Document:-
A/CN.4/SR.2229

Summary record of the 2229th meeting

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

Extract from the Yearbook of the International Law Commission:-
1991, vol. I

should leave the matter as it stood and not start using brackets throughout the text.

87. Mr. PAWLAK (Chairman of the Drafting Committee) said that the decision in defining the word "watercourse" had been reached after lengthy debate. Clearly, the text of article 2 (*b*) was the result of a compromise. The Commission's task was, as the title of the topic indicated, to elaborate the law of the non-navigational uses of international watercourses, not "systems". The Drafting Committee had tried to reflect that idea. There had also been very strong opposition to retaining the word "system", the argument being that, in so doing, the Commission would be taking a general approach to all watercourse systems, when in fact each system had different characteristics.

88. In his opinion, it was not necessary to incorporate the word "system" in brackets. The Commission had to decide either to retain the word or to eliminate it. The issue was secondary when viewed from the standpoint of the results that had already been accomplished, something members could perhaps bear in mind as they considered the draft articles.

The meeting rose at 1.05 p.m.

2229th MEETING

Tuesday, 25 June 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/436,[1] A/CN.4/L.456, sect. D, A/CN.4/L.458 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.2)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

[1] Reproduced in *Yearbook ... 1991*, vol. II (Part One).

ARTICLE 2 (Use of terms) (*concluded*)

1. The CHAIRMAN welcomed Mr. Fleischhauer, the Legal Counsel, and invited the Commission to resume its consideration of article 2.

2. Mr. DÍAZ GONZÁLEZ said that, during the discussion at the preceding meeting, the present text of article 2 had been described as the outcome of a compromise in the Drafting Committee. The Commission must now either endorse that compromise or reject it. Since the Commission had often had occasion to send the General Assembly draft articles which included terms in square brackets, especially in the case of texts adopted on first reading, he saw no reason why, in the present case, it should not reintroduce the term "watercourse system" and place it in square brackets. If the Commission decided to endorse the Drafting Committee's compromise, he would have to reserve his position on article 2.

3. The CHAIRMAN said that article 2 did not rule out the possibility that two riparian States might agree to retain the term "watercourse system" as between themselves, but several members of the Commission had not considered it possible to keep it in the draft. The compromise would then be to agree to the text as it stood, to reflect possible reservations by any members of the Commission in the summary records and to deal with the question in a detailed report to the General Assembly.

4. Mr. SEPÚLVEDA GUTIÉRREZ said that he shared the views of Mr. Díaz González and Mr. Roucounas (2228th meeting). The term "system" enabled States to understand what the components of a watercourse were. However, since the instrument which was being drafted would ultimately be a framework agreement, it should not impose any obligations on States, which thus had no reason, at the present stage, to formulate reservations on the use of terms. They could do so when they took elements from the framework agreement to be used in bilateral or regional treaties.

5. He was nevertheless concerned by the fact that he had still not found a satisfactory definition of the term "framework agreement". If the draft was to constitute a framework agreement to serve as a model for treaties which States A and B, on the one hand, and States M and N, on the other, decided to conclude on questions of an entirely different nature, why should any specific obligations be incorporated in it? He therefore had reservations about the elimination of the term "system" from article 2 and about the nature and scope of the framework agreement.

6. Mr. CALERO RODRIGUES said that the problem was only one of terminology because, unlike the previous speaker, he did not think that the term "system" had been eliminated: what the Drafting Committee had done was to abandon the expression "watercourse system". Article 2 (*b*) clearly and unambiguously used the "system" concept. He was still not sure whether the Commission should go so far, but he accepted the idea that, for the majority of the members of the Commission, the term "watercourse" meant a system or a complex of waters comprising rivers, tributaries, canals, lakes, glaciers and groundwater related to surface waters. If, in-

stead of referring to a "watercourse", the Commission used the expression "watercourse system" throughout the draft articles, it would make the text cumbersome and it would have to change the title of the topic, which referred only to "watercourses". As it stood, the text of article 2 clearly expressed the "system" concept that had obviously been accepted.

7. In submitting two alternatives for article 2 in his seventh report, the Special Rapporteur recognized that:

> The advantage of alternative B is that it begins with the term that is contained in the title of the topic—"watercourse"—and defines it as a "system of waters".

One argument which had been used by the Special Rapporteur and which supported the view expressed by Mr. Díaz González and Mr. Sepúlveda Gutiérrez was that the virtue of alternative B was to:

> ... [keep] before the reader of the draft articles the fact that the waters of an international watercourse form a system. This will help to reinforce appreciation of the fact that all components of watercourses are interrelated; and thus, by implication, that it is important to take into account the impact of actions of one watercourse State upon the system-wide condition of the watercourse.

In his own opinion, there was no need to remind the reader constantly of the expression "watercourse system", which was incorporated in the definition of a "watercourse" which the reader would bear in mind. It would also be better for the Commission to avoid submitting to the General Assembly a complete set of articles in which square brackets would be used simply because of a drafting problem. He therefore appealed to the members of the Commission to look at the draft articles objectively, taking a legal, not a theoretical, approach or one based on the position of States.

