Document:-

A/CN.4/L.411

Draft articles on the law of the non-navigation uses of international watercourses. Titles and texts adopted by the Drafting Committee: titles of parts I and II of the draft; articles 1 to 7 - reproduced in A/CN.4/SR.2028 to SR.2030 and SR.2033

Topic:

Law of the non-navigational uses of international watercourses

Extract from the Yearbook of the International Law Commission:-

1987, vol. I

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 opinon 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.[7]

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*.[8]

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.

[7] *I.C.J. Reports 1949*, p. 185.

[8] *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. Bennouna, 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,[1] A/CN.4/406 and Add.1 and 2,[2] 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][a]

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

[a] 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.

[1] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

[2] 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.[3]

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.

[3] 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 backets 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 watercourse, 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 ot 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.[4]

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

[4] *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,

Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Relations between States and international organizations (second part of the topic) (*concluded*)* (A/CN.4/391 and Add.1,[1] A/CN.4/401,[2] A/CN.4/L.383 and Add.1-3,[3] ST/LEG/17)

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. ILLUECA said that the Special Rapporteur's third report (A/CN.4/401), which displayed logic combined with concision, was a tribute to the spirit of Simon Bolivar, who, more than a century and a half ago, had convened the Amphictyonic Congress in Panama, the underlying purposes of which had heralded the world organization of today. The Special Rapporteur, as urged, had moved with prudence and pragmatism by submitting a tentative outline for the draft articles. It should not be forgotten that, at its twenty-eighth session, the Commission, in offering guidance for the Special Rapporteur at that time, the late Abdullah El-Erian, had specified that the second part of the topic of relations between States and international organizations covered the status, privileges and immunities of international organizations, their officials, and experts and other persons engaged in their activities not being representatives of States.[4] It was with the consent of the Commission that the previous Special Rapporteur had decided that the draft should also extend to resident representatives and observers able to act as representatives of one international organization in another international organization.

2. International organizations were recognized as subjects of international law and were thus governed by general international law. Hence the task was not to consider the functions attributed to them under their constituent instruments, from which an internal law peculiar to each one of them flowed. In that regard, the Special Rapporteur was right to point out (*ibid.*, para. 24) that it had been generally agreed that initially the subject-matter of the study should not be unnecessarily restricted and that he should be given some latitude.

3. Furthermore, with regard to international organizations of a regional character, the Commission had concluded that:

> For the purposes of its initial work on the second part of the topic, [it] should adopt a broad outlook, inasmuch as the study should include regional organizations. The final decision on whether to include such organizations in a future codification should be taken only when a study was completed;[5]

4. Again, as stated in the second report (A/CN.4/391 and Add.1, para. 4), the Special Rapporteur was authorized, in his research, to study the agreements and practices of international organizations, whether within or outside the United Nations system. In that connection, ICRC, a private non-governmental organization, should not be overlooked, for it engaged in international activities. It should also be considered, when the Special Rapporteur deemed it opportune, whether or not the draft articles were to encompass regional organizations and international non-governmental organizations referred to in Articles 52 and 71 of the Charter of the United Nations.

5. Section 2 of the schematic outline, dealing with the legal personality of international organizations (A/CN.4/401, para. 34), should make it possible to examine the factors which created, modified or terminated legal personality. It would prove essential, in codifying the topic, to consider both the process of the constitution and also possible cases of the dissolution of international organizations, either because the organization had been established for a limited period or because it had achieved its goal, or, again, dissolution under an express or implicit resolution of the members not calling for unanimity. The precedent in that regard was the League of Nations and the PCIJ, which had been dissolved by resolutions adopted on 18 April 1946 by the Assembly of the League of Nations at its twenty-first session. Thought should also be given, among the consequences of dissolution, to the liquidation of the organization's property and assets, and possible transfer thereof to another organization.

6. In addition, the Commission should scrutinize situations giving rise to the succession of international organizations in respect of rights, duties and functions. Suffice it in that regard to mention the establishment of OECD, which had replaced OEEC in 1960. Perhaps the Special Rapporteur could study those issues—constitution, succession, dissolution, liquidation—in the context of section 2 of the outline, on legal personality.

7. Lastly, the proposed outline, which reflected a consistent outlook on the topic, deserved the approval of the Commission.

8. Mr. AL-QAYSI said that the topic under consideration had been on the Commission's agenda for nearly a decade and was one of great practical utility if kept within reasonable bounds. The second report (A/CN.4/391 and Add.1, para. 12) and the third report (A/CN.4/401, paras. 20 and 26) revealed that it did not seem appropriate to criticize the Special Rapporteur's outline on the grounds that it unduly emphasized the question of privileges and immunities, since that was the very core of the topic. The Secretariat studies indicated a multiplicity of rules applicable to a wide variety of international organizations, and it was difficult to envisage a régime applying to all. Indeed, it was doubtful whether such an enterprise would be useful or necessary. In the interests of practicality, the Commission should be modest in its efforts, which at the present stage should concentrate on international organizations of a universal character.

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* Resumed from the 2027th meeting.

[1] Reproduced in *Yearbook . . . 1985*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1985*, vol. II (Part One)/Add.1.

[4] *Yearbook . . . 1976*, vol. II (Part Two), p. 164, para. 173.

[5] *Yearbook . . . 1985*, vol. II (Part Two), p. 66, para. 264 (*c*).

9. He, too, thought that the schematic outline proposed by the Special Rapporteur (A/CN.4/401, para. 34) was appropriate and that doctrinal problems should be avoided. He agreed with Mr. Reuter (2024th meeting) that the broadest possible survey was required, and that the help of the Secretariat in that respect would be crucial.

10. Rules applied by international organizations on the subject did exist, and since international organizations generally adopted a pragmatic approach, there were almost no lacunae. Problems none the less arose, and the Commission should endeavour to tackle them. Reference had been made, for example, to inviolability of the computerized archives of international organizations, freedom of travel of international officials and their right of protection. It had also been suggested that certain principles might not be applicable to international organizations. In his view, the discussion of reciprocity between international organizations in relation to the right of protection involved first of all determining to whom such reciprocity was due, and the basis thereof. Questions of that kind required detailed study, on the understanding that the goal was to articulate functional solutions rather than resolve doctrinal questions.

11. Another fundamental point was the future relationship between the Commission's work and the rules that international organizations already applied. Unless the work was scrupulously synchronized with the existing rules and practice of international organizations, it would become purely academic. Consequently, close co-operation with international organizations was essential.

12. He thanked the Special Rapporteur for his clear and succinct report and expressed the hope that future reports would cover the widest possible parameters of the topic.

13. Mr. DÍAZ GONZÁLEZ (Special Rapporteur) said it was regrettable that he had not had the time necessary to review all the points made in the course of the debate. The topic had led to a most varied range of comments, some members taking the view that the subject was very straightforward and simply needed the finishing touches, whereas others thought that it was one of the most difficult and that, as in the case of the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier, the Commission would, as its study moved ahead, inevitably encounter gaps that lent themselves to the progressive development of international law, in addition to matters that could be codified.

14. At the thirty-seventh session, he had indicated that, since the Commission had already approved the previous Special Rapporteur's plan of work, he had started out with the idea that it would be pointless to submit a new outline and had thought that the study would continue on that basis.[6] Accordingly, it had been at the insistence of two members that he had submitted a schematic outline in his third report (A/CN.4/401, para. 34). However, no member who had spoken on the subject had been opposed either to the outline or to the suggestions to restrict the topic to international intergovernmental organizations of a universal character, on the understanding, of course, that the Commission could always decide later to extend the application of the draft articles to regional organizations, or even some non-governmental organizations, such as ICRC.

15. At the beginning of the discussion, Mr. Bennouna (2024th meeting) had raised a number of questions, the first relating to the harmonization of the existing texts. His own intention was not to harmonize existing provisions but to seek to co-ordinate and concretize. On the basis of the current rules concerning the privileges and immunities of international organizations and their officials, in other words on the basis of practice and instruments such as headquarters agreements or the two conventions of 1946 and 1947 on the privileges and immunities of the United Nations and the specialized agencies, his task was not only to codify, but also to find any gaps, namely cases in which such privileges and immunities had to be clarified. He had in mind, for example, the question of freedom of movement of international officials in the host countries, mentioned by Mr. Tomuschat (2025th meeting), and the case of archives, referred to by Mr. Reuter (2024th meeting). Codification and progressive development would therefore have to go hand in hand.

16. With reference to the capacity of international organizations to defend before the courts officials who acted on their behalf, Mr. Bennouna had also asked whether he, the Special Rapporteur, endorsed the advisory opinion of the ICJ of 11 April 1949 on *Reparation for Injuries Suffered in the Service of the United Nations*. Personally, he thought that the Court had, in that opinion, established the legal bases for the personality and capacity of international organizations. In requesting the advisory opinion, the United Nations had sought to determine whether it could claim for itself or for the victims reparation from the State recognized as responsible. According to the Court:

> . . . It is not possible, by a strained use of the concept of allegiance, to assimilate the legal bond which exists, under Article 100 of the Charter, between the Organization on the one hand, and the Secretary-General and the staff on the other, to the bond of nationality existing between a State and its nationals.[7]

But the Court had taken its reasoning a step further by adding:

> . . . To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization . . . In particular, he should not have to rely on the protection of his own State.[8]

And the Court had concluded that, to enable the international Organization to perform its duties in general and to protect its agents in particular, the States Members could only have endowed the Organization with "capacity to bring an international claim". The opinion further stated that the Organization

> . . . is a subject of international law and capable of possessing international rights and duties, and . . . has capacity to maintain its rights by bringing international claims.[9]

[6] *Yearbook . . . 1985*, vol. I, p. 305, 1929th meeting, para. 5.

[7] *I.C.J. Reports 1949*, p. 182.

[8] *Ibid.*, p. 183.

[9] *Ibid.*, p. 179.

and added that "the action of the Organization is in fact based not upon the nationality of the victim but upon his status as agent of the Organization".[10] From those considerations, it followed that the Organization could even, where necessary, bring a claim against the State of which its agent was a national.

17. Mr. Bennouna had also asked whether the topic was solely one for codification or whether it lent itself to progressive development of the law. Needless to say, there was always room for progressive development of the law, and he himself had always maintained that progressive development was of essential importance in the Commission's work, and that the present topic afforded a wide-ranging field of research.

18. It was apparent from the discussion that the Commission was of the opinion that the study of the topic should be continued in accordance with the proposed schematic outline, the study being confined for the time being to international intergovernmental organizations, since there was no reason for the second part of the topic to be founded on bases different from those underlying the first part.

19. His reply to the question whether the draft could provide for lesser privileges and immunities than those guaranteed in headquarters agreements or other relevant instruments was in the negative: the goal was to supplement the rules in force and to elaborate a new set of rules to help resolve the problems that international organizations faced in their relations with States, whether or not host States.

20. He had from the very outset placed before the Commission the question of the definition of international organizations, a matter raised by Mr. Mahiou (2025th meeting), and the Commission had urged him to "proceed with great caution" and endeavour "to adopt a pragmatic approach to the topic in order to avoid protracted discussions of a doctrinaire, theoretical nature".[11] However, it was difficult, if not impossible, to elaborate a set of legal rules without engaging in doctrinaire discussions: while its importance should not be exaggerated, theoretical debate was none the less of some value. Nor should excessive importance be attached to caution, since progressive development of international law called for boldness. In other words, the meaning to be attached to the privileges and immunities of international organizations could not be studied without taking account of what the actual concept of an international organization covered. So far, no agreement had been reached on a legal definition of the concept. Efforts had been made from various angles, but without success. The Commission had simply managed to restrict the scope of the concept by applying criteria relating to membership (universal organizations, regional organizations) or functions (public, technical, political or general activities). Thus international organizations had been the subject of a systematic classification rather than an actual definition. In due course, he would nevertheless have to propose a definition, or at least pin-point the meaning to be attached to an international organization in the draft articles.

21. It was deplorable that some topics, such as the one assigned to him, disappeared from the Commission's agenda for a number of years, for when the Commission reverted to them, it had meanwhile forgotten the earlier work thereon. It was better to embark on a race against time, as in the present instance, than to start out again from scratch.

22. In short, he noted that the Commission endorsed the outline he had submitted, subject to certain changes which he had taken note of and which he would take properly into account. He would also bear in mind the suggestions regarding the scope of the topic. Lastly, he would endeavour to combine the two working methods proposed: first, to follow his outline faithfully for the purposes of codification; and secondly, to seek initially the gaps in the law applicable to the topic and subsequently to formulate draft articles.

23. Mr. MAHIOU said he hoped that the Special Rapporteur, while making full use of the freedom needed in his task, would submit to the Commission at its next session his first draft articles, accompanied by explanations, so that the draft could start to take shape.

24. The CHAIRMAN thanked the Special Rapporteur for his thorough and comprehensive summing-up and said he was confident that the Special Rapporteur would keep Mr. Mahiou's suggestion in mind. The Commission functioned best when it had draft articles to focus on, but the Special Rapporteur should be the one to decide at which stage the work was ripe for drafting articles.

25. If there were no objections, he would take it that the Commission agreed that the Special Rapporteur should proceed with his study of the topic, on the basis of the schematic outline proposed in his third report and the discussion in the Commission.

It was so agreed.

Mr. Díaz González, First Vice-Chairman, took the Chair.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/399 and Add.1 and 2,[12] A/CN.4/406 and Add.1 and 2,[13] A/CN.4/L.411)

[Agenda item 6]

Draft articles proposed by the Drafting Committee (*continued*)

Article 2 (Scope of the present articles)[14] (*concluded*)

26. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that a consensus appeared to have emerged in the lengthy discussion at the previous meeting in favour of inserting the words "protection and development" after "conservation" in paragraph 1, and therefore suggested that members who did not agree to the change should enter reservations.

[10] *Ibid.*, p. 186.

[11] *Yearbook . . . 1983*, vol. II (Part Two), p. 80, para. 276.

[12] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

[13] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[14] For the text, see 2028th meeting, para. 1.

27. Mr. BARSEGOV said that the precedent of altering the text of a draft article already adopted by the Drafting Committee in the light of the opinions expressed previously by members of the Commission was deplorable.

28. It was in the general interest that the natural resources under the permanent sovereignty of States should be protected. However, the wording now being proposed lent itself to an interpretation whereby States could no longer use some of those natural resources—in the present case, their water resources. Such a situation would be particularly dangerous for small States, for the Commission had not yet defined the subject of the draft articles: frontier rivers, frontier lakes or all of a country's waters. Since the ambiguity was a source of danger, States certainly would not agree to a text which affected their permanent sovereignty over their natural resources, and the consequence would be that the draft articles would simply be in the nature of a recommendation. He could not oppose adoption of the text modified in that way, but he was compelled to enter a general reservation regarding document A/CN.4/L.411 as a whole.

29. Mr. HAYES said he hoped that the Chairman of the Drafting Committee would continue to explain the decisions arrived at, particularly in regard to changes in the draft articles. However, the Chairman of the Drafting Committee was not infallible, and he himself shared the view that it was for members of the Commission to indicate whether they agreed or disagreed with an explanation. Nor was the Drafting Committee infallible, and as a member of the Committee he did not feel obliged to support every proposed text in all its details.

30. As for the expression to be used in place of "measures of conservation", the activities covered by the draft articles should be those with the potential to affect the legitimate enjoyment of the benefits of the watercourse by other users. The most obvious were use and development. Although conservation and protection overlapped to a certain extent, he believed the use of both terms was necessary in order to provide adequate coverage of activities. He therefore supported the proposal by the Chairman of the Drafting Committee.

31. Mr. BEESLEY said that he endorsed the proposed change, essentially for the same reasons as Mr. Hayes, and in view more especially of Principles 21 and 22 of the Stockholm Declaration. He hoped that the commentary would touch on the considerations set out in a book by Jan Schneider[15] which he had mentioned in the Drafting Committee and which referred to measures of protection of anadromous species, including the halting of hydroelectric development projects. Lastly, he would like to make it clear that he could also have accepted the original formulation.

32. Mr. EIRIKSSON said that his proposal had been designed to bring article 2, paragraph 1, into line with the other provisions of the draft. Whether the proposal by the Chairman of the Drafting Committee did so would be seen after consideration of the other articles. For the time being, he had no objection to the proposal.

33. For the purposes of the Commission's future discussion on its methods of work, five lessons could be drawn from the exchange of views: first, it was impossible to deal with articles in a piecemeal fashion, in other words without placing them within the overall structure of the draft; secondly, the proposal by the Chairman of the Drafting Committee confirmed the value of informal consultations; thirdly, there should never be too long a period between substantive consideration of articles in the Commission and their presentation by the Drafting Committee; fourthly, the Drafting Committee should have clearer guidelines from the Commission on the substantive proposals referred to it; and fifthly, the Drafting Committee had too much work for it to give all due attention to purely drafting matters.

34. Mr. REUTER said that the exchange of views on the terms to be used in draft article 2, paragraph 1, was out of place, for it brought into question the substance of the future draft articles. He had no objection to the proposal by the Chairman of the Drafting Committee. For his own part, however, he did not interpret article 2 as determining the existence in general international law or in the future draft articles of rules of law that went in one direction or another. In that regard, the Commission was still free to do what it liked. To his mind, article 2 simply described, relatively skilfully, the scope of the draft.

35. Mr. SOLARI TUDELA said that the wording of paragraph 1 should be retained in its present form, for the addition of the term "protection" would be purely tautological. If the Commission wished, despite everything, to speak of protection, it should do so in the way proposed by Mr. Sreenivasa Rao at the previous meeting, namely by saying "measures of conservation, including protection". The effect of introducing the concept of development would be to give the provision a meaning different from the meaning it should have in the other articles.

36. Mr. McCAFFREY (Special Rapporteur) said that he supported the changes suggested by the Chairman of the Drafting Committee, for they were the closest the Commission would come to a form of language commanding a consensus. A scope article was like scaffolding: it had to be put up in order to erect the edifice, after which it might be incorporated into the building or fall away. Certainly, at the present stage the Commission should leave itself ample room to develop the draft articles fully. As Mr. Reuter had said, the Commission should not be unduly frightened of draft article 2, which simply defined in very broad terms what the draft articles would be concerned with. However, as some members had said, if the Commission agreed to the formula, corresponding changes would be necessary in article 6.

37. As for speaking of measures of conservation "including protection", he did not believe that the terms "conservation" and "protection" were synonymous: protection included such matters as health hazards or natural hazards. He therefore hoped that the Commis-

[15] *World Public Order of the Environment: Towards an International Ecological Law and Organization* (University of Toronto Press, 1979), p. 28.

sion would use the formula that appeared to have the broadest acceptance.

38. Mr. GRAEFRATH said that he very much regretted the turn taken by the debate. He recognized that the language of draft article 2 should be brought into line with that of draft article 6, something which the Drafting Committee should have done originally. But the accumulation of terms in article 2, combined with a specific interpretation that the Drafting Committee had not had in mind when it had adopted the article, compelled him to reserve his position. He certainly could not agree that, by adopting the article, the Commission was making an interpretation of or giving an application to other international instruments.

39. Mr. KOROMA said that he shared Mr. Graefrath's views: draft article 2 did not refer to any other international instrument and the interpretations by individual members during the debate were not necessarily the ones the Special Rapporteur would include in the commentary.

40. Mr. CALERO RODRIGUES said that he would not stand in the way of a consensus on the formulation suggested by the Chairman of the Drafting Committee, but he did have a reservation concerning the use of the terms "conservation" and "protection". If both terms were used, a distinction would have to be drawn between them, and the article would not be as clear as it would with either term alone.

41. Mr. ARANGIO-RUIZ said that he would accept the compromise text for the sake of advancing the Commission's work. As a matter of logic and semantics, however, he failed to see how the term "conservation" could add anything to "protection" and "development", which together expressed the concept of conservation in all its possible technical meanings. Consequently, he would have to reserve his position concerning any future articles dealing with matters relating to "conservation, protection and development".

42. Mr. Sreenivasa RAO said the debate showed that there were fundamental differences of approach to the draft articles. To avoid further complications, the Commission should revert to the original formulation proposed by the Drafting Committee. The formulation "including protection" would also be a possible compromise.

