

Document:-  
**A/CN.4/SR.2028**

**Summary record of the 2028th meeting**

Topic:  
**Law of the non-navigational uses of international watercourses**

Extract from the Yearbook of the International Law Commission:-  
**1987, vol. I**

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(<http://www.un.org/law/ilc/index.htm>)*

as difficult as had been suggested. In practice, it was the functions and responsibilities of an organization that were involved, and, for the most part, they were set forth in the constituent instrument. As Mr. Reuter (2024th meeting) had pointed out, the consequence of international personality was that international organizations had the capacity to conclude treaties and to assume certain responsibilities. That being so, it should be possible for the Commission to consider the matter and he strongly urged it to pronounce itself on that all-important issue.

58. In its advisory opinion of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*, the ICJ had recognized the personality of international organizations. Without equating the status of international organizations with that of States, it had acknowledged that the United Nations had been assigned certain functions and rights; that, in order to exercise those functions and rights, it had international personality and the capacity to conclude treaties; and that, although it was not on a par with States, the Organization was a subject of international law, having rights and duties and being endowed with legal capacity. The Court had concluded:

... the Court's opinion is that fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with capacity to bring international claims.<sup>7</sup>

That important opinion of the ICJ constituted the repudiation of a certain form of neo-positivism which tended to make the existence of the international personality of an international organization dependent on recognition by States. It was also interesting to note the recognition of the legal capacity of WHO by the ICJ in its advisory opinion of 20 December 1980 on *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*.<sup>8</sup>

59. He agreed with Mr. Calero Rodrigues's suggestion that the Commission should first concentrate on the privileges and immunities of the organizations themselves. He also agreed that the Commission's first task was to deal with international organizations of a universal character. Having done that, however, the Commission should also deal with regional organizations: it could not ignore such important bodies as OAS and OAU.

*The meeting rose at 1 p.m.*

<sup>7</sup> I.C.J. Reports 1949, p. 185.

<sup>8</sup> I.C.J. Reports 1980, p. 73.

## 2028th MEETING

*Tuesday, 7 July 1987, at 3.05 p.m.*

*Chairman:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Ben-

nouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

### The law of the non-navigational uses of international watercourses (*continued*)\* (A/CN.4/399 and Add.1 and 2,<sup>1</sup> A/CN.4/406 and Add.1 and 2,<sup>2</sup> A/CN.4/L.411)

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE  
DRAFTING COMMITTEE

#### TITLES OF PARTS I AND II OF THE DRAFT *and* ARTICLES 1 TO 7

1. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the titles of parts I and II of the draft and draft articles 1 to 7 as adopted by the Committee (A/CN.4/L.411), which read:

#### PART I

#### INTRODUCTION

##### *Article 1. [Use of terms]<sup>a</sup>*

##### *Article 2. Scope of the present articles*

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

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

##### *Article 3. Watercourse States*

For the purposes of the present articles, a watercourse State is a State in whose territory part of an international watercourse [system] is situated.

##### *Article 4. [Watercourse] [System] agreements*

1. Watercourse States may enter into one or more agreements which apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse [system] or part thereof. Such agreements shall, for the purposes of the present articles, be called [watercourse] [system] agreements.

2. Where a [watercourse] [system] agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse [system] or with respect to any part thereof or a particular project, programme or use, provided that

<sup>a</sup> The Drafting Committee agreed to leave aside for the time being the question of article 1 (Use of terms) and that of the use of the term "system" and to continue its work on the basis of the provisional working hypothesis accepted by the Commission at its thirty-second session, in 1980. Thus the word "system" appears in square brackets throughout the text.

\* Resumed from the 2014th meeting.

<sup>1</sup> Reproduced in *Yearbook* . . . 1986, vol. II (Part One).

<sup>2</sup> Reproduced in *Yearbook* . . . 1987, vol. II (Part One).

the agreement does not adversely affect, to an appreciable extent, the use by one or more other watercourse States of the waters of the international watercourse [system].

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

#### *Article 5. Parties to [watercourse] [system] agreements*

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

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

## PART II

### GENERAL PRINCIPLES

#### *Article 6 [6 and 7]. Equitable and reasonable utilization and participation*

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

2. Watercourse States shall participate in the use, development and protection of an international watercourse [system] in an equitable and reasonable manner. Such participation includes both the right to utilize the international watercourse [system] as provided in paragraph 1 of this article and the duty to co-operate in the protection and development thereof, as provided in article . . .

#### *Article 7 [8]. Factors relevant to equitable and reasonable utilization*

1. Utilization of an international watercourse [system] in an equitable and reasonable manner within the meaning of article 6 requires taking into account all relevant factors and circumstances, including:

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

2. In the application of article 6 or the present article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of co-operation.

2. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) thanked the members of the Drafting Committee for their hard work and co-operation during the 27 meetings at which the Committee had considered those draft articles and welcomed the

fact that some members of the Commission who were not members of the Committee had taken an active part in its work. He also thanked the Special Rapporteur for his constant willingness to find solutions acceptable to all.