8. Mr. BEESLEY said that, as a matter of principle, he had always been in favour of the expression "watercourse system". If that term could not be used, he would have liked it to be kept in square brackets in the text. Lastly, since that solution was also not feasible, he would have preferred the order of subparagraphs (*a*) and (*b*) to be reversed, but the Drafting Committee had not accepted his suggestion. In the light of the discussion in the Drafting Committee and in the Commission, he simply wished to stress that the watercourse system concept had to be reflected in the draft and that he could agree to the subtle compromise which had been proposed.

9. Mr. NJENGA said that the compromise was quite acceptable because the text proposed by the Drafting Committee referred to the "system" concept in subparagraphs (*a*) and (*b*). However, if the Commission placed the expression "watercourse system" in square brackets, it might give the impression that it had not been able to find any area of agreement on a question which had been controversial for many years. He therefore appealed to the members of the Commission who were members of the Drafting Committee not to reopen the discussion of a question which the Committee had already discussed in depth.

10. The CHAIRMAN, speaking as a member of the Commission, said that he shared Mr. Sepúlveda Gutiérrez' doubts about the binding nature of the rules enunciated in a framework agreement.

11. Speaking as Chairman, he said that, if he heard no objection, he would take it that the Commission agreed to adopt article 2 as proposed by the Drafting Committee.

Article 2 was adopted.

ARTICLE 10 (Relationship between uses)

12. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 10, which read:

Article 10. Relationship between uses

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

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

13. Mr. PAWLAK (Chairman of the Drafting Committee) said that article 10 was based on article 24 proposed by the Special Rapporteur in his fifth report[2] under the title "Relationship between navigational and non-navigational uses: absence of priority among uses". The Drafting Committee was of the view that article 10 set forth a general principle and therefore belonged in part II of the draft.

14. The Drafting Committee had noted that the basic thrust of article 24, as proposed by the Special Rapporteur, had met with general approval in the Commission. Doubts had, however, been expressed on the advisability of singling out navigational uses among the various possible uses of an international watercourse, not only because the draft as a whole was confined, under what was now article 1, to non-navigational uses, but also because the question of the priority of navigation was now generally recognized as outmoded.

15. The Drafting Committee had felt that the simplest way of disposing of the problem was to eliminate the reference to navigation and to place all uses on an equal footing. The title of the article had been simplified accordingly. As a result, paragraph 1 now merely provided that no use enjoyed inherent priority over other uses. The words "of an international watercourse" had been inserted after the words "no use" in order to link the article more closely to the subject-matter of the draft as a whole.

16. A second question had been raised in relation to paragraph 1. There had been general agreement in the Drafting Committee that, in practice, watercourse States often agreed to give priority to a specific use depending on their needs and that the Special Rapporteur had therefore rightly couched the rule in paragraph 1 in flexible terms, first, by making it a residual rule and, secondly, by making it clear, through the use of the adjective "inherent", that although inherently and in the abstract no use was superior to another, a particular use could, in concrete situations and in relation to a particular water-

[2] *Yearbook ... 1989*, vol. II (Part One), document A/CN.4/421 and Add.1 and 2, para. 127.

course, be determined by watercourse States to be a priority one. Concern had, however, been expressed that the phrase "In the absence of agreement to the contrary" could be restrictively interpreted as requiring a formal agreement between the States concerned, even though in practice it was often on the basis of usage and traditions that a specific use was given priority. In order to clarify the intent of the text on that point, the words "or custom" had been inserted after the word "agreement" and before the words "to the contrary".

17. Paragraph 2 dealt with the case where two uses, neither of which enjoyed priority under paragraph 1, happened to conflict. It sought to provide guidance to watercourse States for the solution of such a conflict. The paragraph envisaged a conflict between uses and therefore referred to a stage where no dispute in the formal sense had as yet arisen between the watercourse States concerned.

18. The Drafting Committee had considered that the wording proposed by the Special Rapporteur did not bring out clearly enough the purpose of the paragraph, which was not to ensure the equitable weighing of the conflicting uses, but to facilitate the solution of the conflict. The words "it (the conflict) shall be resolved" had therefore been substituted for the words "they (the uses) shall be weighed".

19. The construction of the opening phrase had been slightly modified in order immediately to identify the situation addressed in the paragraph, namely, the case of a conflict between uses.

20. As to that part of the paragraph dealing with the elements to be taken into consideration in solving possible conflicts, the Drafting Committee had noted that, in the Commission, there had been general support for the inclusion of a reference both to the principle of equitable use as contained in what was now article 5 (previously 6) and to the factors on the basis of which equitable use was to be assessed according to what was now article 6 (previously 7). Some members had, however, also favoured the inclusion of a reference to the obligation not to cause appreciable harm as set forth in article 7 (previously 8). The Drafting Committee had accordingly included in the text the phrase "with reference to the principles and factors contained in articles 5 to 7".

21. With regard to the concluding part of paragraph 2, which referred to "vital human needs", the Drafting Committee had considered that, among the factors to be taken into account in solving a conflict between uses, special attention should be given to the supply of water needed to sustain human life, including drinking water or water required for the production of food. While there had been general agreement on the addition of the phrase in question, some members of the Committee had said that, in order to ensure the internal cohesion of the draft, care should be taken to clarify the link between vital human needs and the criterion mentioned in article 6, paragraph 1 (*b*), namely, "the social and economic needs of the watercourse States concerned". The commentary would therefore indicate that the criterion of vital human needs was not a new criterion, but an accentuated form of the criterion set forth in article 6, paragraph 1 (*b*).

22. The relationship between article 6 and the criterion of vital human needs had prompted some queries concerning the factors listed in paragraph 1 of that article. He would deal with that aspect when he introduced document A/CN.4/L.458/Add.1, where article 6 was to be found.

23. One final word on article 10, paragraph 2, was that some members had noted that, in reformulating the article, the Drafting Committee had left aside an important element of the original text, namely, the concept that the factors to be taken into account were those which were relevant to the international watercourse. That concern had been met indirectly through the reference to article 6, which required that "all relevant factors and circumstances" should be taken into account. It had, however, been agreed that, in order to dispel any possible doubt, the point would be explicitly covered in the commentary.

24. Mr. NJENGA said that, in his view, the reference in paragraph 2 to the requirements of vital human needs was a useful qualification, since it would show that, in the event of a conflict, priority—or preference—would be given to one use rather than to another. The Commission would certainly come back to that point when it took up articles 5 to 7, to which the paragraph also made reference.

25. Mr. BEESLEY said that no one would oppose the concept of the requirements of vital human needs. During the discussion in the Drafting Committee, however, he had been troubled by the development of that concept at a fairly late stage in the work and its interrelationship with the factors set forth in particular in article 6, paragraph 1 (*b*), since difficulties of interpretation must not arise on the question of criteria and factors. He was nevertheless satisfied by the cross-reference to articles 5 to 7 and had no doubt that the Commission would reconsider the need to harmonize the articles and to avoid any contradiction. He therefore had no objection to article 10 and could even support it.

26. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 10.

Article 10 was adopted.

ARTICLE 26 (Management)

27. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the title and text proposed by the Drafting Committee for part VI, starting with article 26, which read:

PART VI

MISCELLANEOUS PROVISIONS

Article 26. Management

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

[3] See *Yearbook ... 1990*, vol. II (Part One), document A/CN.4/427 and Add.1.

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

(*a*) planning the sustainable development of an international watercourse and providing for the implementation of any plans adopted; and

(*b*) otherwise promoting rational and optimal utilization, protection and control of the watercourse.

28. Mr. PAWLAK (Chairman of the Drafting Committee) said that article 26 was based on the text proposed by the Special Rapporteur in his sixth report.[3]

29. The Drafting Committee had noted that many members of the Commission had viewed that provision as one of vital importance for the protection of international watercourses. It had agreed that, in providing for an obligation to enter into consultations rather than an obligation to negotiate and in leaving the outcome of the consultations entirely to the discretion of the States concerned, the proposed text struck an appropriate balance between the various existing positions. It had, however, felt that the emphasis in paragraph 1 should be placed on the management of the watercourse rather than on the establishment of a joint organization, in other words, that the consultations envisaged in the article should deal primarily with the issue of management and only secondarily with the question of the establishment of joint machinery. It had also been pointed out that institutional management could take place in a less formal framework, for example, through regular meetings between representatives of the States concerned. The Drafting Committee had therefore decided to reformulate paragraph 1 on the basis of those considerations. In the new version, management was no longer linked, as in the original draft, to the establishment of an organization. The Drafting Committee had felt that, as a result, paragraph 3 had lost its *raison d'être* and could be deleted, particularly as it might be interpreted as limiting the freedom of action of States when defining the functions of any joint mechanism they might agree to establish. It was, however, understood that the differing functions performed by river commissions and other bodies and also State practice in the matter would be referred to in the commentary to the article.

30. The Drafting Committee, having noted that, in the view of the Commission, the text of paragraph 2 proposed by the Special Rapporteur was too elaborate, had tried to encapsulate the essential components of management in a shorter text. The Drafting Committee was aware that the various concepts reflected in subparagraphs (*a*) and (*b*) might appear to be somewhat abstract and vague, but each of those concepts would be fully explained in the commentary, account being taken of the wealth of information contained in the Special Rapporteur's sixth report. In particular, the commentary would indicate that the general formulation used in subparagraphs (*a*) and (*b*) covered the functions described in subparagraphs (*b*), (*c*) and (*d*) of the original text. In the *chapeau* of paragraph 2, the Drafting Committee had replaced the words "includes, but is not limited to" by the words "refers, in particular, to". That change was consequential upon its decision to describe the content of the concept of management in a synthetic rather than an analytical way. The title was self-explanatory.

31. The CHAIRMAN, speaking as a member of the Commission, noted that some of the articles submitted were cast in such a way that they immediately imposed mandatory obligations on States: that, in his view, was not compatible with a framework agreement or convention. He could have accepted article 26 if it had not been cast in mandatory terms, but, despite his reservations, he would not object to its adoption.

32. Mr. NJENGA said that the Chairman had brought up an important question which might arise throughout the consideration of the draft articles, namely, the question of the meaning that should be given to a framework convention. As he saw it, a framework agreement did not have totally binding force; it was an instrument that States could use either to formulate specific agreements in a particular area or in the absence of specific agreement. In the instant case, article 26 did not impose any major obligation on States, but simply indicated what they should do if there was no agreement on the subject. It would, however, be interesting if the Drafting Committee or the Special Rapporteur could provide an explanation on the nature of a framework agreement and on the question whether it could impose actual obligations or whether it should merely contain recommendations. It was an important issue that could crop up again in other cases such as, for instance, the framework convention on climate change.

33. Mr. Sreenivasa RAO said that article 26 caused him no problem. The question of what the content of a framework convention should be depended on its subject-matter. Of course, even a framework convention or agreement could have consequences from the standpoint of the obligations it imposed, but the main function of such an instrument was generally to assist States parties in adapting the principles it set forth to specific needs and, in the present case, to those of the watercourse concerned. It should therefore be general in character, but couched in very clear terms. At the current stage of its work, however, the Commission should take a decision on the articles before it and should not enter into a discussion of what the nature and scope of a framework convention might be.

34. Mr. McCAFFREY (Special Rapporteur), agreeing with Mr. Sreenivasa Rao, pointed out that the Commission had already referred to the question in paragraph 5 of the commentary to article 4, which had since become article 3, on watercourse agreements.[4] The draft articles under consideration certainly did contain rules and obligations, but they were residual rules. They were not norms that would prevail over any contrary agreement. States were always free to enter into agreements on specific watercourses. Moreover, most framework agreements contained certain specific, and sometimes detailed, obligations, such as the Vienna Convention on the Protection of the Ozone Layer, which had led to the conclusion of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer. The same was true of certain bilateral framework agreements such as the 1983

[3] See *Yearbook ... 1990*, vol. II (Part One), document A/CN.4/427 and Add.1.

[4] *Yearbook ... 1987*, vol. II (Part Two), pp. 27-30.

agreement between the United States of America and Mexico on cooperation for the protection and improvement of the environment in the border area,[5] which had provided the basis for the conclusion of specific agreements on the protection of boundary waters against pollution. A framework agreement could therefore be a document that contained specific obligations.

35. Article 26, for its part, merely dealt with the obligation incumbent on watercourse States to consult one another at the request of one of them and the commentary to the article would provide further information in that connection.

36. Mr. PAWLAK (Chairman of the Drafting Committee) said it was his impression that the discussion was going beyond the context of article 26. In his view, the obligations set forth in the article applied only to States that accepted them. The purpose of the rule was to help States solve their problems and to establish their own systems of cooperation with respect to watercourses.

37. The aim was merely to provide a State wishing to consult other States with the possibility of obtaining a response to its request. There were about 200 watercourses that were not subject to any regulation. It was therefore for the Drafting Committee and the Commission to work out principles and rules which would be acceptable to States and with which they would have to comply once they had accepted them.

38. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 26 as proposed by the Drafting Committee.

Article 26 was adopted.

ARTICLE 27 (Regulation)

39. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 27, which read:

Article 27. Regulation

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

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

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

40. Mr. PAWLAK (Chairman of the Drafting Committee) recalled that the article had been proposed by the Special Rapporteur as article 25[6] and that it had received general support during the discussion in plenary. It dealt with regulation of the flow of water, namely, with works and measures that affected the flow or speed of water or that stabilized the river channel. Normally, measures were taken to prevent any change in the course of rivers.

41. The Drafting Committee had borne in mind that many members wanted the term "regulation" to be defined in the article and that a number had felt that States should share in the costs of regulation only if they also shared in the benefits of such regulation. The Drafting Committee had further noted that paragraph 1, as originally proposed by the Special Rapporteur, according to which States would be required to "cooperate in identifying needs and opportunities for regulation of international watercourses", could have been interpreted so as to impose an obligation on States to seek out needs and opportunities even when they had not been identified. That, of course, was not the intent, which was to encourage States to cooperate where there was a need to prevent harm and an opportunity to increase the benefits to be derived from the watercourse. The Drafting Committee had therefore reworded paragraph 1 accordingly.

42. Paragraph 2 had also been partly revised in response to points raised in plenary or during consideration by the Drafting Committee. With regard to the defrayal of the costs of regulation works, the watercourse States must, first, have agreed to undertake such measures and must, secondly, share in the benefits deriving therefrom. The words "participate on an equitable basis" were also designed to deal with the latter point. It had been agreed that the commentary to the article would make it clear that participation in the defrayal of costs would be proportional to the benefits that each State derived from the regulation. The words "In the absence of agreement to the contrary", which appeared at the beginning of paragraph 2 as proposed by the Special Rapporteur, had been replaced by the words "Unless they have otherwise agreed", since the original wording might suggest that States could not agree on arrangements other than those proposed in the paragraph, and that was obviously not the intent.

43. In accordance with the wishes expressed by some members of the Commission, the term "regulation" was defined in a new paragraph 3. It was a general definition designed to highlight two aspects of regulation: on the one hand, the means of regulation, which included hydraulic works or any other continuing measure and, on the other, the objective of regulation, which was to alter, vary or otherwise control the flow of the waters. That objective should be understood in good faith, within the context of the article as a whole, the object of which was to prevent harm and to increase benefits for watercourse States. Since the definition was more in the nature of a clarification of a term used solely in that article, the Drafting Committee had felt it would be preferable not to include it in the article on the use of terms. Lastly, the title had been shortened.

44. Mr. CALERO RODRIGUES said that he did not understand why the obligations laid down in article 27 were not the same as those in article 26. Where management was concerned, watercourse States had an obligation to enter into consultations at the request of any one of them, whereas, in the case of regulation, their only obligation was to cooperate where appropriate. He saw no reason at all for that distinction and would have preferred management and regulation to be dealt with together, since the two were linked. He did not intend to propose any amendment at that stage, however, but

[5] Signed at La Paz, Mexico, 14 August 1983. *International Legal Materials*, Washington, D.C., vol. 22, 1983, p. 1025.

[6] *Yearbook... 1989*, vol. II (Part One), document A/CN.4/421 and Add. 1 and 2, para. 140.

would like his views to be reflected in the summary record.

45. Mr. Sreenivasa RAO said that the question whether the articles should be dealt with together or separately had been considered by the Drafting Committee. It had, however, decided that it would be better for regulation to form the subject of a separate article that represented a compromise and was not of a strictly binding nature.

46. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 27 as proposed by the Drafting Committee.

Article 27 was adopted.

ARTICLE 28 (Installations)

47. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 28, which read:

Article 28. Installations

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

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

(*a*) the safe operation or maintenance of installations, facilities or other works related to an international watercourse; or

(*b*) the protection of installations, facilities or other works from wilful or negligent acts or the forces of nature.

48. Mr. PAWLAK (Chairman of the Drafting Committee) said that the article originally proposed by the Special Rapporteur as article 27 had dealt with the protection of water resources and their installations.[7] The considerable discussion to which it had given rise in plenary and the close examination in the Drafting Committee had highlighted several problems which the Committee now had to solve.

49. First, the article had been found to be too complex, in terms of both content and structure. The Committee had considered that a number of articles in the draft already provided adequate protection for watercourses and that the article in question should concentrate only on the protection of installations. Accordingly, all reference to watercourses and water resources had been deleted from the draft. However, some members of the Drafting Committee had noted that one aspect of the protection of water resources did not appear to have been explicitly referred to in the draft, namely, the protection of water resources from poisoning. Perhaps the Commission could consider that question on second reading, especially in the context of articles 21, 24 or 25.

50. Secondly, it had been necessary to define the nature of the obligation to consult mentioned in the *chapeau* of paragraph 2 as originally proposed. Even though consultations normally resulted in an agreement or understanding, that was not a required outcome. The Committee had therefore decided to delete the phrase "with a view to concluding agreements or arrangements".

51. Thirdly, again with reference to the *chapeau* of paragraph 2, the Committee had considered that it was better to limit the obligation to enter into consultations to situations where one of the watercourse States was concerned that some installations or facilities might have appreciable adverse effects on it. That was the purpose of the words "has serious reasons to believe that", which were the words used in article 18. The Committee had also used the words "appreciable adverse effects" because they were used elsewhere in the draft in respect of planned measures.

52. Fourthly, because the Committee had decided, for the reasons already explained, that any reference to water resources should be deleted, it was necessary to delete paragraph 3 of the article proposed by the Special Rapporteur, which dealt entirely with water resources.

53. Against that background, the Drafting Committee had drafted a new article 28 dealing entirely with installations related to watercourses.

54. Paragraph 1 enunciated the general obligation of watercourse States to employ their best efforts to maintain and protect installations, facilities and other works related to an international watercourse. The expression "best efforts" indicated the "soft" nature of the obligation of States. The question whether a State had or had not employed its "best efforts" was a matter of fact and should of course be determined in the light of the capabilities of each watercourse State. That "soft" obligation normally related to works situated in the respective territories of States, but that did not rule out the possibility that all watercourse States might occasionally have to protect works not situated in their territory, for instance, where the installations in question were jointly managed by several States.

55. Paragraph 2 enunciated the specific obligation of watercourse States to enter into consultations at the request of any one of them that was concerned about suffering appreciable adverse effects, which might be caused by the operation or maintenance of the installations. The new version of subparagraph (*a*), which dealt with that question, contained no reference to the "establishment" of installations, as the original draft had. In the view of the Drafting Committee, the establishment or construction of an installation or even its modification were among the planned measures covered by part III of the draft. Subparagraph (*a*) dealt only with the normal operation and maintenance of installations.

56. However, subparagraph (*b*) dealt with exceptional situations in which installations were placed in danger as a result either of natural events, such as flooding, or of wilful or negligent acts. Those situations differed from the emergency situations which were dealt with in article 25 and in which the threat or danger was imminent. It should also be noted that the Drafting Committee had deleted the reference in that subparagraph to safety standards and security measures. Information concerning such measures might sometimes be considered data vital to national defence or security and might have brought that paragraph into conflict with article 31 of the draft,

[7] See footnote 3 above.

which dealt with such matters. In addition, since the redrafted version of the subparagraph required watercourse States to consult each other concerning the protection of installations, it was not necessary to state explicitly what kind of information might be exchanged during such consultations. The reference to wilful or negligent acts should also be understood in the context of cooperation among States to protect the installations from any danger to which they might be exposed as a result of such acts.

57. Finally, the title of the article had been changed to reflect the fact that the article dealt only with installations.

58. Mr. NJENGA said that article 28 was linked to article 27: the consultations referred to in article 28, paragraph 2, could lead to a decision to improve the security of installations situated in a given State for the benefit of other States and that would raise the question of the financing of the works to be undertaken, which was dealt with in article 27, paragraph 2.

59. If article 28, paragraph 1, was to be wholly acceptable, the words "within their respective territories" should be added after the word "employ". As the Chairman of the Drafting Committee had explained, the wording of the paragraph did not rule out the possibility that, occasionally, all watercourse States might have to employ their best efforts to protect installations, regardless of the State in whose territory the installations were situated. He thought that that situation was covered by article 28, paragraph 2, when, after consultations, States had decided that they should act jointly. He was therefore proposing the additional wording in order to prevent any infringement of the territorial sovereignty of States on the pretext of the protection of installations.

60. Mr. PAWLAK (Chairman of the Drafting Committee) said that, even though there might be situations in which all watercourse States had to act jointly, it was obvious that the words which Mr. Njenga was proposing to add to article 28, paragraph 1, were already implied. He therefore did not object to the proposal.

61. The CHAIRMAN, speaking as a member of the Commission, said that he also supported Mr. Njenga's proposal. Any ambiguity must be removed.

62. In introducing the draft article, the Chairman of the Drafting Committee had stated that the words "employ their best efforts" referred to the "soft" obligation of States. On such an important issue, however, there was no room for "soft" law. The obligation in question was a duty of diligence, since States were bound to do everything they could to meet the required standards. He therefore wondered whether the words "employ their best efforts" meant that States must display all due diligence.

63. Mr. McCAFFREY (Special Rapporteur) said he believed that what the Chairman of the Drafting Committee had meant by a "soft" obligation was a "flexible" one. The provision meant that watercourse States were bound to do everything they materially could. That was certainly a duty of diligence, as he himself had explained in his report.

64. The proposal for the addition of the words "within their respective territories" had been raised in the Drafting Committee by the Chairman of the Committee. Moreover, in a draft commentary which he himself had circulated, he had explained that those words were implied. He therefore supported Mr. Njenga's proposal.

65. Mr. PAWLAK (Chairman of the Drafting Committee) said that he had described the obligation of States as a "soft" obligation in order to take account of the situation of poorer States, which did not have the resources to make the same efforts as richer States. That was an obligation of diligence.

66. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt article 28 with the addition of the words "within their respective territories" after the word "employ" in paragraph 1.

Article 28, as amended, was adopted.

ARTICLE 29 (International watercourses and installations in time of armed conflict)

67. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 29, which read:

Article 29. International watercourses and installations in time of armed conflict

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

68. Mr. PAWLAK (Chairman of the Drafting Committee) said that article 29 was based on the text proposed by the Special Rapporteur in his sixth report as article 28.[8] During the discussion in plenary, some members had taken the view that a provision along the lines proposed by the Special Rapporteur was beyond the scope of the draft articles. Others were very reluctant to venture into that area for fear of the possibility of affecting the existing rules of international law governing that field. However, the prevailing view, both in the Drafting Committee and in plenary, had been that the subject was of vital importance and should be addressed, if only in the form of a reference to the relevant principles and rules of international law.

69. He stressed that the article was not confined to watercourse States, since international watercourses and related installations could be attacked by States other than watercourse States.

70. The Drafting Committee had noted that the text proposed by the Special Rapporteur provided that international watercourses and installations, facilities and other related works were to be used "exclusively for peaceful purposes". That phrase had the two-fold drawback that it did not really fit in the present context and was too broad, since it would, for instance, rule out the use of a watercourse for the transport of troops or mili-

[8] Ibid.

tary equipment. The Drafting Committee had considered that the best way to circumvent the difficulty was to draft the text in terms of the impermissible rather than the permissible uses of the watercourse. The first part of the text therefore took the form of a prohibition, as indicated by the phrase "shall not be used in violation of". The Drafting Committee had deleted the reference to the principles enshrined in the Charter of the United Nations, which it regarded as too loosely related to the subject-matter of the article.

71. The Drafting Committee had also noted that, in plenary, as well as in the Sixth Committee, it had been suggested that, in order to ensure consistency with existing international law, the article should include a reference to the principles and rules of international law applicable to armed conflict. In the text before the Commission, it was therefore by reference to those principles and rules that the permissible and impermissible uses of international watercourses were to be determined.

72. As to the second part of the article, he recalled that the concept of the "inviolability" of a watercourse had given rise to many objections, both in plenary and in the Sixth Committee. The Drafting Committee had therefore replaced it by the concept of protection, the extent of that protection also being defined by the principles and rules applicable to international and internal armed conflict.

73. Mr. NJENGA said that he would not object to the adoption of article 29, but did not think the text prepared by the Drafting Committee was an improvement on the one proposed by the Special Rapporteur, which was actually clearer. He did not see how a watercourse could be used in violation of the principles and rules of international law applicable in armed conflict, except perhaps in the case where a State used hydraulic works to flood a neighbouring country. What the Commission had originally been thinking of was the protection of watercourses and related installations.

74. Mr. TOMUSCHAT said Mr. Njenga had rightly pointed out that the Commission had originally placed the emphasis on the protection of watercourses. In that light, the last two phrases might be inverted so that the article would read: "shall enjoy the protection accorded by the principles and rules of international law applicable in international and internal armed conflict and shall not be used in violation of those principles and rules".

75. Mr. PAWLAK (Chairman of the Drafting Committee) said that the text prepared by the Drafting Committee was the product of a lengthy and laborious discussion. In his own view, it was a well-balanced article, but he would not object to the inversion proposed by Mr. Njenga and Mr. Tomuschat if the Commission decided in favour of it.

76. Mr. GRAEFRATH said that the text was not very satisfactory, but the proposed inversion might not be enough; it might be necessary to postpone the adoption of the article and come back to it after a solution had been found.

77. Mr. CALERO RODRIGUES said that he would not object to the proposed change, but he shared Mr. Graefrath's opinion that a mere inversion might not be enough. He would be quite satisfied with the existing text because, in view of the title of the topic, it would be justified to refer first to the uses of watercourses.

78. Mr. BARSEGOV said that he supported the proposal by Mr. Njenga and Mr. Tomuschat.

79. Mr. McCAFFREY (Special Rapporteur) said it would be easy to invert the order of the two statements if the Commission so agreed. As Mr. Pawlak had pointed out, however, there had been a lengthy debate on the article in the Drafting Committee and it did serve its purpose, which was to indicate that the principles and rules of international law applicable in international and internal armed conflict also applied to watercourses. He was not sure that it would be wise to try to redraft it completely and he doubted whether it would be possible to produce a text that was acceptable to everyone.

80. Mr. ARANGIO-RUIZ said that he shared Mr. Calero Rodrigues' view. He wondered whether the best solution would not be simply to state that the present articles were without prejudice to the application to international watercourses of the principles and rules of international law applicable in international and internal armed conflict. That was basically the point that was being made.

81. Mr. PAWLAK (Chairman of the Drafting Committee) said he hoped that Mr. Njenga and Mr. Tomuschat would not insist that the Commission should accept their proposal. The text in question did not impose any new obligations and it related only to those deriving from international law applicable in times of armed conflict.

82. Mr. FRANCIS said that he endorsed Mr. Graefrath's view because he found that the latest proposals, in particular that of Mr. Arangio-Ruiz, went much further than the purely drafting proposal by Mr. Njenga and Mr. Tomuschat.

83. Mr. HAYES said that, as the Chairman of the Drafting Committee had recalled, the text was the result of a great deal of work. It was simple and well balanced and the Commission should adopt it as it stood.

84. Mr. BARSEGOV said that the amendment proposed by Mr. Njenga and Mr. Tomuschat would make the text much more logical without changing the substance in any way.

85. The CHAIRMAN suggested that, in view of the differences of opinion which had emerged, the Commission should defer the adoption of article 29 until the next meeting in order to allow time for a solution to be found.

It was so agreed.

ARTICLE 30 (Indirect procedures)

ARTICLE 31 (Data or information vital to national defence or security)

86. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for articles 30 and 31, which read:

Article 30. Indirect procedures

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

Article 31. Data and information vital to national defence or security

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

87. Mr. PAWLAK (Chairman of the Drafting Committee) said that he would not speak at length about those two articles because they simply represented slightly modified versions of two articles adopted previously, namely, articles 21 and 20, respectively.

88. With regard to article 30, the Drafting Committee had observed that the indirect procedures to which the article referred could be used not only in relation to the "planned measures" dealt with in part III, where the article had originally appeared, but also in relation to the measures envisaged in parts II, V and VI. It had therefore tranferred the article to the last part of the draft. The Drafting Committee considered it important to provide States with indirect means of fulfilling the entire range of the obligations set forth in the draft, including the obligation to cooperate enunciated, for example, in articles 8 and 27. It had accordingly replaced the reference to articles 10 to 20, contained in former article 21, by a general reference to the obligations of cooperation between the States concerned provided for in the draft and including exchange of data and information, notification, communication, consultations and negotiations.

89. As to article 31, which was practically identical to the previously adopted article 20, the Drafting Committee had felt that that saving clause should apply to the entire draft. It had accordingly transferred it from part III to part VI, replacing the reference to "articles 10 to 19" by a reference to "the present articles".

90. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to adopt articles 30 and 31.

Articles 30 and 31 were adopted.

ARTICLE 32 (Recourse under domestic law)

91. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 32, which read:

[Article 32. Recourse under domestic law

A watercourse State shall ensure that recourse is available in accordance with its legal system for compensation or other relief in respect of appreciable harm caused in other States by activities related to an international watercourse carried on by natural or juridical persons under its jurisdiction.]

92. Mr. PAWLAK (Chairman of the Drafting Committee) recalled that, at the preceding session, the Special Rapporteur had introduced in his sixth report a set of draft articles in an annex entitled "Implementation of the draft articles". After discussing the report, the Commission had decided to refer to the Drafting Committee only paragraph 1 of article 3 on "Recourse under domestic law" and article 4 on "Equal right of access". Those two provisions currently appeared as articles 32 and 33, the last two articles of part VI on "Miscellaneous provisions". In the view of the Drafting Committee, it was not necessary to have a part entitled "Implementation", since many aspects of implementation had already been dealt with in several of the articles, in particular those at the beginning of part III on "Planned measures".

93. The text of article 32, which corresponded to the original article 3 referred to the Drafting Committee by the Commission, was very similar to the language of paragraph 2 of article 235 of the 1982 United Nations Convention on the Law of the Sea. The purpose of article 32 was to oblige watercourse States to provide remedies for persons who had suffered appreciable harm as a result of watercourse activities carried out by natural or juridical persons under their jurisdiction, thus enabling those victims to obtain compensation or other relief, which could take the form, for example, of injunctive relief.

94. The Drafting Committee had deleted the adjectives "prompt and adequate", which had preceded the word "compensation" in the original draft, since the Committee had not reached agreement on whether "prompt and adequate compensation" currently formed part of general international law. It had decided to retain only the word "compensation". The Committee had also felt that the "appreciable harm" giving rise to the right to compensation should refer to actual harm and had deleted the reference to the threat of harm contained in the original draft, considering that such a reference would make the range of obligations of watercourse States too wide.

95. Under the present formulation of the article, a watercourse State had to ensure that its domestic law provided for remedies in respect of harm resulting from its watercourse activities to natural or juridical persons of another watercourse State or non-watercourse State, for example, a coastal State.

96. There had been no change in the title of the article.

97. Lastly, as the members of the Commission would observe, the article had been placed in square brackets, indicating that the Drafting Committee had been unable to agree on the intention of the article, which was to oblige watercourse States to provide remedies for transboundary harm arising from watercourse activities carried out in their territory. That obligation implied that the State had to amend its domestic law if it did not provide for those remedies. That was one of the interpretations offered in the Drafting Committee. That interpretation had been considered unacceptable by some members of the Committee; in their view, a watercourse State could not be obligated to change its domestic law in order to provide remedies for foreigners when such remedies were not even available to their own citizens. They had considered that a watercourse State could only reasonably be expected to provide foreigners with the same remedies that were available to its own citizens. Thus,

what they had been able to accept was a non-discrimination clause in respect of remedies.

98. Since that difficult issue could not be resolved, the Drafting Committee had preferred to leave the decision to the plenary.

99. Mr. McCAFFREY (Special Rapporteur) said that the square brackets needed to be added to the French text of document A/CN.4/L.458.

100. Mr. CALERO RODRIGUES said that, in his view, the article had what was a major flaw for a legal text: it was ambiguous. As the Chairman of the Drafting Committee had pointed out in his introduction, there were two possible interpretations of the article. It was either based on the premise that States were under an obligation to provide remedies to all victims in the case of transboundary harm resulting from watercourse activities, in accordance with the principle that adequate compensation was already an established rule of general international law, or it was based on the principle of non-discrimination between victims residing in the watercourse State and victims residing in other States. It seemed that it was the latter interpretation that the Special Rapporteur had originally had in mind in the draft of article 3 annexed to his sixth report, as indicated by paragraph 2 of his commentary relating to the obligation to provide compensation or other relief ("Persons threatened with harm in the second State should be entitled, to the same extent as persons in the first State . . ."). Moreover, in the draft commentary that he had had circulated informally[9] the Special Rapporteur indicated that the article was:

> . . . addressed to the situation in which there is a remedy under the domestic law of the forum State for harm that originates and is sustained in that State, but in which there may be no remedy for harm that originates within its borders but is sustained extraterritorially.

101. Before adopting article 32, the Commission had to decide how it would be interpreted in order to remove any ambiguity. The Commission could not adopt a text on which it did not have a clear position. Since he did not have a specific proposal to offer at the current stage, he suggested that the article should be given further consideration. It might also be possible to combine articles 32 and 33, which enunciated substantive and procedural provisions in respect of remedies.

102. Mr. Sreenivasa RAO said that articles 32 and 33 had initially been included in the section on implementation (articles 3 and 2, respectively), which the members of the Commission had considered unacceptable on many counts. At the time the two articles had been sent to the Drafting Committee, there had been not only the problem of ambiguity, as stressed by Mr. Calero Rodrigues, but also other problems. He personally feared that, if the Commission discussed the issue of remedies available to private parties, it would soon find itself in the realm of private international law, with all the resulting dangers of conflicts of laws. The question of remedies available to private parties was already dealt with in other texts and it might be asked whether it really belonged in a draft convention which would be basically a framework agreement designed to govern relations between States. He also did not think it reasonable to imagine that individuals or groups of individuals might, on the basis of that framework agreement, hamper bilateral or multilateral negotiations held by States with a view, for example, to regulating the management of natural resources. That was his main reservation with regard to articles 32 and 33.

103. Mr. BARSEGOV said that, as a member of the Drafting Committee, he had also expressed his disagreement with regard to article 32. In his opinion, the Commission could not adopt, as an integral part of the text, articles which had formerly been contained in an annex, did not belong in a framework agreement and were, in addition, unacceptable to watercourse States.

104. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Drafting Committee had given lengthy consideration to article 32, which had originally been adopted and then called into question in the light of article 33. Those considerations had finally led the Drafting Committee to place the text of article 32 in square brackets. In view of the reservations that had been expressed and of the possible need to place greater emphasis on non-discrimination than on domestic remedies, he suggested that the Commission should come back to articles 32 and 33 at its next meeting.

105. Mr. McCAFFREY (Special Rapporteur) said that, although he had the impression that the substantive issues that arose in connection with watercourses were not very different from those dealt with in the United Nations Convention on the Law of the Sea, article 235, paragraph 2, of which was very similar to article 32, he agreed that it might be necessary to make the wording of article 32 clearer.

106. The CHAIRMAN, speaking as a member of the Commission, said that, although he had not been present when the Drafting Committee had adopted the text of draft articles 32 and 33, he too believed that those articles overlapped on various points and could be combined.

107. Speaking as Chairman, he suggested that the Commission should continue its consideration of the two articles at its next meeting.

It was so agreed.

The meeting rose at 1.05 p.m.

2230th MEETING

Wednesday, 26 June 1991, at 10.10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues,

[9] This informal paper was never issued as an official document of the Commission.