43. Mr. AL-QAYSI said that he was prepared to accept either the original text or the text with the proposed additions.

44. Mr. BENNOUNA said he would have hoped that draft article 2 could be adopted without delay and without any superficial misunderstanding: semantic discussions should not overlook the goal being pursued. Apparently, Mr. Barsegov had reservations regarding the new formulation proposed by the Chairman of the Drafting Committee. However, it was difficult to see how the term "conservation" could be criticized, or why the nuances between the two formulations were so important. As to the use of the term "conservation", it should be noted that, as stated in the article, they were "measures of conservation related to the uses"; in other words it was not a question of general protection of the environment.

45. Mr. Barsegov had also raised the question of the nature of the watercourses concerned: were they transboundary, frontier or national watercourses? Although the distinction had no bearing on article 2 itself, it would none the less be useful to investigate the matter further in a future report.

46. To get out of the impasse, members who had conflicting views regarding the wording of draft article 2 could meet and come to an understanding, and the Commission could then take its decision. Otherwise, the draft article would be adopted with an unfortunate number of reservations.

47. Mr. BARSEGOV said that there was indeed a misunderstanding. While he had raised the question of the nature of the watercourses concerned, his intention had not been to start up a new discussion but to call attention to cases in which a watercourse was situated entirely within the territory of one single State. Many countries, including some from which members of the Commission came, were familiar with that type of situation. Furthermore, the use of the words "watercourse system" implied that the scope of the future convention would encompass ground water and all waters connected with one another.

48. As to the term "conservation", it had, in Russian at least, a very specific meaning: "to conserve" meant "not to use up", as could be said in the case of coal, for example. In that regard, the future international régime could well end up by preventing a State from using its water potential as it thought best. The issue, therefore, was the permanent sovereignty of States over their natural resources, and it was surprising that some members of the Commission agreed so easily to a clause with clearly restrictive consequences. It was for States which shared a watercourse to decide between themselves on the rules they intended to apply in using common waters, for example in allocating the amounts of water for each. One example that came to mind was not the rivers in the USSR, to which such a situation did not apply, but the Tigris and the Euphrates, in connection with which Iraq and Iran had to agree on the portion of the flow that each could use for its irrigation works.

49. Mr. ILLUECA pointed out that the Commission was considered as a body of jurists which, in a sea of political vicissitudes, was an island of reason and common sense. No member represented a State, even if he expressed the point of view of a particular legal system. However, contrary to that very principle, the Commission appeared to be embroiled in a fruitless discussion that was making it lose time, when a number of special rapporteurs and the Drafting Committee had devoted many hours to formulating the text under consideration.

50. Nor should it be forgotten that, after consideration on first reading, the text would be submitted to the Sixth Committee, then to the General Assembly, then to Governments, and would then return to the Sixth Committee and, lastly, to the Commission. Accordingly, regardless of the Commission's immediate decision, its

choice was far from binding. It was surprising to find the discussion at such a standstill, something that had never occurred in all the time he had been a member. One would think that efforts were being made to delay the work for political reasons, perhaps in order to avoid other issues.

51. Mr. BEESLEY said that, as he had consistently stated, he could accept the Drafting Committee's proposal and would like to revert to the language used in draft articles 6 and 7. He would also like to know whether there were any members who, in the light of the discussion, now considered rejecting the proposal by the Drafting Committee.

52. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that, while some members rejected draft article 2 as proposed by the Drafting Committee, it was for the Commission, and not the Committee, to decide what was to be done.

53. Mr. THIAM pointed out that it was not the first time that a text proposed by the Drafting Committee had failed to command unanimous support. In such instances, the Commission's custom was to note the reservations in its report to the General Assembly—for consideration of the matter was not completed with its own discussions—and then carry on with the remainder of the text. Later it went on to find a formulation acceptable to all.

54. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that the Chairman might quite simply note that there was no unanimity and ask for the reservations by some members to be included in the Commission's report to the General Assembly.

55. Mr. TOMUSCHAT noted that there seemed to be a majority of members who considered that the formulation "conservation, protection and development" should be used. If the aim was to bring the discussion to an end, that would be achieved by proposing adoption of the amended text, not the original text.

56. Mr. MAHIOU said that he was ready to agree to either solution. However, according to the tradition mentioned by Mr. Thiam, it was necessary to revert to the original text, for that was the custom when an amendment did not command sufficiently broad support.

57. Mr. AL-QAYSI, endorsing Mr. Mahiou's remarks, formally proposed that the Commission should adopt article 2 as originally proposed by the Drafting Committee, on the understanding that any member who so wished could enter a reservation. The Commission could decide on the form of article 6 when it came to take up that article.

58. The CHAIRMAN said that the Commission had a formal motion for adoption before it.

59. Speaking as a member of the Commission, he confirmed Mr. Mahiou's observation, namely that texts had sometimes been adopted with explicit reservations. Personally, he had no objection to the original text and regretted the dispute that had arisen over the term "conservation". That term had, however, been adopted by the Drafting Committee as a compromise solution after lengthy consultations.

60. Mr. AL-BAHARNA observed that it was unfortunate that the Commission had no rules of procedure of its own. The Chairman of the Drafting Committee had submitted an amendment whereby three elements would be included in draft article 2, namely conservation, protection and development. Some members thought that the amendment reflected a measure of consensus within the Commission. As a matter of procedure, he could not agree that the Commission should revert to the original text. If it was going to vote on the article, it should start with the amendment and then proceed to a vote on the original text. Accordingly, he agreed with Mr. Tomuschat that members should be sounded out on their views, first on the amendment, and then, if it were rejected, on the original text.

61. The CHAIRMAN pointed out that it was not customary for the Commission to vote. As the more long-standing members would remember, the Commission had voted on only two or three occasions, in exceptional circumstances.

62. Mr. AL-QAYSI, referring to Mr. Al-Baharna's remarks, said that in fact the Chairman of the Drafting Committee had, after consultations and in the interests of arriving at a consensus, produced a form of wording, which had proved unacceptable. The question therefore was whether to revert to the original text or to introduce into that text the various amendments submitted. In his view, the only viable solution, and the one that would command the broadest support, was to revert to the original text presented by the Drafting Committee, as had been formally proposed.

63. Mr. MAHIOU pointed out that the draft article was being considered on first reading and that, even on second reading, it was extremely rare for the Commission to take a vote. In his opinion, a decision should be taken on the original text.

64. Mr. HAYES, supporting the proposals made by Mr. Mahiou and Mr. Al-Qaysi, said that the Commission should adopt the text of article 2 as proposed by the Drafting Committee, with such reservations as members might express. His own reservation arose out of the new elements that had emerged during the debate, for the main emphasis in the Drafting Committee had been on retaining terms such as "management" and "administration". The inclusion of the terms "protection" and "development" had not been considered.

65. Mr. AL-BAHARNA said that, in his earlier statement, he had not of course meant that the Commission should proceed to a vote in the literal sense of the term, but rather that members should be sounded out on their views. He none the less continued to think that the Chairman of the Drafting Committee had submitted an amended form of wording for draft article 2 that would include the three elements of conservation, protection and development. Perhaps the Chairman of the Drafting Committee would provide further clarification on that point.

66. Mr. FRANCIS said that, under the rules in the United Nations system, a proposal could of course be

withdrawn at any time, and that was what the Chairman of the Drafting Committee had done. As to the conduct of the debate, he suggested that, in view of the lateness of the hour and the need for the Commission to move forward in its work, members should be allowed to submit any reservations in writing to the Secretary to the Commission.

67. The CHAIRMAN, pointing out that Mr. Eiriksson had proposed an amendment relating purely to the form of the English text of draft article 2 (2028th meeting, para. 18), suggested that the English-speaking members of the Commission should meet to choose the terminology they deemed appropriate.

68. As to the substance, he proposed that the Commission should provisionally adopt article 2, on the understanding that the reservations expressed would be included in the summary records of the meetings and in the Commission's report.

It was so agreed.

Article 2 was adopted.

ARTICLE 3 (Watercourse States)[16]

69. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that draft article 3 was based on article 2 as provisionally adopted in 1980 and on draft article 3 as submitted in 1984. It used the expression "watercourse State", which had appeared in the draft articles submitted in 1984 and which it was believed could be employed without prejudging whether or not the term "system" was to be used.

70. The Drafting Committee recognized that the article contained definitional elements. Thus, at a later stage, the provision might find its way into article 1, on the use of terms. The various language versions had been altered to bring out the definitional element, which was already highlighted in the French text. The article had also been amended in some languages in order to emphasize the physical or geographical elements of the definition. For example, in the English text, the word "exists" had been replaced by "is situated", in line with the provisional working hypothesis. Similarly, in the Spanish text, *exista* had been replaced by *se encuentra*. The title was the same as in the 1984 text.

71. Mr. KOROMA said that, in his view, the proper place for the provision was in article 1, relating to the use of terms. Moreover, the words "is situated" were not satisfactory, and he therefore wished to enter a reservation on that score.

72. Mr. AL-KHASAWNEH said that, if the Commission agreed to retain the words "is situated", a corresponding change would have to be made in the Arabic text of the article. Indeed, there were a number of instances throughout the draft in which the Arabic text did not correspond closely to the other language versions, and the English version in particular. In order not to delay the Commission's work, he proposed to consult his Arabic-speaking colleagues on those matters and communicate the required changes direct to the Secretariat.

73. The CHAIRMAN recommended that the Arabic-speaking members of the Commission should follow the example of their Spanish-speaking colleagues: it would be enough for them to agree on the terminology they thought suitable and to communicate it direct to the Secretariat.

74. Mr. AL-KHASAWNEH recalled that a question had been raised in the Drafting Committee as to whether a State which was not a natural system State would be covered by the definition in draft article 3. Perhaps the Special Rapporteur could deal with that point in the commentary.

75. Mr. McCAFFREY (Special Rapporteur) said it was not possible to answer that question at the current stage in the work. Personally, he would be very reluctant to define an international watercourse so as to include such man-made diversions as a canal, which might take the water of an international watercourse into another drainage basin. The term "international watercourse" was normally used to refer to a watercourse created by nature and not to any artificial diversions. In his view, it should be so interpreted until such time as a definition was finally adopted.

76. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 3.

Article 3 was adopted.

ARTICLE 4 ([Watercourse] [System] agreements)[17]

77. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that draft article 4, based on article 3 as provisionally adopted in 1980 and on draft article 4 as submitted in 1984, had been the subject of considerable discussion in the Drafting Committee and the version now before the Commission differed from previous versions in a number of ways.

78. To begin with, it should be remembered that the article was one of the key articles of the draft, since it introduced for the first time the concept of a "framework agreement"—the basis of the Commission's work on the topic since 1980—by stating that watercourse States could enter into one or more agreements which applied and adjusted the provisions of the present articles to the characteristics and uses of a particular watercourse or part thereof.

79. Paragraph 1 had been recast to emphasize that fundamental point. Neither the 1980 text nor the 1984 text had been sufficiently clear in that regard. Moreover, the 1984 text had introduced unnecessary detail and extraneous matters. Members would note the use of the word "may", which emphasized the residual nature of article 4. Watercourse States were not required to conclude such agreements: if they did not conclude such agreements, the provisions of the future convention would apply without modification or adjustment. The second sentence of paragraph 1 was of a definitional character and merely specified that such agreements would be called "[watercourse] [system] agreements".

[16] For the text, see 2028th meeting, para. 1.

[17] For the text, *ibid.*

80. It should be added that some members of the Drafting Committee had raised questions or expressed doubts concerning the "framework agreement" approach, wondering whether it signified that the Commission had already decided to recommend that the draft should be adopted in the form of a convention. Although it was customary for the Commission to decide on the ultimate form to be recommended only at the end of its work on a draft, those members had stressed that acceptance of many provisions of the draft depended not only on their content, but also on the final form the Commission would decide to recommend.

81. Paragraph 2 again highlighted the residual nature of the article by beginning with the phrase "Where [an] . . . agreement is concluded". It had also been adjusted to make it clear that, if such an agreement related to only part of a watercourse or to a particular project, programme or use, that agreement must not adversely affect to an appreciable extent the use of the watercourse by other watercourse States. The Drafting Committee had decided to retain the standard used in the 1980 text, namely "to an appreciable extent", which was intended to provide an objectively verifiable threshold. While some questions had been raised as to the meaning of those words, the Committee had thought it prudent to retain them for the time being, with a full explanation being given in the commentary.

82. Paragraph 3 had been changed considerably. Instead of the ambiguous test expressed in the phrase "in so far as the uses of an international watercourse may require", the new text was precise and clear as to what set its provisions in motion, namely when a watercourse State considered that adjustment or application of the provisions of the present articles was required because of the characteristics and uses of a particular watercourse. After lengthy discussion, the Drafting Committee had decided that the appropriate obligation in such cases was that of consultation, with a view to negotiating in good faith for the purpose of concluding a "[watercourse] [system] agreement". The previous texts had referred to an obligation to negotiate. However, the members of the Committee had been of the view that an obligation to negotiate in that general context might be taken to refer to an unduly formal procedure, one which could not be forced upon unwilling States. The point was, if circumstances permitted, to encourage States to engage in discussions, especially at that initial stage: a conflict of interests should not automatically be presumed and the importance of co-operation should be emphasized. Thus the obligation laid down had been changed to an obligation to consult, with a view to negotiation. Of course, that was without prejudice to later articles which might stipulate an obligation to negotiate within a specific context. Lastly, the expression "watercourse States" did not imply that all watercourse States were necessarily required to consult: that question depended on the specific circumstances.

83. The title of the article reflected the choice, which would have to be made later by the Commission, between "watercourse agreements" and "system agreements".

84. Mr. TOMUSCHAT suggested that the word "shall", in the first sentence of paragraph 2, should be replaced by "should". Otherwise, the rule laid down would seem to be one of *jus cogens*, which was quite out of the question.

85. Mr. KOROMA, referring to paragraph 3, said that he did not think the intention was to compel every State or group of States to conclude an agreement regarding their watercourses. The most important thing was for States to negotiate in good faith on the use of the waters. He therefore proposed that the last part of the paragraph should be amended to read "watercourse States shall consult with a view to negotiating in good faith regarding the use of their waters".

86. Mr. ARANGIO-RUIZ, referring to Mr. Tomuschat's suggestion, pointed out that paragraph 2 opened with the clause "Where a [watercourse] [system] agreement is concluded between two or more watercourse States", which meant that States were free to conclude watercourse agreements or not, as they saw fit. The provision in question also stipulated that any such agreement would define the waters to which it applied. Therefore the word "shall" could not be interpreted as constituting a threat to the sovereignty of the States concerned.

87. Mr. EIRIKSSON said that he had nine drafting proposals to make and would therefore consult the Chairman on how best to proceed in order to submit them to the Commission.

88. He would like to know whether the proviso in the second sentence of paragraph 2 applied to agreements concluded in connection with an entire watercourse or merely to those relating to a part of the watercourse or to a particular project, programme or use.

89. Mr. BENNOUNA proposed that, in the French text, in the first sentence of paragraph 1 and in paragraph 3, the verb *appliquer* should be replaced by *mettre en œuvre*. The purpose of the agreements envisaged in those provisions would be to give effect to the convention the Commission was endeavouring to elaborate, which would be a binding convention. The term he was proposing would better reflect the idea of subsidiary agreements.

The meeting rose at 1.10 p.m.

2030th MEETING

Thursday, 9 July 1987, at 10.05 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, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo,

Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Tribute to the memory of Mr. Nicolas Teslenko, former member of the Commission's secretariat

1. The CHAIRMAN announced with deep regret the death of Mr. Nicolas Teslenko, who had been a distinguished member of the staff of the Codification Division and, for many years, Deputy Secretary to the Commission.

At the invitation of the Chairman, the Commission observed one minute's silence in tribute to the memory of Mr. Nicolas Teslenko.

Mr. Díaz González, First Vice-Chairman, took the Chair.

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

[Agenda item 6]

Draft articles proposed by the Drafting Committee (*continued*)

Article 4 ([Watercourse] [System] agreements)[3] (*concluded*)

2. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that several amendments to draft article 4 had been proposed at the previous meeting. Mr. Tomuschat had proposed that, in the first sentence of paragraph 2, the word "shall" should be replaced by "should"; Mr. Koroma had proposed that the last part of paragraph 3 should be amended; Mr. Eiriksson had proposed that the order of the paragraphs should be changed; and Mr. Bennouna had proposed that, in paragraphs 1 and 3 of the French text, the verb *mettre en œuvre* should be used in place of *appliquer*.

3. Following a procedural debate in which Mr. MAHIOU proposed that the Commission should proceed paragraph by paragraph and Mr. BARSEGOV regretted the fact that the written text of the proposed amendments had not been made available, the CHAIRMAN suggested that, in order save time, drafting amendments relating only to one language version should be transmitted direct to the secretariat, after consultation between the members of the Commission concerned by that language version.

4. Mr. GRAEFRATH said that all members were entitled to propose amendments and explain the reasons for them. It was then up to the Commission to decide whether such amendments related to drafting or to substance.

5. Mr. BARSEGOV, stressing the need to consider substantive amendments, recommended that members should refrain from proposing amendments of a purely drafting nature.

6. The CHAIRMAN proposed that draft article 4 should be considered paragraph by paragraph.

Paragraph 1

7. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that he had no objection to Mr. Bennouna's proposal that, in paragraphs 1 and 3 of the French text, the verb *appliquer* should be replaced by *mettre en œuvre*.

8. Mr. AL-QAYSI said he feared that, in the English text, the effect of that amendment would be that the words "apply" and "application" would be replaced by "implement" and "implementation", respectively.

9. Mr. McCAFFREY (Special Rapporteur) said that the change proposed by Mr. Bennouna affected the substance of the article, for there was a difference between "applying" the binding provisions of a régime and giving effect to them through subsidiary agreements designed to "implement" them.

10. Mr. CALERO RODRIGUES said that, in Spanish, the same word was used to translate *appliquer* and *mettre en œuvre*.

11. The CHAIRMAN, noting that the proposed amendment related only to the French text, requested the French-speaking members of the Commission to decide which wording they preferred.

12. Mr. EIRIKSSON said that the English text of article 4 sometimes used the verb "to conclude" and, at other times, "to enter into". He proposed that the text should be harmonized by using the verb "to conclude" throughout.

13. Mr. AL-BAHARNA said that there was a difference between those two terms and that the term "to enter into" was preferable. The "conclusion" of an agreement was a specific formality, usually the last one leading up to the entry into force of the agreement.

14. Mr. ARANGIO-RUIZ said that, since the Spanish text used the verb *celebrar* throughout, the problem was one of a drafting nature.

15. Mr. EIRIKSSON proposed that the second sentence of paragraph 1 should be deleted and that the idea to which it referred should be reflected in the first sentence, which would read: "Watercourse States may enter into one or more agreements, hereinafter referred to as [watercourse] [system] agreements, which apply and adjust the provisions . . ."

16. He also proposed that the first sentence of paragraph 2 should form a separate paragraph.

17. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that he objected to Mr. Eiriksson's second proposal because paragraph 2 had a logic of its own.

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[1] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

[2] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[3] For the text, see 2028th meeting, para. 1.

18. Mr. ARANGIO-RUIZ said he agreed that paragraph 2 should not be changed. Mr. Eiriksson's proposal would be more elegant, but it would mean that the rest of paragraph 2 would have to be reformulated.

19. Mr. EIRIKSSON said that, since he did not wish to waste the Commission's time, he withdrew his proposals.

20. Mr. AL-BAHARNA said that there was a problem with the tenses of the verbs at the beginning of the first sentence of paragraph 1 of the English text, which should read: ". . . one or more agreements which would apply and adjust . . .".

21. The CHAIRMAN said that drafting amendments should be drawn to the attention of the secretariat.

22. If there were no objections, he would take it that the Commission agreed provisionally to adopt paragraph 1 of article 4 as proposed by the Drafting Committee.

It was so agreed.

Paragraph 2

23. Mr. EIRIKSSON proposed that the first sentence should be amended to read: "A [watercourse] [system] agreement shall define the waters to which it applies."

24. He further proposed that the proviso in the second sentence should form a separate sentence, reading: "A [watercourse] [system] agreement shall not adversely affect to an appreciable extent the use of the international watercourse [system] concerned by any watercourse State which is not a party to the agreement."

25. Mr. AL-QAYSI said that he could not comment on Mr. Eiriksson's proposals until he had seen them in writing. Since the Commission did not have enough time to engage in a debate on those proposals, he considered that the text of paragraph 2 should be adopted as it stood and that any drafting exercise should be left to a later stage.

26. Mr. CALERO RODRIGUES said that Mr. Eiriksson's proposals were a definite improvement on the original text and, if they had been submitted to the Drafting Committee, he would have supported them. At the present stage, however, a debate on those proposals would prevent the Commission from completing its work. He therefore favoured the retention of paragraph 2 as it stood.

27. Mr. BARSEGOV said that, while Mr. Eiriksson's proposals made the text of paragraph 2 clearer, it was not possible for the Commission to examine them at the present time. In any event, the text proposed by the Drafting Committee sufficed for the purposes of a first reading. Mr. Eiriksson's proposals should therefore be referred to the Drafting Committee for discussion at a later stage.

28. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that, if a member had an entirely new form of wording to propose, the Special Rapporteur could always mention that fact in the commentary and, if necessary, include the new text either in the commentary itself or in a footnote.

29. Mr. ARANGIO-RUIZ said that Mr. Eiriksson's first proposal was of a purely cosmetic nature. As to the second, Mr. Eiriksson had only to make it available to the Special Rapporteur, so that he might take it into account when he came to draft the commentary to article 4.

30. Mr. OGISO noted that the Chairman of the Drafting Committee had stated in his introductory remarks (2029th meeting) that the proviso in the second sentence of paragraph 2 would be explained in the commentary to article 4. He would appreciate it if the Special Rapporteur could read out the relevant part of the commentary.

31. Mr. McCAFFREY (Special Rapporteur) said that the final version of the commentary would not be available until the article itself had been adopted. The Drafting Committee's main concern had been to ensure that two States could not enter into an agreement with regard to a part of a watercourse which would adversely affect a third State. He would do his best, with Mr. Eiriksson's help, to reflect that point in the commentary.

32. Mr. Sreenivasa RAO said that, in his view, Mr. Eiriksson's proposals were useful and should be referred to the Drafting Committee. On that understanding, he could agree to the adoption of paragraph 2 in its present form.

33. Mr. KOROMA said that the Commission had not had an opportunity to examine the Drafting Committee's reports properly in plenary. Although it should not examine drafting points at the present stage in its work, it should not be rushed into approving texts where matters of substance were involved. In the case under consideration, he agreed that the proviso in the second sentence of paragraph 2 was in a category by itself and that it should therefore form a separate clause or article. Mr. Eiriksson's amendments were thus valid and should be duly taken into account.

34. Mr. AL-KHASAWNEH said that draft article 4 was very important because it introduced for the first time the concept of an umbrella agreement or the framework agreement approach. That approach, which had been adopted in 1980, had, however, not been debated in plenary as fully as its importance warranted. He had doubts about the appropriateness of that approach, the declared rationale for which was that watercourses differed in terms both of their geographical and natural characteristics and of the human needs they served, whereas such differences, even if they did exist, were for the most part immaterial for the purposes of the progressive development and codification of international law. He did not wish to delay the Commission's work any further, but would like his views to be placed on record.

35. Mr. AL-QAYSI said that, although Mr. Eiriksson's proposal concerning the proviso in the second sentence of paragraph 2 appeared to have some merit, he could not comment on it until he had seen it in writing and had been able to determine what effect it

would have. Paragraph 2 contained two parameters: the first was geographical, and the second substantive. The substantive one was the subject of draft article 9 and in draft article 4, paragraph 2, it appeared only as a parameter of the future agreement.

36. He formally proposed that the Commission should adopt paragraph 2 as proposed by the Drafting Committee, on the understanding that it would be reconsidered later in the light of the draft as a whole.

37. Mr. BEESLEY supported that proposal. He nevertheless stressed that the issue raised by Mr. Eiriksson's proposal was a substantive one.

38. Mr. KOROMA said that he would be prepared to accept paragraph 2 in its present form, on the understanding that it would be re-examined at a later stage in the Commission's work.

39. Mr. ARANGIO-RUIZ said that, like other members, he wished to reserve his position on the second sentence of paragraph 2 and to have his reservation reflected in the summary record of the meeting. In his view, the matter could not simply be dealt with in the commentary.

40. Mr. YANKOV said it was important that the reservations expressed by members of the Commission should be reflected in the summary record of the meeting. Moreover, the Special Rapporteur always had the possibility of suggesting amendments to his text in the light of comments made by members during the discussion.

41. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt paragraph 2 of article 4 as proposed by the Drafting Committee.

It was so agreed.

Paragraph 3

42. Mr. EIRIKSSON proposed that the first part of paragraph 3 should be deleted and that the paragraph should begin with the words "Watercourse States shall, at the request of any watercourse State, consult . . .".

43. He also proposed that the last part of the paragraph should be replaced by the words "with a view to negotiating in good faith a [watercourse] [system] agreement". That wording would be closer to that used in the 1969 Vienna Convention on the Law of Treaties.

44. Mr. BARSEGOV said he had no objection to the adoption on first reading of paragraph 3 as proposed by the Drafting Committee, on the understanding that the drafting improvements proposed by Mr. Eiriksson would be considered at a later stage in the Commission's work.

45. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt paragraph 3 of article 4 as proposed by the Drafting Committee.

It was so agreed.

Article 4 was adopted.

ARTICLE 5 (Parties to [watercourse] [system] agreements)[4]

46. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that the title of draft article 5 had been simplified and that the text was based on article 4 as provisionally adopted in 1980 and on draft article 5 as submitted in 1984.

47. Paragraph 1 closely followed the previous texts, with two basic exceptions. First, to align the text with article 4, paragraph 2, reference had been made to the "entire" watercourse, rather than to the watercourse "as a whole". Secondly, in order to give effect to the obligation set forth in the new version of article 4, paragraph 3, the words "as well as to participate in any relevant consultations" had been added.

48. Paragraph 2 also referred to "consultations", in line with the new version of article 4, paragraph 3. In addition, paragraph 2 had been amended in the light of the debate held at earlier sessions on the right of a watercourse State, under the conditions set forth in that paragraph, to become a party to the agreement referred to therein. If those conditions had been fulfilled, there appeared to be no reason why a watercourse State should not, in the circumstances envisaged, be entitled to become a party to the agreement in question. The commentary would nevertheless explain that the best way of solving the problem would be to proceed on a case-by-case basis. Thus the State concerned might, through a protocol, become a party to the elements of the agreement that affected it or it might become a full party to the agreement: the solution would depend entirely on the nature of the agreement, the elements of the agreement affecting the State in question and the nature of the consequences that might ensue for it. Lastly, the paragraph no longer contained a cross-reference to the preceding article, as had been the case in article 4 of 1980, for that had given rise to confusion and had created a possibility of misinterpretation, as the previous Special Rapporteur had pointed out in his second report.[5]

49. Mr. EIRIKSSON, noting that the words "any relevant consultations" at the end of paragraph 1 were too vague, suggested that they should be replaced by "any consultations relating to such an agreement".

50. At the end of paragraph 2, he suggested that the penultimate phrase should be replaced by the words "to the extent that its use is affected by it".

51. Mr. AL-KHASAWNEH said that he wished to place on record his reservations with regard to draft article 5. The entitlement it gave any watercourse State to become a party to any watercourse agreement was not adequately supported by doctrine and was not in conformity with political reality.

52. Mr. YANKOV said that the wording proposed by Mr Eiriksson for paragraph 1 would improve the text.

[4] For the text, *ibid.*

[5] *Yearbook . . . 1984*, vol. II (Part One), p. 109, document A/CN.4/381, para. 42.

53. Mr. AL-QAYSI, supported by Mr. BEESLEY, said that draft article 5 complemented article 4. If the wording proposed by Mr. Eiriksson for article 5, paragraph 1, were adopted, the wording of article 4, paragraph 3, would also have to be amended. He urged the Commission to adopt article 5 in the form proposed by the Drafting Committee.

54. Mr. McCAFFREY (Special Rapporteur) also urged the Commission to adopt article 5 as proposed by the Drafting Committee.

55. Mr. EIRIKSSON said that his intention had not been to change article 4, paragraph 3. He had simply hoped that his amendments would remedy the inconsistencies between article 4 and article 5.

56. Mr. KOROMA said that he would like his view that article 5 was not in accordance with political reality to be placed on record. He hoped that that provision would be reviewed at a later stage.

57. Mr. REUTER said that he had no objection to the adoption of article 5, but wished to place on record his reservations concerning the incompatibility between paragraphs 1 and 2, and concerning the legal effects of paragraph 1. Those were matters of substance that would have to be discussed more thoroughly at a later stage.

58. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 5 as proposed by the Drafting Committee.

Article 5 was adopted.

59. The CHAIRMAN said that the meeting would rise to enable the Planning Group of the Enlarged Bureau to meet.

The meeting rose at 11.35 a.m.

2031st MEETING

Friday, 10 July 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Tribute to the memory of Mr. Senjin Tsuruoka, former member of the Commission

1. The CHAIRMAN announced with deep regret the death of Mr. Senjin Tsuruoka, a former member of the Commission, who had made an important and lasting contribution to its work.

At the invitation of the Chairman, the Commission observed one minute's silence in tribute to the memory of Mr. Senjin Tsuruoka.

Draft Code of Offences against the Peace and Security of Mankind[1] (*continued*)* (A/CN.4/398,[2] A/CN.4/404,[3] A/CN.4/407 and Add.1 and 2,[4] A/CN.4/L.412)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

TITLES OF CHAPTER I AND PARTS I AND II OF THE DRAFT *and* ARTICLES 1, 2, 3, 5 AND 6

2. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the titles of chapter I and parts I and II of the draft code and draft articles 1, 2, 3, 5 and 6 as adopted by the Committee (A/CN.4/L.412), which read:

CHAPTER I

INTRODUCTION

PART I. DEFINITION AND CHARACTERIZATION

Article 1. Definition

The crimes [under international law] defined in this Code constitute crimes against the peace and security of mankind.

Article 2. Characterization

The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not punishable under internal law does not affect this characterization.

PART II. GENERAL PRINCIPLES

Article 3. Responsibility and punishment

1. Any individual who commits a crime against the peace and security of mankind is responsible for such crime, irrespective of any motives invoked by the accused that are not covered by the definition of the offence, and is liable to punishment therefor.

2. Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it.

. . .

Article 5. Non-applicability of statutory limitations

No statutory limitation shall apply to crimes against the peace and security of mankind.

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* Resumed from the 2001st meeting.

[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

[2] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[4] *Ibid.*

paragraph 3 (*d*), he suggested that it be divided into two new subparagraphs, which would read:

"(*d*) To be tried in his presence and to defend himself in person or through legal assistance of his own choosing and to be informed of this right if he does not have legal assistance;

"(*e*) To have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it;"

In the present paragraph 3 (*e*), he thought that the words "or have examined" were superfluous.

48. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that the introductory clause referred to the applicable law and the facts. The law referred to in paragraph 1 was the *lex fori*, and the words "by treaty" meant any bilateral or multilateral treaty under which the tribunal had been established. The words "or have examined", in paragraph 3 (*e*), referred to letters rogatory, in other words to cases where witnesses were examined by a court other than the one trying the case.

49. Mr. THIAM (Special Rapporteur) said that the commentary would answer the questions raised by members of the Commission concerning draft article 6.

50. Mr. BEESLEY said that, in his opinion, the proposals made by the Special Rapporteur, Mr. Ogiso, Mr. Yankov and Mr. Sreenivasa Rao were all logical and useful. If the Commission adopted those amendments, however, he was not sure whether the word "minimum" in the introductory clause should be retained or whether it might not be better to use the words "common to all legal systems". He was also not certain whether the accused was entitled to be informed of his rights.

51. Mr. BENNOUNA said that he agreed with the changes suggested by the Special Rapporteur in order to make the text clearer and with the proposals by Mr. Ogiso and Mr. Yankov. He did not, however, see why sacrosanct terms should be used if they were ambiguous. The Commission's role should, rather, be to explain and improve on such terms. It would therefore be preferable, in the introductory clause, to use the words "with regard to the applicable law and the establishment of the facts". In the present paragraph 3 (*f*), he suggested that the words "used in court" be replaced by "during the judicial proceedings".

The meeting rose at 1.05 p.m.

2033rd MEETING

Monday, 13 July 1987, at 3 p.m.

Chairman: Mr. Stephen C. McCAFFREY

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

Draft Code of Offences against the Peace and Security of Mankind[1] (*concluded*) (A/CN.4/398,[2] A/CN.4/404,[3] A/CN.4/407 and Add.1 and 2,[4] A/CN.4/L.412)

[Agenda item 5]

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

ARTICLE 6 (Judicial guarantees)[5] (*concluded*)

1. The CHAIRMAN invited comments on the reformulated text of article 6 proposed by the Special Rapporteur and on the various amendments to the article suggested at the previous meeting. He also invited comments on the text proposed by Mr. Yankov, which had been submitted in writing since the previous meeting and which read:

"Article 6. Judicial guarantees

"Any person charged with a crime against the peace and security of mankind shall be entitled without discrimination to the following minimum guarantees due to all human beings with regard to the law and the facts.

"1. He shall have the right to be presumed innocent until proved guilty;

"2. In the determination of any criminal charge against him, he shall be entitled:

"(*a*) To a fair and public hearing by a competent, independent and impartial tribunal duly established by law or by treaty;

"(*b*) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

"(*c*) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

"(*d*) To be tried without undue delay;

"(*e*) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him in any such case if he does not have sufficient means to pay for it;

"(*f*) To examine, or have examined, the witnesses against him and to obtain the attendance and ex-

[1] The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

[2] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

[3] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[4] *Ibid.*

[5] For the text, see 2031st meeting, para. 2.

amination of witnesses on his behalf under the same conditions as witnesses against him;

"(*g*) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

"(*h*) Not to be compelled to testify against himself or to confess guilt."

2. Mr. THIAM (Special Rapporteur), referring to the amendment submitted by Mr. Ogiso (2032nd meeting, para. 40), said that, in his view, it would be preferable to retain the introductory clause of the article as worded to make it clear that the list of guarantees set forth in the article was not exhaustive. He agreed entirely with Mr. Yankov's proposed wording of paragraph 2 and would also have no objection to the proposal that the words "a fair and public hearing", in the new paragraph 2 (*a*), should be replaced by "a fair and public trial".

3. Mr. OGISO said that he would not insist on his proposal, provided his position was reflected in the summary record.

4. The CHAIRMAN pointed out that the proposal to replace the word "hearing" by "trial" would mean a departure from the language of the International Covenant on Civil and Political Rights on which article 6 was based.

5. Mr. GRAEFRATH said that there was no sense at the current late stage in trying to alter the text of the article. The Drafting Committee had decided after a lengthy discussion to follow the language of the Covenant, which had itself been ratified by more than 86 States after long years of consideration.

6. Mr. MAHIOU said that, although he agreed in part with Mr. Graefrath's remarks, he saw no reason why a particular text could not be improved. He did, however, have doubts about the need to amend the text of article 6. The expression "a fair and public hearing" was quite broad and covered committal proceedings as well as the trial itself; if the word "trial" were used, the result might be that the guarantees in question would apply only at the trial stage, not before.

7. Mr. AL-BAHARNA said that, while Mr. Yankov's proposed wording was a great improvement, he would prefer to retain the words "In particular" in the introductory clause. He also considered that it would be better to use the term "trial", which was, in his view, broader than the term "hearing". He found paragraph 2 (*e*) of the text proposed by Mr. Yankov somewhat confusing because of the punctuation and therefore proposed that it be amended to form two subparagraphs, reading:

"(*e*) To be tried in his presence, to defend himself in person or through legal assistance of his own choosing, and to be informed of this right if he does not have legal assistance;

"(*f*) To have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it;"

Paragraph 2 (*f*) to (*h*) would then become paragraph 2 (*g*) to (*i*). He further proposed that the words "or have examined", in paragraph 2 (*f*) of the text proposed by Mr. Yankov, should be deleted.

8. The CHAIRMAN noted that the words "to examine, or have examined" were taken from the Covenant.

9. Mr. BARSEGOV said that there was a discrepancy between the French and English texts of the introductory phrase to the new paragraph 2. In his view, the two texts should be consistent.

10. The CHAIRMAN said that, once again, the difference stemmed from the Covenant.

11. Mr. PAWLAK proposed that the word "person", at the beginning of article 6, should be replaced by "individual", in line with article 3, paragraph 1.

It was so agreed.

12. He also thought that the words "In particular", in the introductory clause of article 6, should be retained.

13. In the new paragraph 2 (*a*), he favoured the word "trial", which was much broader than the word "hearing" and therefore preferable even if it did not appear in the Covenant. In any case, there was no reason why the Commission should not improve on the language of the Covenant.

14. Lastly, he proposed that the title of the article, "Judicial guarantees", should be amended to read "Guarantees for a fair trial".

15. Mr. THIAM (Special Rapporteur) said that the title of the article had been discussed at length in the Drafting Committee, which had decided against any change. He considered that it would be better not to insist on the word "trial", rather than "hearing", but would have no objection to replacing the word "person" by "individual". Subject to that one change, he suggested that the Commission should adopt his reformulated text of article 6 (2032nd meeting, para. 39). Mr. Yankov's proposal had substantive implications and it would perhaps be better not to pursue it.

16. Mr. KOROMA said that the language of the code, as an instrument of criminal legislation, necessarily had to be more narrowly drawn than that of an instrument on human or political rights. The Commission could use the Covenant as a guide, but should not feel bound by it, and there was no reason why it could not improve on the language of the Covenant.

17. In the circumstances, he considered that "trial" rather than "hearing" was the proper word. In addition, he failed to understand the expression "the right to be presumed innocent" in the new paragraph 1, which should, in his view, be amended to provide that an accused should be presumed innocent until proved guilty.

18. Mr. CALERO RODRIGUES said that some of Mr. Al-Baharna's suggestions could have been useful if the Commission had had time to discuss them. He agreed, however, that for the time being the Commission should not try to improve on the language of the Covenant. He therefore proposed that the Commission should accept the text proposed by the Special Rapporteur, which was very similar to Mr. Yankov's text,

with the deletion of the first phrase of paragraph 2, "In the determination of any criminal charge against him".

19. Mr. EIRIKSSON proposed that those words should be transferred to paragraph 2 (*a*) of the new text, in line with the text proposed by the Special Rapporteur.

It was so agreed.

20. Mr. REUTER said that, in his view, the Commission should for the time being adopt the text of article 6 as proposed by the Special Rapporteur. It would, however, have to revert to the article later, first, because it had followed the language of the Covenant without trying to bring the English and French texts into line, and secondly, because a question not only of human rights, but also of the rights of other States was involved, which meant that the list of guarantees was not sufficient. He had in mind, for instance, the position of an extraditing State, which would require certain guarantees regarding the course of the proceedings.

21. Mr. AL-KHASAWNEH said he, too, considered that it was preferable for the time being to adopt the Special Rapporteur's proposal.

22. Mr. HAYES said that he supported the introductory clause of the original text of article 6,[6] as largely retained in the Special Rapporteur's reformulation (2032nd meeting, para. 39), since it was important to have a non-exhaustive list of judicial guarantees. He agreed that the phrase "In the determination of any criminal charge against him" should be transferred to paragraph 2 (*a*) of the new text.

23. He favoured the retention of the language used in the Covenant, since any departure from that language would raise the presumption that the Commission meant something different, and that would not make for an effective provision. Moreover, the relevant provisions of the Covenant were concerned with the exercise of domestic criminal jurisdiction and were therefore relevant to the code.

24. A "hearing", as he understood the word, was wider than a "trial", since it could include pre-trial procedures which involved the determination of a criminal charge but did not actually amount to a trial.

25. Mr. KOROMA said he maintained the view that paragraph 1 of article 6 as reformulated should be brought into line with the French text. He would not insist on that point at the current stage in the work, but none the less thought that there was no harm in rectifying an error: mistakes could slip into a convention and become part of that convention.

26. The CHAIRMAN said that the discrepancy between the French and English texts could be considered at a future date. On that understanding, he suggested that the Commission should provisionally adopt the text of article 6 as amended by the Special Rapporteur (*ibid.*) and as further amended by the proposals of Mr. Pawlak (para. 11 above) and Mr. Eiriksson (para. 19 above).

It was so agreed.

Article 6 was adopted.

[6] See 1992nd meeting, para. 3.

The law of the non-navigational uses of international watercourses (*concluded*)* (A/CN.4/399 and Add.1 and 2,[7] A/CN.4/406 and Add.1 and 2,[8] A/CN.4/L.411)

[Agenda item 6]

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

TITLE OF PART II OF THE DRAFT

27. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that the Drafting Committee recommended that part II of the draft should be provisionally entitled "General principles", on the understanding that the title would be reviewed when all the articles of part II had been prepared.

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

The title of part II of the draft was adopted.

ARTICLE 6 [6 AND 7] (Equitable and reasonable utilization and participation)[9]

29. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that article 6 combined the texts of articles 6 and 7 as submitted by the previous Special Rapporteur and reflected the underlying concepts of article 5 as provisionally adopted in 1980. The latter article, which dealt with the concept of a "shared natural resource", had been criticized on the grounds that it lacked legal precision. It had, however, been recognized that effect could be given to the legal principles underlying that concept without using the expression itself in the body of the article.[10] The Drafting Committee had therefore prepared an article based on the principles of equitable and reasonable utilization and participation in the belief that such an article would more appropriately reflect the principles to be embodied in the draft. The new text did not use the word "share" and it did not refer to the relativity aspect of the uses of a watercourse, a matter which was covered by the provisional working hypothesis and would eventually be covered by the definitional article. Certain members had regretted that the concept of "sharing", which had appeared in earlier texts, had been dropped.

30. Paragraph 1 began with a statement of the basic obligation applicable to all watercourse States, namely that they should in their respective territories utilize a watercourse in an equitable and reasonable manner. That principle had been reflected in the former article 7. The second sentence of the paragraph then explained that that concept meant that a watercourse should be used and developed by watercourse States with a view to attaining optimum utilization thereof and benefits

* Resumed from the 2030th meeting.

[7] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

[8] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[9] For the text, see 2028th meeting, para. 1.

[10] See *Yearbook . . . 1986*, vol. II (Part Two), p. 62, para. 237.

therefrom consistent with adequate protection of the watercourse. Attaining optimum utilization and benefits did not mean achieving "maximum" use or the most technologically efficient use or that the State capable of making the most efficient use of the watercourse should have a superior claim to it. It meant the attainment of the best possible uses and benefits for all with a minimum of harm, in the light of all relevant circumstances and in a manner consistent with the adequate protection of the watercourse in terms, for instance, of flood or pollution control. Some members of the Drafting Committee had stressed that, at some future stage, consideration should be given to the possibility of defining "optimum utilization and benefits" in the article on the use of terms. Equitable utilization did not mean the equal sharing of a watercourse: there might well be cases of "unequal" sharing in the utilization of a watercourse which constituted equitable utilization. That basic concept would be fully explained in the commentary.

31. With regard to the terms used in paragraph 1, the expression "in an equitable and reasonable manner" would, of course, have to be interpreted on a case-by-case basis and the factors that were relevant in that regard were set forth in the new article 7. The words "adequate protection" covered not only measures of conservation, but also measures of "control" in the sense of measures to control floods, pollution or erosion. Although those words referred primarily to measures taken by individual States, they did not exclude co-operative measures or activities undertaken by States jointly.

32. Paragraph 2 provided for the consequences of equitable utilization, namely the equitable and reasonable participation by watercourse States in the use, development and protection of a watercourse. Equitable utilization by each State would necessarily lead to equitable participation by all the States concerned. An important element in that new paragraph was that equitable participation included both the right to equitable utilization, as provided in paragraph 1, and the duty to co-operate in the protection and development of the watercourse. The latter duty was linked to the future article on the general obligation to co-operate which was to be prepared on the basis of draft article 10 as submitted by the Special Rapporteur.[11] Article 6 therefore no longer spoke only of an entitlement, but also of a duty, which did not imply the creation of a collective management scheme but was, rather, linked to the general duty to co-operate. Since the future article 10 would contain references to such general principles as good faith, the Drafting Committee had not deemed it necessary to include them in paragraph 2 of article 6.

33. Doubts had been expressed in the Drafting Committee about some of the terms used in article 6, particularly the word "benefits" in the second sentence of paragraph 1 and the word "includes" in the second sentence of paragraph 2, which, it had been suggested, should be replaced by "shall be based on". It had also been noted that the use in some languages of similar words, such as "use" and "utilize" in English, would have to be reconsidered.

34. Lastly, the title of article 6 was new and reflected the new content of the provision.

35. Mr. KOROMA said that he accepted the principle of equitable and reasonable utilization, but had serious doubts about extending that principle in such a way as to impose an obligation on States to participate in the use, development and protection of an international watercourse. He therefore proposed that the words "and participation" should be deleted from the title of the article and that the words "shall participate", in the first sentence of paragraph 2, should be replaced by "may participate" or "may decide to participate".

36. Mr. ROUCOUNAS recalled that, at the Commission's thirty-eighth session, it had been agreed that the draft articles should reflect the idea of a "shared natural resource" without actually using that expression.[12] Article 6 as drafted, however, did not seem to reflect the idea that the waters of a watercourse were, by their very nature, shared among the States concerned.

37. Mr. AL-KHASAWNEH said he thought that the first sentence of paragraph 2 should be couched in less mandatory terms as he was not certain that the duty for which it provided really existed. He also had doubts about the second sentence of paragraph 2, which was lacking in legal precision. Did the word "includes", for instance, mean that there were rights other than the right to use the international watercourse system? In any event, the corollary of that right was not the duty to co-operate in the protection and development of a watercourse system, but rather the duty not to cause injury to other States.

38. The CHAIRMAN, speaking as Special Rapporteur, said that article 6 had been the subject of a detailed discussion in the Drafting Committee, which had taken the view that the concept of equitable participation would convey the notion that States had a duty to co-operate and, in so doing, to achieve and maintain equitable utilization within the meaning of paragraph 1 of the article. The Drafting Committee, as he understood the position, had regarded the second sentence of paragraph 2 not as stating two corollaries, but rather as referring to two aspects of the specific duty of equitable participation. Determining the precise contours of that duty might, of course, have to await the further development of the draft.

39. Mr. AL-KHASAWNEH said that, as it now stood, the second sentence of paragraph 2 none the less gave the impression that the right and the duty referred to were corollaries—and he did not think that that had been the intention of the Drafting Committee. He would, however, not stand in the way of the adoption of article 6.

40. Mr. KOROMA said he was still not convinced that there was a rule of law which required watercourse States to participate in the use, development and protection of a watercourse system.

41. Mr. ARANGIO-RUIZ said that, in his view, the mandatory term "shall" applied not so much to participation in the use, development and protection of an

[11] See 2001st meeting, para. 33.

[12] See footnote 10 above.

international watercourse as to the requirement that such participation should be equitable and reasonable. The effect of the word "may", if it were to replace "shall", as suggested by Mr. Koroma, would be virtually to destroy the intent of the article, which was to ensure that the States which made use of a watercourse did so in an equitable and reasonable manner. It should also be borne in mind that, even if a State made no use whatsoever of a watercourse that flowed through its territory, that watercourse inevitably affected the territory of that State. Those considerations might dispel some of Mr. Koroma's doubts.

42. Mr. GRAEFRATH said that he shared Mr. Koroma's concern. "Participation" referred not to a shared watercourse system, but to the use a State made of the waters within its territory and its co-operation with other watercourse States under specific agreements.

43. Mr. CALERO RODRIGUES said that, in purely theoretical terms, he agreed with Mr. Koroma that paragraph 2 should not be interpreted as imposing on a State a strict obligation to participate in the use of a watercourse. However, he read article 6 not as Mr. Koroma did, but rather as Mr. Arangio-Ruiz did. He understood paragraph 2 to mean that, where each State along a given watercourse used the waters of that watercourse in its own territory, there was participation in the uses, and such participation should be equitable and reasonable. What was stated in the article was only a general principle of co-operation that would have to be developed later in the draft.

44. Mr. BARSEGOV said that he, too, shared Mr. Koroma's concern on a matter which involved the sovereign competence of States. As he saw it, the Commission's task was to draw up a set of recommendations to assist States in concluding agreements on specific uses of watercourses.

45. Mr. BEESLEY said that he could accept the text of article 6 as worded on the understanding that it was interpreted to mean that watercourse States participating in the use, development and protection of a watercourse system should do so in an equitable and reasonable manner and not as imposing any obligation on watercourse States.

46. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 6 [6 and 7] as proposed by the Drafting Committee.

Article 6 [6 and 7] was adopted.

47. Mr. EIRIKSSON said that he had two proposals which he was making following the adoption of article 6 to ensure that they did not give rise to any debate. The first was that the word "respective", in the first sentence of paragraph 1, and the word "both", in the second sentence of paragraph 2, should be deleted and the second was that the second sentence of paragraph 1 should be couched in the active, not the passive, voice.

48. Mr. ARANGIO-RUIZ said that he could not agree to the deletion of the word "respective", which clarified the meaning of the provision.

ARTICLE 7 [8] (Factors relevant to equitable and reasonable utilization)[13]

49. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that article 7 was based on article 8 as submitted by the previous Special Rapporteur in 1984. As indicated in its title, article 7 was concerned with factors relevant to the equitable and reasonable utilization of international watercourses and thus provided States with guidance as to the meaning and application of article 6. The introductory clause of paragraph 1 provided that the utilization of a watercourse in an equitable and reasonable manner within the meaning of article 6 required that account be taken of all relevant factors and circumstances, including those listed in paragraph 1 (*a*) to (*f*). In its new version, that clause did not include the words "In determining whether the use . . . is exercised in a reasonable and equitable manner", which had appeared in the previous Special Rapporteur's draft. The Drafting Committee had decided, in order to achieve a more widely acceptable text, to delete any reference to "determining", which, in the view of some members, implied third-party determination.

50. Article 7 as it now stood recognized that, in the first instance, it was for States to make the necessary assessments in weighing the various factors. The cross-reference to article 6 made it clear that watercourse States were the primary actors in equitable and reasonable utilization and participation. The article did not, of course, preclude the possibility that technical commissions, joint bodies or third parties might be involved in such assessments under any arrangements or agreements accepted by the States concerned.

51. The word *implique*, in the French text of paragraph 1, was meant to convey the idea of the need to ensure that the relevant factors were taken into account. Article 7 did not, of course, deal with the question of the weight to be accorded, in the first instance by States, to the various factors or with the extent to which individual factors were to be taken into account in any given situation.

52. With regard to the list of factors and circumstances, the Drafting Committee had agreed with the conclusion by the Special Rapporteur indicated in the Commission's report on its thirty-eighth session, namely that the Commission should strive for a flexible solution and confine the factors to a limited indicative list of more general criteria.[14] The Drafting Committee had accordingly decided not to adopt the detailed list proposed by the previous Special Rapporteur. The list contained in article 7, paragraph 1 (*a*) to (*f*), was therefore only of a general nature and was not intended to be exhaustive or to establish any order of priority. Each factor had to be viewed in relation to the particular watercourse concerned.

53. Subparagraph (*a*) concerned physical or natural factors and included the factor of "contribution", which was referred to in the 1984 text. Subparagraph (*b*), which was new, combined several elements of the

[13] For the text, see 2028th meeting, para. 1.

[14] *Yearbook . . . 1986*, vol. II (Part Two), p. 63, para. 239.

former text. Subparagraph (*c*) related to the possibility of conflicting uses. Subparagraph (*d*), which was also new, spelt out a factor implicitly covered by subparagraphs (*b*) and (*c*). It should be noted, however, that "existing uses" were but one factor to be taken into account, and again no priority was assigned among any of the factors. Subparagraph (*e*) combined various elements of the former text. The expression "economy of use" referred to the avoidance of unnecessary waste and the cost of measures taken for that purpose was also highlighted. Subparagraph (*f*) provided for the availability of alternatives to a planned or existing use, but only where such alternatives were of a "corresponding value". "Corresponding" referred to equivalence in the broadest sense, meaning equally convenient, economical and, on the whole, of the same value, "value" being interpreted in a broader sense that a simple "cost" figure to include elements of convenience and practicability as well. Indeed, "cost-effectiveness" was the element implicitly stressed. Moreover, the alternatives envisaged related not only to alternative uses of the watercourse, but also to alternative means of achieving the desired objective, even without utilizing the watercourse.

54. The new paragraph 2 was linked to the application of article 6, as well as to that of article 7, and it no longer referred to "determining", for the reasons already stated in connection with paragraph 1 (para. 49 above). In addition, the requirement now involved an obligation to enter into consultations, rather than negotiations, in a spirit of co-operation. It had been considered that a reference to negotiation might be interpreted to imply the commencement of a procedure for the settlement of a dispute, when in fact, very often, a dispute as such did not exist. States might simply wish to exchange information or commence discussions. Paragraph 2 therefore aimed at dispute avoidance rather than dispute settlement and, at the present stage, the shaping and encouragement of co-operation was the objective being sought.

55. The phrase "when the need arises" was meant to serve as a "triggering" mechanism which was based on objective criteria and would bring paragraph 2 into play. It was not intended to mark the start of a formal dispute-settlement procedure to be invoked at the request of one State. In practical terms, if States applied the provisions of the draft articles in good faith and in a spirit of co-operation, a request by one State for consultations should not be ignored by the other States concerned.

56. The second sentence of paragraph 2 as proposed by the previous Special Rapporteur, which referred to the procedures for peaceful settlement to be provided for in the later parts of the draft, had been deleted. As the content of those provisions had not yet been discussed by the Commission, it had been considered premature to mention them at the present stage.

57. The title of article 7 had been adjusted in the light of the new wording.

58. Mr. BENNOUNA said that the text of article 7 was entirely satisfactory to him. He would, however, suggest that the word "or", in the first part of paragraph 2, should be replaced by "and" or by "and/or" to make it clear that articles 6 and 7 could be applied together.

59. Mr. MAHIOU, referring to the French text, suggested that the word *les* should be added at the beginning of paragraph 1 (*a*) to bring that subparagraph into line with the other subparagraphs.

60. The CHAIRMAN, speaking as Special Rapporteur, said that, in the English text at any rate, the absence of the definite article was a matter of euphony, not of substance, and did not mean that any particular factor carried less weight.

61. Mr. AL-BAHARNA said that he could accept article 7 as drafted. Without wishing to reopen the debate on article 6, however, he considered that, for the sake of consistency, the words "conservation and" should be added before "adequate protection" in the second sentence of paragraph 1 of article 6, in order to bring that provision into line with the wording of paragraph 1 (*e*) of article 7.

62. Mr. OGISO said that he, too, read article 7 in conjunction with article 6. He noted in that connection that article 6 consisted of two elements: equitable and reasonable utilization, as dealt with in paragraph 1, and equitable and reasonable participation, as dealt with in paragraph 2. The factors referred to in article 7, paragraph 1 (*e*), were particularly important with regard to participation. To make the relationship between the two articles clearer, he therefore proposed that the words "and participation" be added at the end of the title of article 7 and also after the word "utilization" in paragraph 1 of the article. He would not insist on his proposal if the Commission was reluctant to consider it at the present stage.

63. The CHAIRMAN, speaking as Special Rapporteur, said that personally he would have no objection to Mr. Ogiso's proposal. The response to the same proposal in the Drafting Committee had, however, been that article 7 did in fact cover participation inasmuch as participation was involved in equitable utilization, as was apparent from article 6, paragraph 2. The only element not covered in article 7 was thus co-operation, which would be dealt with in a separate article.

64. Mr. AL-KHASAWNEH proposed that, in paragraph 2 of article 7, the words "paragraph 1 of" should be inserted before "the present article".

It was so agreed.

65. He questioned the value of paragraph 1 of article 7, which was very ambitious and seemed to say that every case should be decided on an *ad hoc* basis and on its own merits. That would make the position of those responsible for taking a decision in such matters very difficult indeed, particularly since the paragraph laid down an imperative rule rather than a guideline.

66. The CHAIRMAN, speaking as Special Rapporteur, said that the Drafting Committee had endeavoured to comply with the Commission's wish to provide States with some guidance in the form of a non-exhaustive list of factors applicable to the utilization of an international watercourse.

67. Mr. BEESLEY said that, in his view, the list of factors would be more complete and accurate if it contained the word "biological" at some point. He could, however, accept the article as drafted, since the list was only indicative and the Commission would presumably revert to it.

68. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 7 [8] as proposed by the Drafting Committee, with the amendment proposed by Mr. Al-Khasawneh (para. 64 above).

It was so agreed.

Article 7 [8] was adopted.

69. Mr. EIRIKSSON said that, had time allowed, he would have liked to introduce a number of amendments. For instance, he noted that the word "circumstances", in the introductory clause of paragraph 1, did not appear in the title of the article and he wondered whether it was really necessary. He would have preferred to delete the word "concerned", in paragraphs 1 (*b*) and 2. He did not like the use of both the singular and the plural in paragraph 1 (*c*) ("use or uses") or the use of the word "particular" in paragraph 1 (*f*). He would like to have an explanation of the expression "economy of use" in paragraph 1 (*e*) and, in that context, would have preferred to speak merely of "protection and development". In his view, the word "corresponding", in paragraph 1 (*f*), should be replaced by a term such as "comparable". He would also have liked to amend paragraph 2 to read:

> "Watercourse States shall, at the request of any watercourse State, enter into consultations with respect to the application of article 6 or paragraph 1 of the present article."

70. Lastly, he thought it should be explained in a footnote that the numbers between square brackets were the original numbers of the articles, to avoid giving the impression that the Drafting Committee had been in doubt.

71. The CHAIRMAN thanked the Chairman of the Drafting Committee for his report and expressed appreciation for the patience and skill with which he had discharged his task.

The meeting rose at 6.05 p.m.

2034th MEETING

Tuesday, 14 July 1987, at 10.05 a.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Prince Ajibola, Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Draft report of the Commission on the work of its thirty-ninth session

1. The CHAIRMAN invited the Commission to consider its draft report, chapter by chapter, starting with chapter I.

CHAPTER I. ***Organization of the session*** (A/CN.4/L.413)

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

2. Mr. PAWLAK (Rapporteur) proposed that the words "and sets out the five articles on the topic, with commentaries thereto, provisionally adopted by the Commission at the present session" should be added at the end of the second sentence and that the words "and sets out the six articles on the topic, with commentaries thereto, provisionally adopted by the Commission at the present session" should be added at the end of the third sentence.

3. Mr. BARSEGOV said that the Commission had not yet seen the commentaries referred to in those amendments.

4. The CHAIRMAN said that the commentaries would appear in documents to be submitted to the Commission shortly and would form part of the relevant chapters of the draft report.

5. Mr. BARSEGOV said that he could not agree to the approval of commentaries he had not yet seen. Moreover, because of the lack of time, those commentaries were likely to be approved in great haste.

6. Mr. PAWLAK (Rapporteur) explained that the amendments he had proposed were intended to show that commentaries would be attached to the articles which the Commission had provisionally adopted on two of the topics on its agenda. The content of those commentaries would, of course, be considered by the Commission at a later stage.

7. Mr. MAHIOU, noting that past reports had contained wording such as that proposed by the Rapporteur only when a set of draft articles had been adopted on first reading, proposed that the amendments should be left in abeyance until the Commission had approved the commentaries to which they referred.

8. The CHAIRMAN suggested that the Commission should adopt paragraph 2 on the understanding that it would consider the amendments proposed by the Rapporteur when it approved the commentaries to which they referred.

Paragraph 2 was adopted on that understanding.

Paragraphs 3 to 8

Paragraphs 3 to 8 were adopted.