3. He recalled that, at its thirty-second session, in 1980, the Commission had provisionally adopted six draft articles on the topic and had accepted a provisional working hypothesis as to what was meant by the term "international watercourse system". At its thirty-sixth session, in 1984, it had referred to the Drafting Committee draft articles 1 to 9 as submitted by the previous Special Rapporteur, Mr. Evensen, in his second report; the first six of those nine draft articles had constituted revised versions of the articles and the working hypothesis provisionally adopted by the Commission in 1980. The 1980 texts and the nine draft articles referred to the Drafting Committee in 1984 had been reproduced in the second report of the present Special Rapporteur (A/CN.4/399 and Add.1 and 2, para. 4 and footnotes 20 and 22 to 29).

4. The Drafting Committee had taken account in its work of the discussions held on the topic at earlier sessions and, in particular, of the comments made at the previous session on the four points concerning draft articles 1 to 9 as submitted in 1984 to which the Special Rapporteur had drawn the Commission's attention.<sup>3</sup>

5. With regard to the texts proposed by the Drafting Committee (A/CN.4/L.411), the Committee had followed the standard practice of referring to "the present articles" and had not used the words "the present Convention", which had appeared in some of the draft articles submitted in 1984. Moreover, the words "article 6 [6 and 7]" were used to indicate that the new article 6 combined the texts of draft articles 6 and 7 referred to the Committee in 1984. Similarly, article 7 corresponded to draft article 8, referred to the Committee the same year.

6. Due to lack of time, the Drafting Committee had been unable to complete its consideration of draft article 9, referred to it in 1984, or to take up draft articles 10 to 15, which the Commission had referred to it at the present session. The Committee would consider those seven draft articles at a future session of the Commission.

#### TITLE OF PART I OF THE DRAFT

7. The Drafting Committee recommended that the first section of the draft should be called "Part I" and entitled "Introduction", in keeping with several recent codification conventions. That was, as usual, a provisional designation pending completion of the work on the draft as a whole.

8. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt the title of part I of the draft.

*The title of part I of the draft was adopted.*

<sup>3</sup> See the summary of the debate in *Yearbook . . . 1986*, vol. II (Part Two), pp. 62-63, paras. 234-241.

## ARTICLE 1 [Use of terms]

9. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that, at its thirty-second session, in 1980, the Commission had accepted a provisional working hypothesis as to the meaning of the term "international watercourse system". At its thirty-sixth session, in 1984, it had referred to the Drafting Committee article 1, which contained an explanation (definition) of the term "international watercourse". The question of the use or non-use of the term "system" and that of a precise definition of an international watercourse had proven somewhat controversial.

10. In accordance with the general trend of the discussion in 1986, the Drafting Committee had agreed to leave aside for the time being the question of the inclusion in the draft of an article on the use of terms, as well as the question of the use of the term "system". It had also agreed that, until it reverted to those questions, it would continue to work on the basis of the 1980 provisional working hypothesis, without adopting or rejecting it at the present time. Thus, in order not to prejudge the matter, the word "system" had been placed in square brackets wherever it appeared in the draft articles adopted by the Committee. That decision had been set forth in the footnote to draft article 1. In order to simplify matters, he would, in the remainder of his statement, use the term "watercourse", on the understanding that what was meant was an "international watercourse [system]".

11. Article 1 thus appeared in the draft with the usual title "Use of terms", which had been placed in square brackets as a reminder that definitional provisions were still pending, particularly as far as the matters dealt with in the footnote to the article were concerned.

12. Mr. BARSEGOV said that the Drafting Committee's decision had indeed been provisional, yet the terms the Commission subsequently decided to use would necessarily affect the content of the draft articles. The Commission therefore had to settle that question, and the sooner the better. He would, however, have no objection if the Commission decided to use square brackets on a provisional basis.

13. Mr. ROUCOUNAS said it seemed that, at the present stage in the Commission's work, the terms "system" and "watercourse" had been placed on an equal footing. However, the footnote to draft article 1 was not very clear in that regard, for it implied that the Commission had already opted for one of those terms.

14. Mr. BEESLEY said that, in the light of the explanations given by the Chairman of the Drafting Committee, he agreed with the provisional compromise solution, but reserved his position with regard to the inclusion of the term "system" at a later stage in the work on the draft.

15. The CHAIRMAN, speaking as a member of the Commission, said he agreed with those members who took the view that it had been provisionally decided to retain the term "system".

16. Speaking as Chairman, he said that, if there were no objections, he would take it that the Commission agreed to leave aside for the time being the question of

article 1 (Use of terms) and that of the use of the term "system", to continue its work on the basis of the provisional working hypothesis accepted at its thirty-second session, in 1980, and to place the word "system" in square brackets throughout the text.

