

Document:-  
**A/CN.4/L.458 [and Corr.1 and Add.1]**

**Draft articles on the law of the non-navigational uses of international watercourses. Titles and texts adopted by the Drafting Committee: Parts I, II and VI of the draft articles; articles 2, 10 and 26-33 - reproduced in A/CN.4/SR.2228 to SR.2230**

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

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

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operator, he believed there was less difficulty in accepting the principle of the responsibility of the State and its consequence, which was the obligation to provide compensation, than in the other case. He seriously doubted whether, in contemporary positive international law, the State had an obligation to provide compensation for the harmful consequences of activities not prohibited by international law, when those activities were carried out by private operators or other entities whose activities were not attributable to the State; that obligation would be in addition to the obligation of due diligence rightly expected of all States and he was referring in that connection to the classic *Trail Smelter* case.<sup>17</sup> That basic distinction was practically absent from the Special Rapporteur's approach and, in fact, had hardly been referred to by the members of the Commission. Yet, if it failed to make that distinction, the Commission would encounter difficulties in arriving at an agreement.

67. His second point involved the issue of the foundation of the topic. Mr. Solari Tudela's arguments in favour of the deletion of the words "injurious consequences" from the title were highly debatable. Recalling the basic philosophy underlying the draft articles on State responsibility, at least according to the approach which the former Special Rapporteur, Mr. Ago, had taken to it and which the Commission seemed to endorse, he pointed out that, in that draft, the Commission made a careful distinction between responsibility and reparation, which was only a consequence of responsibility. It was the internationally wrongful act which gave rise to responsibility. If, in addition, the internationally wrongful act resulted in individualisable harm, reparation was called for. While the internationally wrongful act formed the basis for the international responsibility of States in its general form, the factor which gave rise to reparation was harm. Unlike Mr. Solari Tudela, he believed that Mr. Ago's approach could be transposed, *mutatis mutandis*, to the topic under consideration: it could be considered that risk gave rise to certain mechanisms, particularly the obligation of prevention, which was essential, and that harm gave or could give rise to reparation.

68. Mr. ARANGIO-RUIZ, referring to Mr. Pellet's first comment on the conditions under which a State might be held liable for harm when it was not carrying out the activity which had injurious consequences, said he believed that the State was still acting as a governing institution in respect of the operator. To the extent that a State could be held liable, it would be liable not only because of the operator, but also by virtue of not having fulfilled the obligation of due diligence. However, a question remained in the case where a State was liable at the international level for transboundary harm resulting from a nuclear accident that had occurred in a territory under its jurisdiction or on board a ship flying its flag. There would then be two possibilities. The first was to apply the rule which he had drafted for dangerous activities, by analogy with the Civil Code of his country: the State was liable for a nuclear accident only if it was at fault and that would be the case only if the State was unable to prove that it was not at fault and that it had used

all due diligence. He had also suggested another solution: in the case of nuclear activities, it would be no more necessary for the State than for the operator to be at fault in order to be held liable; in that situation, the strict liability of the State would be the criterion. When the time came to adopt the rules on the causal liability of the State, the Commission should use a modified form of the rules provided in conventions relating to operators. While a regime of unlimited liability should be established, there should also be provisions relating to international solidarity in the event of a nuclear disaster, particularly for developing countries.

*The meeting rose at 1 p.m.*

## 2228th MEETING

*Friday, 21 June 1991, at 10 a.m.*

*Chairman:* Mr. Abdul G. KOROMA

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

### International liability for injurious consequences arising out of acts not prohibited by international law (*continued*) (A/CN.4/437,<sup>1</sup> A/CN.4/L.456, sect. G, A/CN.4/L.465)

[Agenda item 6]

#### SEVENTH REPORT OF THE SPECIAL RAPPORTEUR<sup>2</sup> (*continued*)

1. Mr. BARBOZA (Special Rapporteur), summing up the discussion, said some members had described his seventh report as proposing a repetition of the general debate and had said that the Commission had already dealt with such general concepts as were now brought to its attention. However, one member had recalled that the Commission's report on its forty-second session had stated:

The sixth report raised some complex policy and technical issues and contained 33 articles. Many members of the Commission felt that they needed more time to reflect on the issues raised in the report and

<sup>17</sup> See 2222nd meeting, footnote 7.

<sup>1</sup> Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

<sup>2</sup> For outline and texts of articles 1-33 proposed by the Special Rapporteur, see *Yearbook . . . 1990*, vol. II (Part Two), chap. VII.

were able to make only tentative remarks. The Commission therefore decided to revert to the issues raised in the sixth report at its next session.<sup>3</sup>

2. Accordingly, it was perplexing to find that some of the same members who had prompted the Commission to revert to those issues at the present session were now complaining because that decision had been followed.

3. One member had made the important comment that the Drafting Committee had not so far considered any one of the articles proposed, not even the first 10, which had been referred to the Committee at the Commission's fortieth session, in 1988. It had been urged that the Commission should start consideration of those first 10 articles at the next session, a view with which he could not but agree. Failure to consider those 10 articles had deprived him of the kind of guidance that was essential for moving ahead in any topic.

4. The Drafting Committee was the Commission's forum where dialogue was more lively and where comparison of ideas helped to dispel misunderstandings and made it possible to arrive at common formulations on difficult points. A good example in that connection was the topic of the non-navigational uses of international watercourses, which had at first been considered as totally intractable. However, the patient search for areas of agreement in the Drafting Committee had made it possible to arrive at formulations for some articles already adopted on first reading. Without the guidelines emerging from discussions in the Committee, particularly in a topic where progressive development of the law played such an important role, drafting new articles or correcting existing ones was rather like working in a vacuum.

5. The purpose of his seventh report was to make an overall review of the status of the work done so far, to identify trends on important issues and to try to give the General Assembly an indication of the direction in which the Commission intended to proceed. He had chosen to follow that course, suggested during the Sixth Committee's debate, rather than to continue drafting articles—a task which appeared rather useless.

6. The fact that a large number of texts, covering practically the whole of the topic, had already been presented and discussed implied that, if agreement could be reached on the basic issues, the task of completing the consideration of the articles would be done quite quickly. Such an approach to the seventh report would also serve to verify whether it was true to say that the Commission had developed its study in directions scarcely imaginable in 1978 and had considerably broadened the scope of the topic, a question that had been raised in the Sixth Committee. Of course, it was not easy to say what had been in the minds of those who had first thought of the topic in 1978, but one member had demonstrated that the Commission had not gone much further than the schematic outline, which had been accepted in principle some years ago, both by the Commission and by the General Assembly.<sup>4</sup> Actually, the idea that the scope had been extended was a fantasy. The draft ar-

ticles were intended to cover liability for transboundary harm, something that was badly needed. In so far as the environment was affected by transboundary harm, the articles had to do with environmental law and, in that sense, they simply complied with the recommendation contained in Principle 22 of the Stockholm Declaration<sup>5</sup> to develop the law of liability in the field of the environment. That notion had been reiterated in the 1991 European draft convention on the transboundary effects of industrial accidents.<sup>6</sup>

7. Two members had referred to the role of the Special Rapporteur. In his report, he had stated that the Special Rapporteur was neutral, meaning that he did not intend to impose his views on the Commission, either directly or indirectly. Of course, a special rapporteur made proposals and every one of his 33 draft articles constituted a proposal. If, however, his opinions were not accepted or encountered obstacles, he tried to discern the real trends in the Commission and in the Sixth Committee in order to find acceptable formulas. The process of codification was a dialogue between the Special Rapporteur and the Commission, and then between the Commission and the Governments represented in the Sixth Committee. Neutrality meant that a special rapporteur should not join any one faction, or try to head his own faction.

8. One member had pointed out that there were a number of conventions on specific activities and had suggested that the Commission should identify fields which stood in need of new rules. Personally, he took the view that, in a general exercise like the present one, the Commission was not called upon to identify particular fields where new rules were needed; that task should be left to other specific conventions. There did exist, however, some gaps in contemporary international law that the Commission's articles should fill, such as the lack of general principles.

9. No principles on the subject had been stated or expressly accepted by the international community. Many conventions on specific activities implied the existence of certain principles: reparation for damage caused without breach of an obligation, or the principle of prevention, or that of cooperation. Nevertheless, there had not been any declaration or any formal acceptance of those principles by the international community. During the discussion in the Commission, it had been said that a State had no obligation under international law to make reparation for the injurious consequences of an activity which was not prohibited by international law. One member, however, had rightly emphasized that in 20 years of environmental law rules had emerged for specific activities but very little in general terms. Also, very little had been done in the realm of liability, apart from an exhortation to States to develop the law on liability, that was to say, a repetition of Principle 22 of the Stockholm Declaration. He felt strongly that principles should be formulated, because no civilized legal system could afford to leave a gap that would reveal such a lack of solidarity as to cast doubt on the very existence of an international community. Principles like the ones proposed

<sup>3</sup> *Ibid.*, para. 472.

<sup>4</sup> See 2223rd meeting, footnote 5.

<sup>5</sup> See 2221st meeting, footnote 6.

<sup>6</sup> See 2224th meeting, footnote 11.

in the draft were unimpeachable; they stood to reason; they were logical, and the Commission had no need to come back to them. If, as it was said in the Commission, what was logical was not yet law, then it was the task of the Commission to propose those principles as law. Again, it had been stressed that the special situation of the developing countries should be taken into account. He heartily agreed with that position, and urged that the situation of developing countries should be borne in mind throughout the development of the topic.

10. As emphasized by one member, the Commission had arrived at several important areas of agreement. They included (a) the principle of *sic utere tuo ut alienum non laedas*; (b) recognition that the central theme was transboundary harm, whether threatened or actual; (c) acceptance of Stockholm Principle 21; (d) the principle that the innocent victim should not be left to bear the loss; and (e) the role of the balance-of-interest test. He fully concurred with that member and with his conviction that those (and other) areas of agreement formed a suitable basis for continuing with the topic.

11. On the question of the separation between the present topic and that of State responsibility, he would draw attention to paragraph 146 of the Commission's report on its thirty-ninth session, which pointed out that:

Contrary to State responsibility, international liability rules were primary rules, for they established an obligation and came into play not when the obligation had been violated, but when the condition that triggered that same obligation had arisen. . . .<sup>7</sup>

12. There were thus some general differences between liability and responsibility that related to the nature of the rules: secondary rules in State responsibility and primary rules in liability. That difference implied that, in responsibility for wrongfulness, there had to be a violation of an obligation. In the case of liability, the opposite situation prevailed: payment of the damages was the fulfilment of a primary obligation. Responsibility for wrongfulness would be discharged in certain cases, for example in obligations of result if the imputed State proved that it had employed all reasonable means to prevent the event from occurring. If, however, the event did occur, in the field of liability the State generally had to compensate without entering into the question of the means employed.

13. As to reparation, there were also different patterns in the two fields. The *Chorzów Factory* rule<sup>8</sup> or the restoration of the *status quo ante* were two possibilities. In the field of responsibility for wrongfulness he understood that the Commission had chosen the *Chorzów Factory* rule. In addition, there were important differences in terms of the incidence of a number of different factors, like the restoration of the balance of interest or the imposition of a ceiling on liability and also in the matter of reparation and compensation. The same was true of attribution. In State responsibility an act of an organ of the State was needed. In the case of liability, the Commission considered that the mere fact that an activity was being conducted in the territory of a State under its jurisdiction or control was sufficient.

14. It had been suggested during the discussion that the responsibility of the State for transboundary harm should differ depending on whether the State acted as an operator or not. In the former instance, one member of the Commission was ready to accept the principle of the responsibility of the State, but not in the case where the State was not the operator. That issue was tied in with the old debate about whether a State was liable for acts performed in its territory, namely, under its jurisdiction and control, by private persons.

15. The discussion had been a fruitful one and several areas of agreement had emerged. A clear majority agreed with him that the decision on the nature of the instrument should be postponed, although a few members would prefer the matter to be settled now and suggested that there should be two drafts, one of a binding character and the other purely recommendatory. The proponents of the latter approach none the less differed among themselves. Accordingly, it had to be inferred that the question of the nature of the instrument should be taken up later and that the Commission should continue to submit articles that were coherent, logical and politically acceptable.

16. With regard to the Commission's future work, there was a consensus that the topic should have very high priority in the next quinquennium and also that the Drafting Committee should start at the next session with the first 10 articles submitted to it in 1988, a conclusion he endorsed.

17. He had proposed at the beginning of the session the establishment of a working group to examine the principles of the topic so as to transmit the results of its work to UNCED. No group of "friends of the Special Rapporteur" had been suggested by him, a procedure which had not been accepted by the Planning Group. It had been rightly pointed out that the session was too advanced to permit a working group to produce anything of real importance. Other members suggested that the results of the working group's deliberations should not be sent to the Conference in Brazil. Actually, Working Group III of the Preparatory Committee for the Conference could reach its own conclusions by reading the Commission's proceedings. Consequently, and since the Drafting Committee would in 1992 take up the first 10 articles, which included the principles, he was grateful for the support received from many members but preferred to withdraw his proposal for a working group.

18. It was generally agreed that the title of the topic should be changed so as to replace the term "acts" by "activities". The change did not relate to the English text alone, and the conclusion to be drawn on that point was that the Commission had to submit the question of the title to the Drafting Committee with a view to asking the General Assembly to make the change.

19. With regard to scope, some members considered that activities should not be categorized because, after all, it was the transboundary harm that triggered liability, while other members wanted to broaden the scope so as to include the damage caused by isolated acts. Yet others insisted that the topic should relate only to the physical consequences of activities. However, it was plain that the majority were in favour of including both activities

<sup>7</sup> *Yearbook* . . . 1987, vol. II (Part Two), p. 43, para. 146.

<sup>8</sup> *P.C.I.J., Series A, No. 17*, judgment of 13 September 1928, p. 47.

involving risk and activities with harmful effects. One member proposed a different categorization of activities according to the risk involved: on the one hand, abnormally and particularly dangerous activities, and on the other, activities which caused damage that was not easily attributable to the sources. Perhaps when the time came, that categorization could be made compatible with the one in the draft.

20. Most members did not favour a list of dangerous substances. One member urged including it in the draft as a protection for developing countries, which would thus be able to claim the same standards of protection against activities using those substances as those embodied in the 1991 European draft convention on transboundary effects of industrial accidents. A majority accepted the principles already proposed in the draft, but one member wanted the articles on reparation to be no more than recommendatory and did not accept reparation as a principle. Other members took a similar view regarding prevention, although one of them expressly accepted the principle of reparation, exhaustion of local remedies and non-discrimination.

21. Again, many members urged that the idea that the innocent victim must not be left to bear his loss should find its way back into the formulation of the principle of reparation, and no objection was raised against that opinion. Reparation was then accepted as a general principle.

22. Many references had been made to the concept of threshold as a necessary element in applying those principles. It was obvious that the Commission must go on considering the subject of principles, including the concept of threshold, which needed to be refined somewhat.

23. In the matter of prevention, differences had emerged between those who believed that obligations of prevention should be binding, and those who preferred to relegate prevention as a whole to a separate, non-binding, instrument.

24. There was a considerable body of opinion that procedural obligations regarding prevention should be recommendatory only, and that view reinforced the preference for two separate instruments of a different legal character. It was generally felt that procedural obligations could be further simplified and that, if binding, they should be permissive, in other words prior international consent would not be required before the activity could be carried out. More members favoured unilateral measures of prevention than procedural obligations. Some believed that unilateral measures should be obligatory whereas others thought that general international law would cover the consequences of a breach of such measures. The latter view, of course, implied acceptance of State responsibility for the breach. One member argued that the measures should constitute obligations of conduct, which would give rise to legal consequences if breached; others insisted that such consequences should arise only where transboundary harm occurred. The subject of prevention was one on which there were widely-diverging views, with a strong trend in favour of non-obligatory measures of prevention. A separate instrument on prevention might well simplify matters. Including prevention in the topic tended to raise problems of duplication with the topic of State responsibility.

25. As to responsibility and liability, the Commission was virtually in agreement that civil liability should take priority, and State liability should be residual. One or two members had argued for a choice in favour of the victim. It had been contended that the draft should establish a minimum amount of regulation because of the differences in domestic legal systems. One member had emphasized that the draft should not require States to establish causal liability in their domestic law. Clearly, it was to be inferred from the debate that civil liability should be regulated in the draft, and should include the interrelationship between civil and State liability, on the basis of primary civil liability and residual State liability. The principle of non-discrimination was essential: without it civil liability could not operate equitably.

26. Lastly, some members considered that the question of the "global commons" should be excluded from the draft altogether. Others felt that the bilateral or State-to-State approach which prevailed in the draft was outdated, and that the "global commons" should be included. Some members would prefer to ask the General Assembly to assign the subject to the Commission as a separate topic. His conclusion was that the question should be left open at least for one more year, to enable him to complete his preliminary study of the subject.

27. Mr. FRANCIS said that he must disagree with the Special Rapporteur's conclusions about the "global commons". The subject was very urgent and the Commission should at least indicate its preliminary views to the General Assembly. Certainly, it was much too urgent to be deferred for a year. He did not think it should be grafted on to the present topic, since that would delay its examination even longer.

28. Mr. NJENGA asked what the Special Rapporteur had meant by concluding that the question should be left open. He fully agreed with Mr. Francis that the "global commons" was an urgent subject. It should be brought to the attention of the General Assembly, which could give the Commission its guidance on how to tackle it.

29. Mr. HAYES thanked the Special Rapporteur for a comprehensive but succinct summing-up of the debate. He was very disappointed, however, that the Special Rapporteur had withdrawn his proposal that a working group should be set up to consider the principles involved and attempt to draft a document which, after approval by the Commission, could be presented to UNCED. During the remaining period of the session, a working group should be able to prepare a coherent report in the light of the discussion so far. Indeed, failure to do so would reflect badly on the Commission. He appealed to the Special Rapporteur to reconsider his withdrawal of the proposal.

30. Mr. BEESLEY said he, too, shared the reservations expressed by Mr. Francis and Mr. Njenga about the Special Rapporteur's conclusions on the "global commons". He would welcome further comment on such an important issue. There was a strongly held view that the Commission ought to produce some material on the subject, and Mr. Hayes was right to say there was still time to do so.

31. He was also disturbed by the implicit assumption that the Drafting Committee had no time to deal with liability. Liability ought to go hand in hand with State responsibility although the two were different in nature. It would not be difficult for the Committee to tackle article 6, for example, since it already commanded general acceptance and the only change needed was to alter the one word "risk". Furthermore, the Commission had itself decided to give the Drafting Committee time to deal with liability. There had been no decision to give priority to State responsibility.
32. Mr. EIRIKSSON said that a working group could be helpful to the Drafting Committee, and it would also facilitate the preparation of the Commission's report on the topic. An informal group of that kind had been set up at the Commission's previous session to consider the question of an international criminal court.
33. Mr. ARANGIO-RUIZ said he disagreed. The Drafting Committee was working to a programme adopted by the Commission itself. Moreover, it had successfully advanced its work on five substantive articles. He himself was willing to serve on the Drafting Committee every morning from then on until the end of the session, and he was equally effective working at night.
34. Mr. PAWLAK supported the proposal to establish a small working group to assist both the Special Rapporteur and the Commission itself in their work on the principles involved in the topic. The important subject of liability should not be left out.
35. Mr. ROUCOUNAS said that the Special Rapporteur had produced an excellent summary. After ten years' work on the topic, a report should be submitted, at least on the principles on which agreement had been reached. Work could continue either in the Drafting Committee or in a small working group. However, the future treatment of the draft articles should not be tied in with UNCED. The question of the "global commons" had been discussed only superficially.
36. Mr. NJENGA pointed out that the Special Rapporteur had himself made the original proposal to set up a working group, but only in connection with the 1992 Conference. The establishment of such a group was essentially a matter for the Special Rapporteur, with the consent of the Commission. It was more important for the Drafting Committee to proceed with the 10 draft articles, which mostly related to general principles. The General Assembly should be asked to advise on the treatment to be given to the question of the "global commons".
37. Mr. BARSEGOV noted that six or seven members were in favour of presenting to the 1992 Conference a document on the "global commons", prepared by a special working group. Others objected to the proposal on various grounds: the Commission was not yet ready to make such a report, there was no real consensus on the subject, and the Commission, as an organ of the General Assembly, had no mandate for such a procedure. He wondered if the Commission had now reverted to its earlier view.
38. Mr. BEESLEY said the prevailing view seemed to be that the topic should not be considered closed. Consequently, procedural problems should not prevent it being reopened, perhaps through an informal group which could submit its views to the Drafting Committee.
39. Mr. EIRIKSSON said that two views appeared to have emerged: first, the Commission had no mandate to make a submission to the 1992 Conference, through a working group or otherwise; and second, there were procedural obstacles to setting up an informal working group.
40. Mr. ARANGIO-RUIZ said he deferred to the superior judgement of the Special Rapporteur, on the question of establishing a working group.
41. Mr. DÍAZ GONZÁLEZ said that the Special Rapporteur had expressly withdrawn his proposal for a working group to prepare a document for the 1992 Conference. Moreover, no document could be submitted without the prior approval of the Commission, and in the short time that remained no statement could be completed on principles on which no agreement had yet been reached in the Commission. An informal group was equally out of the question; all the Commission's work had official standing. If the Special Rapporteur required the assistance of experts, they could be appointed under the terms of the Statute of the Commission. The question of establishing a working group should be left for a more opportune moment.
42. Mr. CALERO RODRIGUES said the Special Rapporteur might well agree to the formation of a working group to prepare a summary of areas of agreement and disagreement within the Commission, thereby enabling the Commission to submit a report to the General Assembly based on some degree of consensus. As to UNCED, a report on the status of the Commission's work could be brought to its attention by the General Assembly.
43. Mr. BARBOZA (Special Rapporteur) said that, in his summing-up, he had described the "global commons" as an open, not a closed, question. So far, the Commission had given only perfunctory consideration to the subject, which was a relatively new field, and the discussion had been inconclusive. He had simply proposed that the Commission should wait one more year to consider the subject properly. As yet, there was little to report to the General Assembly. It was not even clear whether the "global commons" was a distinct topic or not. So far as the division of opinion on establishing a working group was concerned, there would be no need for a group to prepare a report on principles if the Drafting Committee took up the first 10 draft articles at the Commission's next session. Agreement had been reached on the scope of the draft articles, and there had been an important debate on prevention. The question of civil liability had also been partly resolved. The Commission would therefore be able to report some real progress to the General Assembly.
44. Mr. FRANCIS said that he did not agree with the Special Rapporteur's remarks concerning the "global commons", which could never be accommodated within the topic under consideration and should form the sub-

ject of a special study. The Commission should make that quite clear to the General Assembly.

45. Mr. EIRIKSSON said he did not think it was the Commission's intention to impose a working group on the Special Rapporteur. With regard to the remark that the agreement on matters such as scope and liability would be reflected in the Commission's report, the problem was that such agreement would be reflected in the parts of the draft report circulated to the Commission fairly early on, and possibly in only two languages, but it might well collapse at the end of the session. If that could be avoided by setting up some mechanism whereby advance agreement could be secured, it would be helpful for the work of the Commission.

46. Mr. BEESLEY said that he understood the Special Rapporteur's position on the question of the "global commons", but would point out that the question was not new to all members and that some of them had in fact spoken at some length on the matter.

47. The CHAIRMAN suggested that further discussion on the matter should be suspended.

*The meeting was suspended at 11.50 a.m. and resumed at 12.15 p.m.*

48. The CHAIRMAN said that, following consultations, it had been agreed that a working group would be set up to assist the Special Rapporteur in drawing up the conclusions of the debate.

49. Mr. BARSEGOV said that he would like to know who had agreed to the establishment of a working group and what the group's mandate would be. During the discussion, various kinds of working group had been suggested, but the Special Rapporteur himself had rejected the idea of any group. Regrettably, therefore, he could not agree to such an idea.

50. The CHAIRMAN explained that the working group would take as the basis for its work the summary of the situation made earlier in the meeting by the Special Rapporteur. There was no question of any Commission document containing a statement of principles being referred to the Conference in Rio de Janeiro. His suggestion had been made simply to find a way out of what appeared to be an impasse. Nothing would be referred to the Sixth Committee without the Commission's approval.

51. Mr. DÍAZ GONZÁLEZ said that matters were not at all clear. Before the meeting had been suspended there had been no question of a working group, and the Special Rapporteur had even withdrawn his proposal in that connection.

52. Mr. FRANCIS said that a working group would be a good idea in principle. However, as it was still not certain precisely what form the Commission's report on the topic to the General Assembly would take, a decision in the matter was perhaps a little premature.

53. The CHAIRMAN suggested, in the light of comments made, that further consideration of the matter should be deferred.

*It was so agreed.*

## Closure of the International Law Seminar

54. The CHAIRMAN said the participation, albeit indirect, of those attending the twenty-seventh session of the International Law Seminar in the work of the Commission was seen by members of the Commission as a guarantee for the future. The serious approach of participants was a measure of their commitment both to the Commission and to the rule of law, something that was particularly relevant at a time when there was much talk of a new international order. As jurists, the participants would have an important role to play in working together to ensure that the new international order was based on the rule of law. Their attendance at the lectures organized within the framework of the Seminar had enabled them to familiarize themselves with the United Nations system.

55. He trusted that participants in the Seminar had found their stay in Geneva useful and that they would be able to build on the friendships they had undoubtedly made for the future. He also trusted that they would take back to their countries many favourable impressions: they would perhaps return to Geneva one day as members of the Commission.

56. Mr. BOTA (Chef de Cabinet, Office of the Director-General), speaking on behalf of the Director-General of the United Nations Office at Geneva, said that it was his pleasure to address the participants in the twenty-seventh session of the International Law Seminar, which had been dedicated to the memory of Professor Paul Reuter, an eminent jurist who had devoted his entire adult life to international law. The work of the Commission, of which Professor Reuter had been a member for many years, would long bear the mark of his influence.

57. The Seminar had been attended by 25 jurists from widely differing parts of the world, all of whom had had the opportunity to familiarize themselves with the work of the Commission, to further their knowledge, and to exchange views in a constructive manner on recent developments in public international law. It was a source of satisfaction to him that the United Nations Office at Geneva continued to provide the venue for the Seminar. Now more than ever, the United Nations symbolized that global perspective of world affairs which alone was conceivable at the end of the current turbulent century.

58. As the Secretary-General of the United Nations had said in his most recent report on the work of the Organization:

Resolution of conflicts, observance of human rights and the promotion of development together weave the fabric of peace; if one of these strands is removed, the tissue will unravel.<sup>9</sup>

That was the underlying idea on which the whole approach of the United Nations had always been based—an approach which was designed to promote the well-being of the individual and which encompassed all aspects of the lives of States and peoples. It was that same approach which dictated the basis for the work of the

<sup>9</sup> Official Records of the General Assembly, Forty-fifth Session, Supplement No. 1 (A/45/1), p. 10.

Commission, concerned, as it was, with the topics of State responsibility, the jurisdictional immunities of States and their property, a draft Code of Crimes against the Peace and Security of Mankind, the law of the non-navigational uses of international watercourses, and relations between States and international organizations. All of them were topics that reflected the vast and dynamic nature of international law and the evolution of modern international life.

59. It was his hope that the Seminar would continue to be held in the future and that the United Nations would be able to provide the necessary facilities.

60. Miss FERIA, speaking on behalf of the participants at the twenty-seventh International Law Seminar, expressed appreciation for the opportunity afforded to them to attend the Seminar, dedicated to the memory of Professor Paul Reuter. Although none of the participants had had the honour of knowing Professor Reuter, they were acquainted with many of his writings. The lectures held during the Seminar had shed fresh light on the Commission's work on the progressive development and codification of international law and on the profound influence that Professor Reuter had exercised on many aspects of that work.

61. She thanked members for giving generously of their time to lecture on the topics currently before the Commission and on areas in which Professor Reuter had taken a particularly keen interest. The participants in the Seminar had derived much benefit from being taught by some of the foremost legal authorities of the day; they would return to their countries all the wiser, and eager to put their new knowledge into practice. Though they came from many regions of the world, they shared a common bond in their desire for a better understanding of international law, and, as international lawyers and civil servants, they looked forward to contributing to the progressive development of that law.

*Mr. Bota, on behalf of the Director-General, presented participants with a certificate attesting to their participation in the twenty-seventh session of the International Law Seminar.*

**The law of the non-navigational uses of international watercourses (continued)\* (A/CN.4/436,<sup>10</sup> A/CN.4/L.456, sect. D, A/CN.4/L.458 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.2)**

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY  
THE DRAFTING COMMITTEE

62. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the report of the Drafting Committee (A/CN.4/L.458 and Corr.1 and Add.1) containing the titles and texts of the draft articles proposed by the Committee.

\* Resumed from the 2218th meeting.

<sup>10</sup> Reproduced in *Yearbook* . . . 1991, vol. II (Part One).

63. Mr. PAWLAK (Chairman of the Drafting Committee), expressed his gratitude to all those who had contributed to the Committee's work during the 17 meetings it had held on the topic. He thanked in particular Mr. Hayes, who had replaced him during the three days he had been absent owing to other obligations, and paid a tribute to the Special Rapporteur, Mr. McCaffrey, whose constructive spirit and diligence had enabled the Committee to complete the first reading of the draft articles on the law of the non-navigational uses of international watercourses. Thanks to the Special Rapporteur and to the hard work of all those who had participated in the deliberations of the Drafting Committee, the Commission would, he trusted, have a second complete draft—after the draft on jurisdictional immunities of States and their property—to submit to the General Assembly at its forthcoming session. He also expressed appreciation to all members of the secretariat who had helped in finishing the work on time in an efficient and organized manner.

64. The Drafting Committee's report consisted of two parts, the first part (A/CN.4/L.458) covering in the main the articles the Drafting Committee had adopted at the current session. He had said "in the main" because two articles, namely articles 30 and 31, were in fact amended versions of two articles adopted at previous sessions, as articles 21 and 20 respectively. As indicated in the footnote to those two articles, it had been felt preferable to include them in document A/CN.4/L.458 so that the Commission would have before it the complete text of part VI.

65. The second part of the report (A/CN.4/L.458/Add.1) reproduced the articles adopted at earlier sessions except, for the reason he had just explained, for former articles 21 and 20. The Committee, having completed the consideration of all of the articles, had had a complete view of the draft and had deemed it appropriate to review the order of articles previously adopted. It suggested that the articles should be re-arranged as indicated in document A/CN.4/L.458/Add.1. Furthermore, in view of the recommendation which the Drafting Committee had reached after a long discussion on the use of the term "international watercourse", the word "[system]" had been eliminated throughout the draft. The Drafting Committee had also made a few adjustments, mostly of an editorial nature, to which he would refer at a later stage.

66. He suggested that the Commission should begin with document A/CN.4/L.458.

ARTICLE 2 (Use of terms)

67. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 2, which read:

*Article 2. Use of terms*

**For the purposes of the present articles:**

(a) "international watercourse" means a watercourse, parts of which are situated in different States;

(b) "watercourse" means a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus;

(c) "watercourse State" means a State in whose territory part of an international watercourse is situated.

68. Mr. PAWLAK (Chairman of the Drafting Committee) said that, following the usual practice, the Drafting Committee had felt that the article entitled "Scope of the present articles" should appear as the first article. The article on use of terms therefore appeared as article 2.

69. Article 2 consisted of three subparagraphs, of which subparagraph (a) contained the definition of the term "international watercourse". Although some members had felt that the definition should logically be presented after that of a "watercourse", the Committee had decided to define an international watercourse first, in view of the fact that the actual subject-matter of the draft was international watercourses and that the word "watercourse" was generally used throughout the draft in conjunction with the adjective "international". The definition in subparagraph (a) followed the text proposed by the Special Rapporteur in his report. The commentary would recall that some members objected to the expression "international watercourse", which in their opinion connoted common management, and favoured the term "multinational" or "plurinational".

70. Subparagraph (b) was based on subparagraph (a) of alternative B proposed by the Special Rapporteur in his report and took into account the preference that had been expressed in plenary for the term "watercourse" over the term "watercourse system". The main change the Committee had made to the definition of a "watercourse", as proposed by the Special Rapporteur, was to add the phrase "and flowing into a common terminus" at the end. In plenary, several members had observed that under the proposed definition, different drainage basins connected by canals would constitute a single watercourse system, a result which, in their view, had been undesirable. The requirement that the components of the watercourse should flow into a common terminus had been added in order to keep the scope of the articles within reasonable bounds.

71. The Drafting Committee had also substituted the phrase "surface and underground waters" for the one originally proposed by the Special Rapporteur, namely, "hydrographic components, including rivers, lakes, groundwaters and canals". It had noted that, according to experts, the term "hydrographic" referred to a drainage pattern rather than to the components of a watercourse system and that the term "hydrological", which the Special Rapporteur had suggested as a possible substitute, might be interpreted as encompassing atmospheric waters and would therefore cover much more than the components dealt with in the draft articles. It therefore had been agreed to omit the term "hydrographic". The Drafting Committee had felt that the reference to "rivers, lakes, groundwaters and canals", merely provided examples and could therefore be deleted, on the understanding that the commentary would explain that a system of surface and underground waters included rivers, lakes, aquifers, glaciers, reservoirs and canals.

72. Some members of the Committee had expressed doubts about including "canals" as one of the components of a watercourse. In their view, the term "watercourse" connoted a natural phenomenon and the draft

had been elaborated on that assumption. A territorial scope larger than what had been envisaged in elaborating the draft would emerge if, for example, canals connecting natural watercourses were included. For those members, such a result would be undesirable. With respect to the phrase "surface and underground waters", the prevailing view in plenary was that groundwater should be included in the concept of a watercourse at least in so far as it was related to surface water. The notion that groundwater should be connected with the watercourse in order for it to be considered as forming part of the watercourse was implicitly conveyed by the references to "physical relationship" and to "a unitary whole". That would be made explicit in the commentary.

73. Subparagraph (c) reproduced the definition of a "watercourse State", which had thus far been contained in article 3. Article 3 had been eliminated and articles 4 to 10 had accordingly been renumbered 3 to 9.

74. Mr. DÍAZ GONZÁLEZ said that, since 1980 the Commission had been considering the topic on the basis of a provisional working hypothesis, which had included the concept of an "international watercourse system". Thus, even though it had decided, at its thirty-ninth session, to leave aside the issue of the use of terms, the Commission had in fact been operating all along on the assumption that what was being talked about was a watercourse system. As indicated by the Special Rapporteur in his seventh report, the concept of a "watercourse system" was not a new one and had found expression in various international agreements, both old and new. The Special Rapporteur had therefore recommended that the draft articles should include a definition of the term "watercourse", submitting that the rights and obligations of watercourse States under the draft would be made most clear and cooperative planning and management of international watercourses most effective by defining that term as "a system of hydrographic components which, by virtue of their physical interrelationship, constitute a unitary whole".

75. The Special Rapporteur had proposed two alternative versions for the article on the use of terms, expressing his own preference for alternative A. In the course of the discussion, the majority of members had endorsed alternative A. It was therefore surprising that the Drafting Committee had chosen to ignore what was almost a consensus on the use of the word "system" and had virtually eliminated the use of that term from the draft articles. Accordingly, he wished to enter a general reservation regarding all of the draft articles so far as the use of terms was concerned. Furthermore, an explanation of the Drafting Committee's decision should be given in the commentary.

76. Mr. NJENGA said that he endorsed the Drafting Committee's changes to subparagraph (b), namely, the replacement of the enumeration of the various hydrographic components, as proposed by the Special Rapporteur, by the phrase "surface and underground waters". In addition, the phrase "and flowing into a common terminus", added to subparagraph (b), was an appropriate way of responding to concerns that had been expressed by some members and of defining the scope of the articles. On the other hand, the Committee seemed not to

have addressed the issue of underground waters that straddled two or more States and did not flow into a common terminus. In his view, that element should have been included in the definition.

77. Mr. BARSEGOV said that he had participated in the drafting of the text of article 2, which represented a compromise. The article involved the crucial issue of which of two alternative approaches to the wording should be adopted. He would not oppose adoption of the article as it stood. However, he wished to point out that the final nature of the document had not yet been determined. His assumption was that, on the basis of specific agreements they might conclude, the watercourse States would themselves determine whether the articles applied to specific watercourses.

78. Mr. ROUCOUNAS said that, throughout the debate on the topic, it had generally been agreed that the Commission should define the term "watercourse" in a manner that was acceptable to scientific experts and to jurists alike. He still believed that the term "international watercourse system" was the best choice in view of the Commission's objectives. Thus, he did not favour the wording currently used in subparagraph (b). He wondered, moreover, whether there was a difficulty from a drafting standpoint because the word "system" did not appear in other draft articles. In general, it would have been better to use the expression "international watercourse system" throughout the Commission's work on the topic.

79. Mr. Sreenivasa RAO said that he had strong reservations about article 2, which had made it very clear that the definition of a watercourse would not be linked to the third "limb" or element of the working hypothesis, namely, the concept of the relative, international character of a watercourse. The working hypothesis had, since 1980, provided the basis for the Commission's work on the topic, and the third limb had been a fundamental element on which Member States had expressed their views on the topic at the General Assembly over the years. It was not appropriate for the Commission to remove such an element, something that changed the thrust of the definition and cast the draft articles in an entirely different light. Any change of that nature should come from the General Assembly itself. Article 2, as it stood, was therefore unacceptable. He could agree to it only if it included the third limb of the working hypothesis, even if that part were to appear in brackets.

80. Mr. AL-KHASAWNEH said that article 2 was a good compromise text. However, he wondered what was the relationship between article 2 and article 3, on watercourse agreements, which stated in paragraph 2, that:

Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. . . .

A definition was relatively easy to elaborate in the case of surface waters. However, according to the definition of a watercourse established in article 2 (b), three elements were involved: surface and underground waters; their relationship as a unit; and the flow of those waters into a common terminus. He wondered, then, to what extent should States, in determining the waters to which their agreements applied, take cognizance of those three elements.

81. Mr. McCAFFREY (Special Rapporteur) referring to Mr. Njenga's question about groundwater straddling two States, said that, if the groundwater was related to surface water, it would be included in the scope of the draft article; if it was unrelated, it would then fall under the category of confined groundwater. In the draft commentary, distributed to members for their use in connection with the review of the draft articles, he had noted that some members believed that confined groundwater should be included within the term "watercourse", provided the aquifer in which it was contained was intersected by a boundary. Perhaps the Commission might wish to reconsider that matter on second reading.

82. As to Mr. Sreenivasa Rao's comment on the third limb of the working hypothesis, namely, the notion of relative internationality, it had been the view of the Drafting Committee, and of a clear majority of members who had spoken on the issue in plenary, that it had not been necessary to include that notion in the definition because the requirement had been built into the articles themselves.

83. In regard to the question raised by Mr. Al-Khasawneh, his own understanding had always been that watercourse States were free to define the waters to which their agreements applied in any way they wished. The Commission was elaborating a framework agreement. Accordingly, in concluding agreements States were free to take account of the Commission's definitions or to ignore them. The value of the definition as it appeared in article 2 (b) was that it could help States to recognize that, if they excluded terrestrial elements of the hydrologic cycle, they did so at their risk because of the interrelationship among the various components.

84. Mr. ROUCOUNAS said that he had not heard any explanation for the deletion of the word "system" from the draft articles or any response to his observation about the use of that same word in article 2 (b). Members should bear in mind that they were adopting the articles on first reading; therefore, there was nothing wrong with placing some terms in brackets, rather than conveying the impression of a consensus that did not exist.

85. Mr. McCAFFREY (Special Rapporteur) said that, in defining the term "watercourse" as a "system of . . . waters", the Drafting Committee had assumed that whenever the term "watercourse" appeared in the draft articles, it would be taken to mean watercourse as defined in article 2. An additional factor was that the term "watercourse", rather than "watercourse system", appeared in the title of the topic. Furthermore, some members of the Committee had thought that it would be rather strange to define the term "watercourse system", since the topic was really concerned with watercourses.

86. He believed that the definition contained in article 2 represented a good compromise. He did not think it was essential to use the term "system" throughout the draft, nor did he think there was any legal difficulty arising from the absence of the word "system" throughout the draft articles and defining watercourse as a system of waters. In view of the fact that watercourse was defined in article 2 as a system of waters, the Commission

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

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

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

*The meeting rose at 1.05 p.m.*

## 2229th MEETING

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

*Chairman: Mr. