Viet-Nam and Thailand on a large scale. It has surveyed the Indus and its potentialities and is endeavouring to persuade the unhappily hostile peoples and governors of India and Pakistan that the prospects of great economic benefits for many — if not indeed for all — are more alluring than political and religious hostility and an atmosphere of fear. It could happen that engineers and bankers may succeed despite the inadequacies of our statements of law and principles. But it would be better if the expressions of law and principle could keep abreast of events. And that has always been one of the great purposes of our I.L.A.

TREATY LAW

So long as the treaties remain in force, they govern. Frequently there is the possibility of denunciation, whereby the parties may revert to the situation of the general law.

There appears to be disagreement as to whether accumulations of similar treaty provisions result in the formation of international law.

CUSTOMARY LAW AND "GENERAL PRINCIPLES"

There was thorough discussion, through correspondence and in meetings of the Committee at Geneva and at The Hague, of the methods of establishing the present-day existence of customary international law. Article 38 of the Statute of the International Court of Justice[3] was taken as basic. There was not dispute as to the obligatory force of treaties upon signatories.

With regard to "custom" and "general principles" there was more difficulty. Opinions by international tribunals would be of importance in establishing a principle as law, but there are very few such opinions, for the reason that States nowadays show unwillingness to take their river disputes to courts. One must, therefore, look for the attitudes of States, as shown in various ways, to ascertain whether there is a consensus among them accepting a rule or principle under consideration. It seems unnecessary, among professional international lawyers, to discuss these various ways of ascertaining the attitudes of States; but two objections, relevant to the situation of international rivers, were raised and should be noted here.

It was argued by some, that treaties cannot be adduced as evidence of the existence of a rule or principle of customary law.

The reasoning is that every treaty represents transaction or a compromise, and is an *ad hoc* affair to solve an immediate conflict or disagreement. Therefore, it cannot be regarded as expressing an unadulterated legal principle. It is rather the result of a business transaction. This view is understood to have been expressed by Soviet legal authorities.

Your Reporter is not sympathetic to this view. Present day authorities do not support it. Such are collected in the report of the Committee of the American Branch.

Many of the Committee felt positively that signature by a State to a treaty is evidence of the attitude of the State with regard to the particular practice, or principle, therein stated; and that consequently, treaties can be adduced, not only as binding upon their signatories, but as evidence of the practice of States.

[3] Article 38 of the Statute of the Court reads—the Court, whose function is to decide in accordance with international law, shall apply:

(*a*) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(*b*) international custom, as evidence of a general practice accepted as law;

(*c*) the general principles of law recognized by civilized nations;

(*d*) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Study of the treaties is nowadays facilitated by the great collections of the League of Nations (1919–1945) and of the United Nations (since 1945) and Hudson's volumes entitled "International Legislation". No one, however, has as yet made a selective study of the river treaties. Several members of the Committee could be in a position to do so. Also the Institut de Droit International has a similar project. It is a question of funds.

A resolution as to the desirability of finding funds for further research is appended.

PRINCIPLES OF LAW AND RECOMMENDATIONS

OUTLINE

OUTLINE

PART I: PURPOSE AND SCOPE

I—1.—*Purpose.*

The purpose of this draft is to develop Principles and Recommendations for the guidance of conciliation committees, arbitrators, courts, negotiators and draftsmen of bilateral and multilateral agreements with reference to problems of the uses of the waters of international river-basins.

I—2.—*Scope.*

All uses of surface waters of every description flowing in recognizable channels, comprising lakes, and comprising swamp areas, being within basins whose basin-areas are, as to territorial

sovereignty and jurisdiction, territorially divided between two or more States, fall within the scope of the principles stated in this Statute.

Conversely, waters of a basin which is territorially undivided and which lies wholly within the sovereign territory of one single State, do not fall within the scope of this Statement. Questions of Navigation and of Freedom of Transit fall within the scope of the Barcelona Convention and Statute 1921 concerning the Régime of Navigable Waterways of International Concern or of the Barcelona 1921 Convention and Statute 1921 respecting Freedom of Transit and depend upon the terms and ratifications of those Conventions.

I—3.—*Basin Development as an Integrated Whole.*

The basic principle, to be achieved by co-operation of Riparian States, is that a river system in a drainage basin should be treated as an integrated whole (and not piece-meal) to the end that here may be the fullest beneficial use of the water for the present and the foreseeable future for all purposes and uses and for all communities.

PART II: DEFINITIONS

II—1.—*System of Waters.*

A system of waters consists of the inter-connecting flowing surface waters, lakes, and swamp areas within any drainage basin whose lower outlet leads to any sea or to some body of inland water from which there is no outlet to a sea.

II—2.—*" International " System of Waters.*

An " international " system of waters consists of the inter-connecting flowing surface waters, lakes, and swamp areas within a drainage basin, any area (land area) of which lies within the territory of two or more States.

II—3.—*Riparian State.*

A riparian State is a State having territorial jurisdiction and sovereignty over the whole or any part of a land surface area comprising a drainage basin.

(Note: Compare the different definition of the Barcelona Statute 1921, Art. I (e.)

II—4.—*Co-Riparian State.*

A co-riparian State is a State which shares, in any respect, territorial jurisdiction and sovereignty over a land surface area within any part of a drainage basin, of which basin another State also has rights of jurisdiction and sovereignty.

II—5.—*Non-Riparian State.*

A non-riparian State is a State which does not possess or share any territorial jurisdiction and sovereignty over any land surface area within a drainage basin.

II—6.—*River Basin—Drainage Basin.*

A river basin is an area of land in which all the streams of flowing surface water, both natural and artificial, drain a common watershed, terminating in a common outlet either to a sea or to some body or inland water from which there is no outlet to a sea.

II—7.—*Seaward Boundary of Basin.*

The seaward outlet of a drainage-basin extends to the line which divides the internal waters of the State (or States) at the point or in the region of the outlet from the " territorial waters " of the State (or States).

Note: The expression " territorial waters " is used in the same sense as the statement of The Law of the Sea, recommended by the International Law Commission of the United Nations in July 1956.

II—8.—*Navigation.*

Navigation refers to passage by any type of boat or vessel, passage by logs and rafts.

Any natural waterway or part of a natural waterway is termed " naturally navigable " if now used for ordinary commercial navigation, or capable by reason of its natural conditions of being so used.

By " ordinary commercial navigation " is to be understood navigation which, in view of the economic condition of the riparian countries, is commercial and normally practicable.

(Note: Source—Barcelona 1921 Statute, Art. 1 (b).)

II—9.—*Tributaries.*

Tributaries are not to be considered as separate waterways.

II—10.—*Lateral Canals.*

Lateral canals constructed to remedy the defects of a waterway are assimilated to the waterway.

(Note: Source—Barcelona 1921 Statute, Art 1 (d).)

II—11.—*Fisheries.*

Fisheries refer to fisheries on fresh-water rivers, streams, lakes and swamps.

Nothing in this Statement may be deemed to invalidate or to amend any agreement or treaty or customary use respecting fisheries and fishing rights in any particular river, stream, lake or swamp, in respect of any portion or the whole thereof.

II—12.—*Pollution.*

Pollution is any artificial change in the natural quality of any particular natural water.

II—13.—*Rate of Water-flow.*

Rate of water-flow is the speed of passage of water measured by scientific engineering methods.

II—14.—*Quantity of Water-flow.*

Quantity of water-flow is the volume of water in a given channel passing a given point in a given period of time.

II—15.—*Quality of Water-flow.*

Quality of water-flow is the chemical analysis of samples of water passing a given point at intervals sufficient to establish an average record of the quality of the water at that time and place.

II—16.—*Barcelona Convention and Statute*, 1921.

The reference is to the so-called "general" International Convention and Statute concerning the Régime of Navigable Waterways of International Concern, signed at the Meeting of the Transit and Communications Section of the League of Nations, at Barcelona, April 20, 1921, which came into force on October, 31, 1922. Citations: LNTS, vol. 7, page 35. Hudson: International Legislation, No. 42. Dor: Revue de Droit Maritime Comparé, tome 5, page 571. Knauth's Benedict on Admiralty, 7th edition, vol. 6, page 336.

II—17.—*Geneva*, 1923.

The reference is to the Convention on the Development of Hydraulic Waterpower affecting several States, signed at Geneva, December 9, 1923, at a session of the Transit and Communications Section of the League of Nations.

The citations are: LNTS, vol. 36, page 75.
Hudson: International Legislation, No. 109.
Hartig: Internationale Wasserwirtschaft (1955), page 97.

II—18.—*Colonies, etc.*

For the purpose of this Statement, colonies, protectorates, and other territories having a subordinate status are deemed to form part of the States which are responsible for the conduct of their foreign relations.

PART III: PRINCIPLES OF LAW

III—1.—*Riparian Sovereign Right—Extent.*

A riparian State has sovereign right to make the fullest use of the waters in those parts of ariver-drainage-basin under its jurisdiction (and control) consistent with the corresponding right of (each) (any) co-riparian (and of any non-riparian possessing any rights).

III—1.—*Alternative A* (*Smith*).

Within the limits determined by treaty obligations and the recognized principles of law every riparian State has exclusive legislative judicial, and administrative jurisdiction over the whole of its territory within the area of the basin, including jurisdiction over all persons and things which may be upon, within, beneath, or above the waters of the basin.

In the exercise of its jurisdiction, as defined, every riparian State is entitled:

(i) To construct such works and to take such measures for the use or control of the waters of the basin within its territory as do not cause or threaten material injury to any other Riparian State or its inhabitants;

(ii) To reserve to its own nationals or inhabitants all fisheries and any other benefits which may be derived from the exploitation of the waters of the basin within its territory and the land underneath the waters;

(iii) Subject to treaty and other rights of traffic and transit, to reserve to its own nationals or inhabitants all rights of navigation of every kind within its territory.

A riparian State is at liberty to construct within its territory artificial channels connecting one river basin with another, provided that such constructions do not involve a diversion of water in such quantities as to be inconsistent with the principles of this Statement.

Changes in Population.—Changes in the density or geographical distribution of population should not, in the absence of other relevant factors, affect the mutual rights and obligations or riparian States under this Statement.

III—2.—*Riparian Sovereign Duty—Extent.*

A riparian State is under a duty itself to refrain from conduct which would violate the rights of a co-riparian.

Every riparian State is responsible for such acts or omissions of persons, authorities and agencies within its territory or under its control as may cause or threaten material injury to any other Riparian State or its inhabitants. See IV—11: Changes in Régime.

III—2 (continued).—*Pollution.*

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.

III—3.—*Co-Riparian Sovereign Right — Extent — Equitable Apportionment.*

All riparian States have a common interest in the beneficial uses and beneficial control of the waters of any particular basin, and each riparian State is entitled to a reasonable and equitable share in the beneficial uses which can be made of such waters.

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

III—4.—*Co-riparian Sovereign Duty — Extent.*

A co-riparian is under a duty itself to refrain from conduct which would violate the rights of another riparian.

A co-riparian is under duty to exercise diligence to prevent, in the territory under its jurisdiction, conduct by persons, authorities and agencies which would violate the rights of another riparian.

III.—5.—*Non-riparian Sovereign Right—Extent.*

A non-riparian has no rights in the uses of the waters of a basin, save as rights may be granted by agreement with the Riparian States or by usage having the force of law.

III—6.—*Non-riparian Sovereign Duty—Extent.*

A non-riparian State is under a duty itself to refrain from conduct which would violate the rights of a riparian, and to exercise diligence to prevent, in the territory under its jurisdiction conduct by persons, authorities and agencies which would violate the rights of a riparian.

III—7.—*Role of the United Nations.*

The United Nations and its agencies should co-operate with the riparian and co-riparian States for the maintainance of the rights of each and to avoid breaches of duties by each, to the end that the uses of the waters of basins of international interest shall be developed to the fullest extent of their use for the mutual benefit of all.

III—8.—*Priority as between Uses of Waters.*

Priority in the uses of waters may differ as between one Basin and another, and as between one part of a Basin and another. If priority in the uses is not arranged by agreement, the advice of technical experts should be sought. In general, domestic uses rank first, navigation uses rank second, flood control uses rank third, hydro-electric uses rank fourth, agricultural and irrigation uses rank fifth. Priorities may vary with the season, and may vary as between arid and well-watered areas.

III—9.—*Prior Uses of Water—vested Rights—Divestment.*

Existing treaties and agreements 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.

III—10.—*Forms of Compensation.*

Just compensation for the legal divestment of a vested right in a use of water should preferably take the form of the provision of a substitute source and supply of water of substantially equivalent rate, quantity and quality, or the provision of a substantially equivalent supply of electric power; it may take the form of money compensation for the value of the lost investment.

PART IV: RECOMMENDATIONS

IV—1.—*Availability of Information respecting International Rivers*

Riparian and co-riparian States upon a common river and sharing a common drainage basin should make available to the United Nations agency charged with the matter and to the co-riparians technical information as to hydrological and meteorological information, particularly as to stream-flow, quality of water, rain and snow fall, water tables, for the benefit of authorities charged with duties concerning sources and uses of water.

IV—2.—*Exchange of Information.*

Regular and frequent exchanges of information concerning the technical characteristics of the drainage waters of a basin should be arranged and carried out between the authorities of the riparian and co-riparian States, for the benefit of authorities charged with duties concerning the sources and uses of water.

IV—3.—*United Nations Information Service and Centre.*

The action of the Economic and Social Council of the United Nations looking towards the establishment of a United Nations Centre for the assembling and exchange of information concerning rivers, drainage basins and waters of international concern, is welcomed, and the hope is expressed that this work will be undertaken with adequate energy and will result in a service to humanity.

IV—4.—*Technical Water Study Agencies.*

Riparian States should by agreement constitute permanent or ad hoc agencies for the continuous study of all problems arising out of the use, administration, and control of the waters of the basin.

IV—5.—*Water Study Agencies—Reports.*

These agencies should be instructed to submit reports upon all matters within their competence to the appropriate authorities of the constituent States and to make such recommendations or proposals as they may think desirable.

IV—6.—*Technical Water Study Agencies—Unanimous Recommendations.*

The constituent States should co-operate, in so far as possible, in giving effect to any proposals or recommendations which are submitted by the unanimous agreement of the members of these agencies.

IV—7.—*Non-unanimous Recommendations.*

The appropriate authorities on the co-riparian States should make every endeavour to resolve by agreement all matters upon which there is no unanimous agreement among the members of the technical agencies.

IV—8.—*Regional Agreements.*

In view of the variety of conditions of climate, hydrological facts, and economic conditions in the various river basins of the five continents, and the varieties of possible uses and needs for water, it is observed that regional agreements may serve the needs of riparian States and communities in many situations and it is recommended that efforts to reach regional agreements should be given first priority in all situations.

IV—9.—*Disputes—Conciliation.*

Failing agreement concerning the recommendations of the technical agencies, first resort should be had to conciliation.

IV—10.—*Disputes—Arbitration.*

Failing an agreement as result of conciliation, co-riparian States should agree to submit to arbitration by an appropriate tribunal any questions upon which it has, within a reasonable time, been impossible to reach agreement by direct negotiation. An arbitration tribunal should be requested and empowered to give its award in accordance with these Principles and Recommendations and Article 36 of the Statute of the International Court of Justice.

IV—11.—*Changes in Régime of Drainage Basins, Waters, Rivers.*

Notice of Intention—Seeking Agreement: A State has a duty, before proceeding with development of basins, rivers, waters in its own territory, to give notice of intention and to seek agreement with other riparian States which protest that the proposed action might affect the flow or character of the water to the harm of the latter States.

IV—11.—(*Alternative*).

A riparian State has a *duty*, before constructing, or permitting the construction of, new works and before taking new measures for the use or control of the waters within its territory that might cause or threaten material injury to co-riparians, to enter into negotiations with the co-riparians in a spirit of good faith, with readiness for compromise and reasonable restriction of national interests. In the eventuality of a failure of the negotiations, the party proceeding with new works and measures is under the obligation to use the utmost care and diligence to avoid and minimize loss and damage and to take into due consideration the legitimate interests of the co-riparian States.

IV—12.—*Funds for Research.*

As there exist a great number of unexplored hydrological, engineering, economic and legal facts bearing upon the prospective operation of the existing and desired rules of law relating to the uses of the waters of river basins, it is desirable that further and extensive studies should be undertaken in order to inform the discussions as to the improvement of the proposed texts. For this purpose funds should be sought from Foundations likely to be interested in this subject, and it should be considered how, and to what extent, the work can be carried further in harmony with the similar work of the Institut de Droit International.

COMMENTS OF THE RAPPORTEUR

I—1.—A non-member of the League of Nations may not adhere to the Barcelona and Geneva Conventions according to their strict terms. The new nations created since 1945 find this embarrassing. A Rivers' Statement of Principle should be available to all nations in the future.

I—3.—It is the aim of this entire effort to state desired principles. If this aim is rejected, the task becomes merely one of recording past negotiations and affixing to some of them the label—*Lex Lata* in the sense of settled law, which would abandon the purpose of the I.L.A. in leading towards more orderly legal management and control of the uses of waters.

II—1.—The facts concerning underground waters are in many cases unknown. Therefore, no general principles can be stated. The text is limited to surface waters.

II—2.—" International " is used as a term of art in a special sense to describe river-system basins.

COMMENT: The definition of the System of Waters being of " international " concern appears to vary according to the use made of the waters. For purposes of Navigation, the definition is in terms of navigability from the sea in an up-stream direction as far as the natural or artificial point known as " the head of navigation." Under natural conditions, the head of navigation is usually the first rapids or waterfall.

Under artificial conditions, navigation may be extended further up-stream by canalization, by locks, and similar works.

For hydro-electric purposes, the definition is in terms of suitable sites for dams and reservoirs.

For domestic and agricultural uses, for flood control, for fishing, logging and other purposes, the definition must extend to the very headwaters of each branch or tributary.

The broad term " river-system-basin" is used in this Report. It connotes a land area, from one mountain crest or height of land to another crest or height, all of whose drainage finds its way into one (eventual) River System.

The phrase " System of waters of International Concern " is used in the 1921 and 1923 Conventions and Declaration of the Transit and Communications Section of the League of Nations, made at Barcelona and Geneva, and relating to the Freedom of Transit, Régime of Ports, Régime for Navigational purposes of International Rivers and Hydro-power uses of Rivers. The navigable portions of Rivers are only a part — often a small part — of the System for which these Principles and Resolutions are being stated. The broadest concept is the basin drainage area, and this has been adopted.

It is recognized that this definition will have the result, in many cases, that a relatively small area of a basin being crossed by an international boundary may have the result of classifying a very large and perhaps remote area of a basin-system as " international ", and subject to these Principles and Recommendations.

It has been attempted to define the System in terms of flowing water in recognizable streams, lakes and swamps. The members of the Committee appear as a whole to favour the broad drainage-basin-area definition, and this is recommended.

II—3.—The definition of a " riparian State " found in the Barcelona 1921, Statute, Art I (e) is not accepted because it is limited to the navigable portion of a river.

II—5.—No new research has been offered as to the question of possible *rights of non-riparian* in the use of economic or other benefits of River Systems, and this problem is laid aside at this time, to be taken up at a later point.

II—7.—The definition of the seaward boundary of a basin appears important when a river terminates in a delta, a bay or an estuary. The delta situation may require more thought. The complicated waters of the boundary of Belgium and The Netherlands offer an example.

The phrase " territorial waters" is derived from the Law of the Sea.

II—8.—" Now used" is derived from Barcelona Art. I (b) where it means 1921. In this new setting it means 1958.

II—9.—Barcelona 1921 excludes tributaries which are usually not navigable. This draft Uses of Rivers text includes tributaries.

II—10.—" Lateral canals " is derived from Barcelona 1921, Art. I (d).

II—11.—Numerous existing fisheries agreements relate to fish—as the salmon—which migrate from salt to fresh waters. This Rivers text does not intend to interfere with the established fisheries agreements.

II—12.—The Committee members did not appear to be ready to discuss pollution.

The London, 1954, Convention on the Control of Pollution of the Sea by Oil should be considered. It became effective in July, 1958. See text in Knauth's Benedict on Admiralty, 7th ed., vol. 6, page 506, 509. The Convention on The High Seas, signed at Geneva, April 29, 1958, contains provisions as to pollution of the sea by oil (Art. 24) and by radio-active materials (Art. 25). These passages are derived from Art. 48 of The Law of the Sea as proposed by the International Law Commission in 1956. Text : Knauth's Benedict on Admiralty, 7th ed., vol. 6, page 377.

COMMENT II—13, 14, 15.—For the purposes of these Principles and Recommendations, the emphasis is on the rate, the quantity, and the quality of any stream flow. The problems envisaged are those arising out of changes in the rate, the quantity, or the quality of the supply of water available to co-riparians of any River System.

III—1.—The term " corresponding right " is elucidated by Principle III—3 which states the view known as " equitable apportionment."

COMMENT TO III—1.—Alternative statements would seem to be suitable at this point, because the discussions have at several points indicated that very different views have in the past reached expression, although research does not indicate that they have been acted upon in practice. A single government document, appearing in 1895 and known by the name of its signer as the " Harmon " doctrine, has been rephrased by the Rapporteur in the following terms, and it is here submitted because an adequate discussion of this subject would seem to be much enlightened by an examination of a sharp alternative to Principle III—1 as here stated, being Dubrovnik Principle III.

III—1.—Alternative B.

Water standing in earth, water standing on land, and water flowing over land is a part of the land and may be dealt with at will, and without accountability to neighbours or riparians, (a) *by the sovereign of the land and* (b) *by the landowner.*

No Committee member has actually advocated the " Harmon " doctrine, but it has been elaborately discussed in public debates in Seattle on the problems of the Columbia-Kootenai Rivers, and the Report of the American Branch Committee devotes some attention

to refuting it. Also a recent study by the U.S.A. State Department, making research in respect of the U.S.A.-Canadian Boundary Waters situations, gives it attention for purpose of refuting it. The Reporter proposes to ask for discussion of it, in order to bring to light how much support it may be receiving at the present day.

At the other extreme, an "ideal" statement of the correct attitude may also be offered, with the caveat that the Reporter would feel 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 human rights" to the general benefit of water.

III—2 Alternative C.—*Water in all its forms—humidity, rain, snow, ice, drainage of every description, rivers, lakes, seas—is, like air, a general endowment of nature essential to human life; and every sovereign and every person who has custody or control over water owes a duty to all other sovereigns and persons so to exercise his control and regulate his use as not to harm others.*

A Latin phrase for this concept is:

Sic utere tuo ut alienum non laedas.

COMMENT: The middle ground would appear to be found in the view known as "equitable apportionment," which is expressed in Principle III—3.

III—3.—Several alternative texts were offered. The Rapporteur has selected that offered by Mr. H. A. Smith.

III—7.—The riparian's duty should extend to the problem of pollution, or change in the natural quality of water. The arbitration decision of the *Trail Smelter* case dealt with pollution of the air, and may furnish a guiding clue.

The London Convention on Oil Pollution of the Sea is significant.

III—8.—Technical advice seems necessary in considering the priorities or ranking of competing uses of water.

III—9.—The study of Nationalization by Committee-Member Isi Foighel, of Denmark, is commended. The views as to the nature of vested rights and their divestment by legal means, with legal adjustment of just compensation, are a significant development.

IV—10.—Legal mechanisms for adjusting river agreements to accommodate changes in various states of factors to Rivers were recognized by the Barcelona and Geneva Conventions and Statutes in 1921 and 1923. The U.N. has also undertaken studies of the

general question of Conciliation and Arbitration and Judicial Settlement.

The most recent statement as to steps for the adjustment of disputes is the Optional Protocol adopted by the Geneva Conference on The Law of The Sea, signed on April 29, 1958, by 81 States. The Protocol is designed for States which accept the Optional Clause for compulsory jurisdiction before the International Court of Justice. Adapted to the Law of Rivers, the provisions would be:

Article I. *Compulsory Jurisdiction of the International Court of Justice.* Disputes arising out of the interpretation or application of any Convention or Statute relating to the Law of Rivers of International Concern shall lie within the compulsory jurisdiction of the International Court of Justice, and may accordingly be brought before the Court by an application made by any party to a dispute being a Party to this Protocol.

Article II. *Scope of Undertaking.* This undertaking relates to all the provisions of any Convention or Statute on the Law of Rivers of International Concern except (list of any desired exceptions).

Article III. *Arbitration.* The parties may agree, within a period of two months after one party has notified its opinion to the other that a dispute exists, to resort not to the Court, but to an arbitral tribunal. After the expiry of the said period, either party may bring the dispute before the Court by an application.

Article IV. *Conciliation.* (1). Within the same period of two months, the parties to this Protocol may agree to adopt a conciliation procedure before resorting to the Court. (2). The Conciliation Commission shall make its recommendations within five months after its appointment. If its recommendations are not accepted by the parties to the dispute within two months after they have been delivered, either party may bring the dispute before the Court by an application.

Article V. This Protocol shall remain open for signature by all States who become Parties to any Convention on the Law of Rivers of International Concern, and is subject to ratification, where necessary, according to the constitutional requirements of the signatory States.

Article VI. The Secretary-General of the United Nations shall inform all States who become Parties to any Convention on the Law

of Rivers of International Concern of signatures to this Protocol and of the deposit of instruments of ratification in accordance with Article V.

Article VII. The original of this Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States referred to in Article V.

ARNOLD W. KNAUTH.
Chairman and Rapporteur

June, 1958.

ANNEX II

THIRD REPORT

OF THE COMMITTEE ON THE USES OF THE WATERS OF INTERNATIONAL RIVERS

Heads of Unanimous Agreement :

It is agreed that our immediate purpose is to put forward some principles and some recommendations on which there is unanimous agreement.

It is agreed that there are rules of conventional and customary international law governing the uses of waters of drainage basins that are within the territories of two or more states.

It is agreed that there may be issues not adequately covered by recognized rules of international law and also that there are rules as to which there exist differences as to their meaning.

As used in this statement, a drainage basin is an area within the territories of two or more States in which all the streams of flowing surface water, both natural and artificial, drain a common watershed terminating in a common outlet or common outlets either to the sea or to a lake or to some inland place from which there is no apparent outlet to a sea.

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 at the New York Conference have reached *unanimous agreement.*

AGREED PRINCIPLES ON INTERNATIONAL LAW

1. A system of rivers and lakes in a drainage basin should be treated as an integrated whole (and not piece-meal).

Comment : Until now international law has for the most part been concerned with surface waters although there are some precedents having to do with underground waters. It may be necessary

to consider the interdependence of all hydrological and demographic features of a drainage basin.

2. Except as otherwise provided by treaty or other instruments or customs binding upon the parties, each co-riparian State is entitled to a reasonable and equitable share in the beneficial uses of the waters of the drainage basin. What amounts to a reasonable and equitable share is a question to be determined in the light of all the relevant factors in each particular case.

3. Co-riparian States are under a duty to respect the legal rights of each co-riparian State in the drainage basin.

4. The duty of a riparian State to respect the legal rights of a co-riparian State includes the duty to prevent others, for whose acts it is responsible under international law, from violating the legal rights of the other co-riparian States.

Agreed Recommendations.

1. Co-riparian States should refrain from unilateral acts or omissions that affect adversely the legal rights of a co-riparian State in the drainage basin so long as such co-riparian State is willing to resolve differences as to their legal rights within a reasonable time by consultation. In the eventuality of a failure of these consultations to produce agreement within a reasonable time, the parties should seek a solution in accordance with the principles and procedures (other than consultation) set out in the Charter of the United Nations and the procedures envisaged in Article 33 thereof.

2. The action of the United Nations and its specialized agencies looking towards the assembling, exchange and dissemination of information concerning drainage basins is welcomed, and the hope is expressed that this work will be undertaken with the addition of the assembling, exchange and dissemination of legal information.

3. Co-riparian States should make available to the appropriate agencies of the United Nations and to one another hydrological, meteorological and economic information, particularly as to streamflow, quantity and quality of water, rain and snow fall, water tables and underground water movements.

4. Riparian States should by agreement constitute permanent or *ad hoc* agencies for the continuous study of all problems arising out of the use, administration and control of the waters of drainage basins. These agencies should be instructed to submit reports upon all matters within their competence to the appropriate authorities of the riparian States.

5. Since priorities in the kinds of uses of waters may differ from basin to basin and from one part of a basin to another, in case of differences as to the proper order of priority, the advice of technical experts should be sought.

6. The appropriate authorities of the co-riparian States should endeavour to resolve by agreement all matters concerning which recommendations are made by technical agencies.

7. In view of the variety of conditions of climate, hydrological facts, emographic and economic conditions in the various drainage basins, and the varieties of possible uses and needs for water, it is observed that regional agreements may serve the needs of riparian States and communities in many situations and it is recommended that every effort should be made to reach agreements on a regional basis.

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.

9. It is desirable that there be further study of the hydrological, engineering, economic and legal matters bearing on the prospective operation of the existing and desired rules of international law relating to the uses of the waters of a drainage basin.

10. Funds should be sought from foundations likely to be interested in this subject, and it should be considered how, and to what extent, the work can be carried further in harmony with the similar work of the Institut de Droit International and of the Inter-American Bar Association.

COMMITTEE :

* Asterisk indicates presence at New York.

Rapporteur : * Professor Arnold W. Knauth, New York

Committee : Hon. A. M. Atabani, Attorney General, Sudan.
Judge Algot Bagge, Sweden.
* Dr. F. J. Berber, Germany
* Louis M. Bloomfield, Q.C., Canada
* Professor Guillermo J. Cano, Argentina
* Dr. Dante Caponera, Italy
* Professor Maxwell Cohen, Canada
Professor Charles de Visscher, Belgium
* Dr. A. G. Donaldson, Northern Ireland
Maître Léopold Dor, France
Professor Isi Foighel, Denmark
Dr. H. Fortuin, Netherlands
* Professor Paul Gieseke, Germany
Count Edmund Hartig, Austria
Dr. Werner Hecht, Israel
Dr. B. Hellstrom, Sweden

Sayed Hosni, Sudan
* John G. Laylin, United States
Professor E. J. Manner, Finland
Dr. Jovan Paunović, Yugoslavia
* Manzur Qadir, Pakistan
Shabtai Rosenne, Israel
P. Sevette, Switzerland
* S. M. Sikri, India
Professor H. A. Smith, England
L. Villars-Dahl, Norway
* Henri Zurbrügg, Switzerland

Alternates : * Dr. Charles Boasson, Israel
* Tage Zetterlöf, Sweden

Guests : * Dean Russell D. Niles, New York
* Dr. K. Krishna Rao, India

New York, September 6, 1958.

RECIPROCAL ENFORCEMENT OF FOREIGN JUDGMENTS

Wednesday, September 3rd, 1958,
at 9.30 a.m.

Chairman : Dean Horace E. Read.

DEAN READ (Chairman) : I think the discussion should be confined to problems of principle as I do not think that the time has arrived to go into details. The main principles to be discussed are the principle of conclusiveness of foreign judgments and the principle that reciprocity should not be required. With regard to the question whether the aim of the Committee should be to draft a convention or model legislation, I should like to remind you that some federal constitutions, such as the Canadian constitution, do not give the federation the right to conclude treaties in these matters without implementation by the member provinces or states. Therefore, I think it necessary also to draft model legislation as well as to draft the model treaty.

PROFESSOR J. G. CASTEL (Rapporteur) : Although it is hardly necessary to stress the advantages to international trade which may result from a universal recognition and enforcement of foreign money judgments, it appears that the increased volume of international trade has not been followed by a comparable development of the facilities granted to creditors to recover on their claims. Each country has a tendency to protect itself against foreign judgments to the prejudice of creditors in whose favour the judgment lies. This attitude is principally due to the lack of confidence in other legal systems. At a time when so many proposals are being made to remedy this situation, it becomes important to determine which solutions would result in a better organisation of international relations. If some common principles can be agreed upon and embodied in a model uniform act or international treaty it might be possible to lessen some of the international tensions which inhibit freer economic relationships between nations, and thus create a community of justice which at the present time is non-existent. The Committee on the Reciprocal Enforcement of Foreign Judgments was organised last spring to deal with these problems. In