*It was so agreed.*

## ARTICLE 2 (Scope of the present articles)

17. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that draft article 2 was based on article 1 as provisionally adopted in 1980, and on draft article 2 as submitted by the previous Special Rapporteur in 1984. In paragraph 1, the Drafting Committee had retained the reference to international watercourses "and their waters" in order to make it clear that the term "watercourse" meant not only a pipe or conduit for the waters, but also the waters themselves. That was, of course, a definitional matter with which the Drafting Committee would be able to deal when it reverted to article 1. In the mean time, the Drafting Committee had deemed it sufficient to make that point clear in article 2, paragraph 1, as well as in the commentary to that provision, without repeating the reference to watercourses and their waters in the remainder of the draft. The Committee had also decided to retain the words "measures of conservation" without adding "administration and management", as had been proposed in the 1984 text. It had considered that, for the time being, the term "measures of conservation" should be interpreted to include measures of administration, management and co-operation. Obviously, those terms could be added later, depending on the content of future articles. Paragraph 2 had not been changed, with the exception of minor adjustments to which he had already referred, such as the inclusion of the word "system" in square brackets and the deletion of the words "of the waters". Similarly, the title had not been changed.

18. Mr. EIRIKSSON said that, until the Commission had discussed the article on the use of terms and the draft articles as a whole, it could deal only provisionally with the scope of the articles. He nevertheless had four suggestions to make concerning the wording of draft article 2. First, since the expression "of their waters" involved a definitional matter that would be settled once a decision had been taken on the wording of draft article 1, he suggested that, in order to avoid any confusion in the other draft articles proposed by the Drafting Committee, it should be explained in a footnote that the term "watercourse[s]" should be understood as including the waters they contained. Secondly, he was concerned about the use of the term "conservation". The term "protection" was used more frequently in the other draft articles, and he thought that it might be advisable to use that term rather than "conservation". Thirdly, he suggested that, at the end of paragraph 1, the word "of" should be inserted before "their waters", in line with the wording in the first part of the paragraph, which read: "uses of . . . watercourse[s] . . . and of their waters". Fourthly, he had some doubts about the double negative that seemed to be implied by the words "uses . . . for purposes other than navigation", in paragraph 1, and "the use . . . for navigation is not within the scope", in paragraph 2. He therefore suggested that those two paragraphs should be replaced

by a single paragraph consisting of two sentences, the second of which would replace paragraph 2 and would read:

“The present articles shall, however, also apply to the use of international watercourse[s] [systems] for navigation in so far as other uses affect navigation or are affected by navigation.”

19. Mr. KOROMA said that it was not certain that the term “conservation” would be defined in draft article 1 and that, in any event, it was not known what form that definition would take. The oral report by the Chairman of the Drafting Committee had made it clear that “conservation” included administration and management, but the term actually had several meanings and it might be taken in the sense of “water conservation”, its original meaning, whereas the Drafting Committee had given it a political connotation. The question therefore called for some clarification.

20. The Chairman of the Drafting Committee had also said that the Committee proposed deleting the reference to “the waters” of a watercourse in the remainder of the draft. Those words had originally been included in order to highlight the term “international watercourse[s]”, since it was just as difficult to refer to an international watercourse without thinking of its waters as it was to refer to a State without thinking of its territory. He personally had no objection to the retention of those words for the time being.

21. Mr. TOMUSCHAT said that he would like some clarification concerning the relationship between the concept of “conservation” in draft article 2 and the concepts of “protection” and “development”, which were used in draft article 6. Did “conservation” mean protection and development? Some consistency was required.

22. Mr. BARSEGOV said that, if his understanding was correct, the Chairman of the Drafting Committee had been speaking in his personal capacity in presenting his oral report, since the Drafting Committee had not yet considered the question in detail. He therefore wished to qualify to some extent the comments made by the Chairman of the Drafting Committee, who had said that some terms had been deleted from the text of draft article 2 because they were repetitive and that the wording chosen would cover the concepts of administration and management. That was a very serious question and one which called for some response.

23. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said he challenged any assertion that his reporting reflected ideas of his own. Indeed, he had endeavoured to recount as faithfully as possible the decisions taken in the course of the Drafting Committee’s work. If he had made any mistakes in presenting matters, it was for the members of the Committee to draw attention to them. However, the draft articles he had presented had been discussed at a number of meetings, particularly draft article 2, and that article would not have been presented to the Commission if it had not been adopted by the Drafting Committee. As Chairman of the Drafting Committee, he did not have, nor did he aspire to, the power to change a draft article on his own initiative.

24. Mr. Eiriksson’s suggestion to explain the words “and of their waters” in a footnote seemed acceptable. Nevertheless, the commentary would in any event give ample explanations about the use of that expression in paragraph 1 of article 2.

25. The expression “measures of conservation” was drawn from draft article 2 as submitted by the previous Special Rapporteur, but the Drafting Committee had not thought it necessary to use the whole of the expression in question, namely “measures of administration, management and conservation”. As far as the Committee was concerned, the concept of conservation encompassed those of protection, administration and management.

26. He was not in favour of combining the two paragraphs of article 2, for they covered quite different concepts, and merging them into a single provision would merely make for confusion.

27. Mr. BARSEGOV said that he would like to clear up some points, so as to avoid any controversy. The comments made both in the Drafting Committee and in the Commission were always of special importance, but, since they were not submitted for approval by the members, they had no legal value. Accordingly, no conclusions could be drawn therefrom. If the points of view did match and an agreement did appear to emerge, he would raise no objection, but those comments could not be presented as an interpretation by the Drafting Committee. He would not like to convey the impression that he endorsed such an agreement.

28. Mr. BEESLEY asked the Special Rapporteur whether, in his view, it was desirable to leave aside the question of using the word “protection” and combining the two paragraphs of draft article 2, and whether Mr. Eiriksson’s proposal altered the meaning of article 2 as a whole. For his own part, he would add, without wishing to embark on a discussion or to prolong the debate, that if the Chairman of the Drafting Committee could not present his report as he saw fit, the text should be circulated. It was disturbing to see an emerging practice of dissociating oneself from the statements made by the Chairman of the Drafting Committee. He none the less realized that, if a member did not endorse the remarks by the Chairman of the Drafting Committee, he had the right, if not the duty, to make known his own point of view.

29. The CHAIRMAN said that the commentaries to each draft article adopted by the Commission were prepared by the Special Rapporteur himself, and they too were approved in plenary. The comments made by the Chairman of the Drafting Committee summarized or explained the Committee’s decisions and were intended to clarify the meaning of each draft article for members of the Commission who were not on the Drafting Committee. But those comments were one thing, and the commentaries to be attached to the draft articles in the final report were another.

30. Mr. YANKOV asked whether the Special Rapporteur could not, in preparing the commentaries, give a historical review of some of the draft articles—particularly in the case of texts which the Commission had already adopted—and indicate the changes made. The

report would thus be more accurate and the information would be useful to anyone wishing to refer back to the preparatory work. The term “conservation”, for example, had appeared in article 1 as provisionally adopted by the Commission in 1980. It would thus be easier to make a comparison either by reproducing the text in a footnote, or by giving the appropriate reference in square brackets alongside the title of the new article.

31. He could agree to draft article 2 in its present formulation, with a reservation regarding the use of the term “watercourse systems” or “watercourses”. In the work of the Third Committee of the Third United Nations Conference on the Law of the Sea, however, the words “protection”, “conservation” and “preservation” of the marine environment had had specific meanings at that time. In his opinion, the meaning of the term “conservation” could not be reduced to the idea of protection. If the terminology of draft articles 2 and 6 was to be harmonized, perhaps the best course would be to speak of “protection”. In any event, his comment was intended not as a formal proposal but simply as an explanation to facilitate the work in hand.

32. Mr. EIRIKSSON noted that paragraph 1 (e) of draft article 7 mentioned “conservation” and “protection” and he suggested that only one of those terms should be utilized in that provision; he would revert to the matter later. He appreciated the point of view expressed by the Chairman of the Drafting Committee on his proposal to combine the two paragraphs of draft article 2 and would not, therefore, press the point. Nevertheless, he still felt that paragraph 2 should be worded as he had suggested (para. 18 above), so as to avoid the double negative he had mentioned.

33. Mr. CALERO RODRIGUES said that, as a member of the Drafting Committee, he unreservedly accepted the proposed text. Although it was not entirely what he would have liked, it did represent a satisfactory compromise. The fact remained that members of the Commission were entitled to suggest changes, and more particularly to raise issues which might have escaped the Drafting Committee’s attention: there was no reason to keep to the text prepared by the Drafting Committee and to rule out any possibility of amendment. However, among the many changes proposed, only one, namely the proposal to replace the term “conservation” by “protection” in paragraph 1 of draft article 2, enlisted his support, particularly in view of Mr. Tomuschat’s comments concerning draft article 6. It would not be a mistake to use the term “conservation”, provided that an explanation was given of its meaning. But in the light of the discussion he was convinced that the word “protection” was preferable. The other proposed amendments would not improve the Drafting Committee’s formulation.

34. Mr. GRAEFRATH said the fact that the terms “international watercourse[s]” and “[systems]” were used with square brackets did not mean that either term had been accepted. Personally, he was not prepared to accept the term “system” and believed that it had been placed in square brackets precisely because no final decision had been taken on it.

35. The terms “administration” and “management”, which had appeared in the previous text and had led to some objections, had been deleted not because those concepts would be encompassed by the concept of conservation, but because they were more of a means than a purpose, and it was an open question to what extent administration and management were institutionalized. It would be very strange to interpret “conservation” as something that included the concepts of administration and management, for the administration and management of a watercourse were much broader than what was implied by the idea of conservation. A proposal had then been made to speak not of conservation, but of protection. For his part, he would be tempted to endorse the proposal to refer to measures of “protection” instead of “conservation”, provided that the words “and development” were added, so as to bring the text of draft article 2 into line with that of draft article 6.

36. Mr. ILLUECA said that draft article 2 could not be viewed in isolation from the other provisions prepared by the Drafting Committee, and pointed out that, for third world countries, the term “protection” had unpleasant connotations of “protectorate” and of the law of the strongest, even though such reasoning was more political than juridical. Perhaps the Special Rapporteur could explain the points of concordance between the various draft articles, so as to determine what the “measures of conservation” referred to in article 2 were related to. If those measures related to uses, there might be a link with draft articles 6 and 7, and particularly with paragraph 1 (e) of article 7, for those provisions employed the terms “use”, “development” and “protection” on the one hand, and “conservation”, “protection”, “development” and “economy of use” on the other.

37. Mr. Sreenivasa RAO said that, as a member of the Drafting Committee, he endorsed a number of the comments made by Mr. Barsegov and Mr. Graefrath. The expression “measures of administration, management and conservation” had been discussed at length and it had been adduced that, since administration and management were means to an end, they could not be dealt with as if they were separate goals. Accordingly, it had been tentatively decided not to use those terms together. The question whether the idea of “conservation” included those two concepts or whether it was necessary to mention measures of administration and management had not really been discussed. In his opinion, therefore, the Commission need not determine for the time being whether conservation was the only goal to be pursued, or whether conservation included administration and management. The issue of harmonizing the terms employed in the various draft articles had not been considered by the Drafting Committee, which had examined one by one each of the articles referred to it. He had thought that the Drafting Committee would deal with that matter on second reading. However, the question had been raised, and he would be inclined to think that the term “conservation” had been used with its own particular meaning and could easily be replaced, for the purposes of uniformity, by “protection” or “protection and development”. No final decision had been taken on the term “system”. To decide on that matter, it would be necessary to see the whole of

the draft and determine the relationships between the various provisions.

38. Mr. KOROMA said it was apparent from the discussion that the term "conservation" did not cover the concepts of administration and management, but could encompass those of development and protection. Since the term was broader in scope than the word "protection", he proposed that draft article 2 should speak of "measures of conservation, including protection and development". To use the word "protection" alone would be to restrict unduly the scope of the draft.

39. Mr. BEESLEY said that it was obviously necessary to harmonize the terminology used. Nevertheless, he was not only concerned but alarmed at the Commission's tendency to take the place of the Drafting Committee and change a word here and there without any clear idea of the effects of the changes. At the present stage, the Commission was not required to decide on the use of a particular term. Moreover, he was ready to support any comment by the Chairman of the Commission, the Chairman of the Drafting Committee or the Special Rapporteur explaining that no decision had yet been taken on the terms that were to be used and that the terminology would ultimately depend on the comments made in the course of the discussion.

40. Despite Mr. Eiriksson's remark about the need to harmonize the terminology, he would prefer the Commission to refrain from deciding on the use of the term "conservation" or "protection". It would also be remembered that the Commission could call on experts before reaching a final decision. He noted that terms such as "planning", "conservation", "utilization", "development", "management" and "control" were used in the Delaware River Basin Compact, cited in the Special Rapporteur's third report (A/CN.4/406 and Add.1 and 2, para. 17). Hence it would be better, until such time as members had a clearer idea of the concepts they were endeavouring to define, not to take a decision in that regard.

41. Mr. TOMUSCHAT noted that everyone acknowledged the need for consistency between draft articles 2, 6 and 7. Personally, he thought that the idea of development was not really included in the concepts of protection or conservation, and hence there was a need for it to be expressly mentioned. As to the concepts of protection and conservation, he was not a native English speaker and could not say which concept was the broadest. Like Mr. Graefrath, Mr. Illueca and Mr. Sreenivasa Rao, he was of the opinion that article 2 should perhaps speak of "protection and development" or "conservation and development".

42. The CHAIRMAN, speaking as a member of the Commission, said he had no difficulty in accepting draft article 2 in its present wording. The term "conservation" had many connotations in Spanish, but in the present instance it fully reflected what the Commission was seeking to express. However, he had no objection to adding the terms "protection and development" in paragraph 1. Moreover, Mr. Illueca and Mr. Yankov had been right to emphasize the need to harmonize the terminology used in draft articles 2, 6 and 7. The form of article 2, namely its division into two

paragraphs, was satisfactory and he could not agree to Mr. Eiriksson's proposal.

43. Mr. McCAFFREY (Special Rapporteur) said that there was always a problem of timing, since it was customary for the Commission to adopt draft articles before a special rapporteur prepared the relevant commentaries. Obviously, a special rapporteur had very little time to prepare the commentaries in the interval between approval of the draft articles by the Drafting Committee and their presentation to the Commission. Moreover, articles and commentaries had to be submitted for translation. Perhaps the Commission could consider that matter when it came to discuss its methods of work; but he was not sure that it would be possible in practical terms for him to draft the commentaries as and when the Drafting Committee was putting the final touches to the texts of the articles. So far, the Commission had always approved the commentaries to draft articles during the adoption of the relevant chapter of its report. While he shared the concern of the members of the Commission who wondered about the meaning of certain terms and the way they were to be explained in the commentary, he did not see how the situation could be remedied at the present stage.

44. In any event, the report by the Chairman of the Drafting Committee could do no more than reflect and sum up as accurately as possible the Drafting Committee's discussions. Naturally, members of the Committee whose views were not properly reflected in the report were entirely free to explain them in plenary during the consideration of the draft articles.

45. With reference to all the draft articles now before the Commission, it would be remembered that they had not been considered at the present session or in 1986, or even in 1985, and most of them had been examined only superficially in 1983 and 1984. It was therefore perfectly natural for questions to be raised in connection with certain terms and expressions that some members of the Commission were seeing for the first time. He none the less hoped to be able to reflect in the commentaries the agreement that appeared to be emerging in the discussion.

46. The Drafting Committee had done its best to keep closely to the texts of the articles provisionally adopted in 1980, which contained the term "conservation". Mr. Evensen, in revising those articles, had added the terms "administration" and "management". The Drafting Committee had interpreted the term "conservation" as covering measures to deal with pollution and other types of harm to an international water-course, as well as flood control, erosion, sedimentation and salt-water intrusion. As Special Rapporteur, he was not wedded to the term "conservation" and thought, as did Mr. Calero Rodrigues and other members of the Drafting Committee, that it would perhaps be preferable to harmonize the terminology used in draft article 2 with that of subsequent draft articles, particularly article 6. The term "protection" could therefore replace "conservation". The question as to which term had the broader meaning was definitional, almost subjective. In English, the term "conservation" had the connotation partly of protection and partly of not wasting a resource. Before the "environmental

revolution", it had been customary to speak of the "law of conservation", not "environmental law". The term therefore encompassed a number of concepts and he had no objection to using the term "protection", particularly in the sense in which it was used in subsequent draft articles.

47. He also endorsed the suggestion to introduce the idea of development in paragraph 1, especially since that term was used in a number of places in the draft. It would indicate more accurately the subject of the draft. The concepts of "administration" and "management" were certainly not ruled out, since Mr. Evensen's outline, which had been the basis for his own work, had envisaged a chapter on administration and management. However, administration and management did not entail legal obligations and a reference to them would simply be a recommendation to States regarding the best means of achieving optimum use. Unless members of the Commission were emphatic on the matter, it did not even seem necessary to speak of administration and management in the commentary. On the other hand, an explanation could be given of what "protection and development" were taken to mean.

48. With regard to harmonization of the terminology, reference had been made to paragraph 1 (e) of draft article 7. He would suggest that the question should be dealt with when the Commission came to consider that provision. For the time being, it would be remembered that the factors enumerated in article 7 were much broader and the terms used therein were intended to point out for States the kinds of considerations they would have to take into account in the use of watercourses. Thus the purpose of the provision was not the same as that of article 2, in which it would be difficult to use all those terms. When the time came to examine article 7, the Commission might perhaps consider whether there was a useful distinction between "conservation" and "protection".

49. He had no objection to Mr. Eiriksson's suggestion to insert the word "of" before "their waters", at the end of paragraph 1. In regard to Mr. Eiriksson's proposal concerning paragraph 2 (para. 18 above), Mr. Beesley had asked whether it altered the meaning of article 2 as a whole. Personally, he was in principle opposed to any use of double negatives, but the proposal would not change the actual sense of the article and would be a source of ambiguity, for the topic was entitled "The law of the non-navigational uses of international watercourses": in the proposed modified form, article 2 would depart from that title. Paragraph 2 was better drafted in its present form, for the emphasis was placed on the fact that navigation, with a few exceptions, did not come within the scope of the draft. If worded as Mr. Eiriksson had suggested, the paragraph would convey the idea that, generally speaking, the draft related to navigation, with a few exceptions.

50. As to Mr. Yankov's wish for an explanation to be given in the commentary of the evolution of the draft articles, he had had no intention of adopting such a course, fearing that it might lead to questions and pointless comparisons, and even criticisms. But he would of course follow that suggestion if the Commission so wished. In that case, he should perhaps do so

concisely, without actually juxtaposing the successive versions of the draft articles, and simply indicate that a particular article was based on an article provisionally adopted in 1980 or proposed by the previous Special Rapporteur in 1984. In any event, the relevant chapter of the Commission's report would give a historical review of the Commission's work on the topic and point out that some articles had been provisionally adopted in 1980. Perhaps it was not essential for the Commission to take a decision on the matter at the present meeting.

51. The CHAIRMAN said that there appeared to be a consensus in favour of the present wording of paragraph 1 of draft article 2, on the understanding, however, that the words "of conservation" would be replaced by "of protection and development".

52. Mr. KOROMA said he was still of the opinion that paragraph 1 should retain the concepts of conservation, protection and, if necessary, control.

53. Mr. BEESLEY said that he was prepared to agree to virtually any proposal on a provisional basis. His final position would depend on the decisions to be taken in connection with draft articles 6 and 7, for he accepted all the explanations given by the Special Rapporteur, except the explanation concerning draft article 7. In fact, article 7 could not contain provisions that were wider in scope than the article on the scope of the draft. He would revert to that matter later. As far as he was concerned, the term "conservation" was different in meaning from the term "protection", but he would not press the point.

54. Mr. EIRIKSSON pointed out that the Chairman of the Drafting Committee had agreed to his suggestion to explain the expression "of their waters" in a footnote, since it was a definitional matter that would be dealt with later in article 1. Furthermore, the wording he had proposed for paragraph 2 of article 2 (para. 18 above) contained the word "however", which would clearly demonstrate that it was an exception to the scope of the draft. In actual fact, paragraph 2 as currently worded did not fully meet the Special Rapporteur's concern.

55. Mr. YANKOV, supported by Mr. GRAEFRATH and Mr. CALERO RODRIGUES, said that, in instruments which included provisions on measures of conservation, those measures were concerned specifically with living resources and were not simply taken to mean measures of protection against pollution and other harm to the environment. They were also intended to protect certain species against depletion, and to improve stocks. For example, in the 1982 United Nations Convention on the Law of the Sea, the term "conservation" was used only in the provisions on fisheries. Using the terms "protection" and "development" would not broaden the scope of the draft, which would thus be more in keeping with the Commission's understanding of the expression "non-navigational uses". Nevertheless, he thought it advisable to use only those two terms, namely "protection" and "development", for the three terms together could well overlap.

56. Mr. ILLUECA said that he did not think there was any consensus to use the terms "protection" and



“development”. Like Mr. Beesley, he saw no reason not to use the term “conservation” as well.

57. Mr. BEESLEY, explaining some of the reasons why he would prefer to retain the term “conservation”, pointed out that, in paragraph 1 of draft article 2, measures of conservation were tied in with the concept of utilization, and, as Mr. Yankov had said, the term “conservation” was used in some conventions in connection with living resources. In the case of the non-navigational uses of watercourses, it would therefore be wise to retain that term, if only to provide for protection of salmon runs. Furthermore, since the terms “conservation” and “protection” reflected slightly different concepts, the best thing would be to use both of them for the time being.

58. He had no objection to the term “development”, pending further explanation at the appropriate time. However, in draft article 6 the term was predicated on a different assumption, namely that when States developed an international watercourse they had to act in an equitable and reasonable manner. Yet everyone knew of cases of virtual overdevelopment of a watercourse. It was therefore understandable that members of the Commission were reluctant to adopt the concept of development, but did not want to rule it out entirely. In the circumstances, he could agree provisionally to a compromise solution in the light of the discussion on draft articles 6 and 7, a solution that seemed possible if the Commission chose terminology that occupied the middle ground, or rather common ground.

59. Mr. FRANCIS said that, during the consideration of the Special Rapporteur’s third report, he had raised the question of changing weather patterns (2008th meeting), for while some watercourses had abundant water, others did not. In those cases, the downstream States might, depending on the climate, be affected by excessive use upstream. From that point of view, conservation should constitute an important factor in any use of watercourses. He therefore urged the Commission to reflect further before departing from the text worked out by the Drafting Committee. Personally, he would prefer a form of words that mentioned conservation, along with the other elements to which members of the Commission attached importance.

60. Mr. Sreenivasa RAO proposed that paragraph 1 should speak of “measures of conservation, including protection and development”, for the use of those terms as three different concepts would require a discussion lasting much longer than the time still available to the Commission.

61. Mr. KOROMA pointed out that article 2 related to the scope of the draft and that watercourses formed part of the environment. In general, when one spoke of conservation one had in mind conservation of the environment. In other words, conservation implied something natural, whereas protection entailed physical intervention. However, the Commission could reach a consensus on the basis of the definition of the term “conservation” given in the draft articles for the preservation and protection of the marine environment submitted by Kenya at the Second Session of the Third United

Nations Conference on the Law of the Sea (Caracas, 1974):

“Conservation of the marine environment” means the aggregate of measures taken to render possible the maintenance of the natural quality, productivity and ecological balance of the marine environment.<sup>4</sup>

In his opinion, conservation was much broader than protection and the term “conservation” was the one best suited to the present topic. Thus the Drafting Committee had been right to use it. In view of the doubts among some members, however, perhaps the Commission could adopt the proposal by Mr. Sreenivasa Rao, even if it meant reverting to the various terms later on.

62. Mr. BARSEGOV said that paragraph 1 should speak of “protection”. The term “conservation” in Russian (*sokhranenie*) implied the adoption of a set of regulations on the rational use of water. Naturally, abuses could occur, and if a State’s conduct was not in keeping with the requirements of conservation, that State’s attention could be drawn to the measures to be taken for the purposes of rational utilization of the watercourse. However, using the term “conservation” would have major consequences, for until the Commission had resolved issues of substance, such as that of “watercourse[s] [systems]”, it would not be able to reach agreement on a provision of such scope.

63. Mr. McCAFFREY (Special Rapporteur) said that, if the expression “measures of protection and development” did not cover the idea of conservation, then conservation should also be mentioned in paragraph 1. However, some members had already said that the terms “protection” and “conservation” overlapped to some extent: that could therefore be indicated in the commentary, and draft article 2 could use only the expression “measures of protection and development”. If the term “conservation” were included, draft article 6 would also have to be changed. In his opinion, “conservation” applied not only to living resources, but also to water resources in the context of watercourses, where it meant the husbanding of supplies of water and protection against pollution, against overfishing, and so on. The term “protection” also had other meanings. In that regard, chapter IV of the outline for a convention prepared by his predecessor had been entitled “Environmental protection, pollution, health hazards, natural hazards, safety and national and regional sites”. At the present stage, he did not yet know whether the draft would actually contain provisions regarding the protection of dams, for example, but it was a possibility. In that case, the term “protection” would be better than “conservation”. If the Commission decided to speak only of protection and development, it could explain in the commentary that the term “protection” covered the concept of conservation. It could not, however, claim that “conservation” covered the idea of development, which referred to works undertaken by States in order to combat salt-water intrusion, for instance, to prevent erosion or to produce hydroelectric power—works which did not all come under the heading of “conservation”. Consequently, he could agree to

<sup>4</sup> Official Records of the Third United Nations Conference on the Law of the Sea, vol. III (United Nations publication, Sales No. E.75.V.5), p. 245, document A/CONF.62/C.3/L.2.

either one of two proposals, namely replacing the expression “measures of conservation” by “measures of protection and development” or by “measures of conservation, protection and development”.

64. Mr. BENNOUNA said he saw no reason to harmonize things that were not comparable. The Drafting Committee had used different terms precisely in order to convey different concepts. Since draft article 2 was concerned with the scope of the draft, the Drafting Committee had used the broadest possible generic term, in other words “conservation”. Yet from a careful reading of paragraph 1, it was apparent that “measures of conservation” were added to all non-navigational uses, including, therefore, development. Consequently, the paragraph did not relate to conservation alone. Draft article 6 was quite different in purpose, since it specified the way in which States were to participate in the utilization, development and protection of a watercourse. Thus there was no reason to use the same terms in all the provisions of the draft, since the provisions dealt with different issues. If the Commission did not wish to restrict the scope of article 2, the term “conservation” was the one that appeared to have the broadest meaning, for it could include all activities intended not only to protect, but also to develop resources, including living resources. In its present formulation, article 2 seemed to be entirely in keeping with the proper goal, which was to cover all non-navigational uses.

65. Mr. AL-KHASAWNEH said that he had no firm ideas on the question of using the term “protection” or “conservation”. Indeed, was there any major difference between those two concepts? It was difficult for jurists to say. Perhaps other experts could give a more accurate definition. To advance the Commission’s work, he would suggest the adoption of a minimalist approach, in other words using the expression “measures of protection and development”, which, rightly or wrongly, seemed to some members to be narrower than “measures of conservation”.

66. Mr. TOMUSCHAT said it appeared that the expression “measures of conservation, protection and development” met with the consent of the majority of members of the Commission, although personally he thought the expression “measures of protection and development” would suffice.

67. Mr. BEESLEY said that, in dealing with the scope of the draft articles, the Commission was dealing with the subject-matter itself, and the time spent on that question was in no sense time wasted. He was ready to accept any term, provided the Commission could revert to terminological problems when it came to consider draft articles 6 and 7. He knew of cases in which works had been constructed—for example, fish ladders, for the conservation of salmon—in which it would be possible to speak of the development of the watercourse, and other cases in which the development of the watercourse—for example, hydroelectric development—had been forgone in order to conserve certain living resources. For that reason he would prefer to use all three terms: conservation, protection and development. In his opinion, it would be a mistake to adopt a narrower formulation. The idea of development was doubtless attractive, but it should not be forgotten that

excessive attachment to that concept had led in the past to the pollution of entire ecosystems, and that the Commission’s goal was precisely to prevent a recurrence of that kind of development. If the Commission did not retain the term “conservation” in paragraph 1 of draft article 2, he would have to reserve his position until such time as he was able to see how terms were used in other draft articles.

68. Mr. AL-BAHARNA said that, when draft article 2 had been referred to the Drafting Committee, paragraph 1 had contained the expression “measures of administration, management and conservation”, which had been discussed at length because some members of the Committee feared that it would place heavy obligations on States. One member of the Committee had then proposed that only the term “conservation” should be used, explaining that it was a milder term but one which could include administration and management. Accordingly, the term had been accepted not for the reasons adduced later on—namely that it was a substitute for “protection and development”—but for reasons of convenience. It was surprising to see that the argument put forward in the Drafting Committee, namely that use of the term “conservation” as a compromise solution implied that it included the ideas of management and administration, and perhaps even protection, was now giving way to quite the opposite argument. It had just been explained that the expression “protection and development” covered the idea of conservation. If it continued in that way, the Commission would merely reach an impasse. Having listened attentively to the various points of view, he was convinced that it was essential to come closer to draft article 7, since the purpose of draft article 2 was to indicate which factors would be enumerated in article 7.

69. The present wording of paragraph 1 was satisfactory, but he was ready to accept the expression “measures of conservation, protection and development” if it could command a consensus. On the other hand, he would be opposed to replacing the term “conservation” by “protection and development”.

70. Mr. ROUCOUNAS said that the term “conservation” covered particular situations to which the term “protection” was not applicable. He, too, thought that the expression “measures of conservation, protection and development” should be used in draft article 2.

*The meeting rose at 6.10 p.m.*

## 2029th MEETING

*Wednesday, 8 July 1987, at 10 a.m.*

*Chairman:* Mr. Stephen C. McCAFFREY

*later:* Mr. Leonardo DÍAZ GONZÁLEZ

*Present:* Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes,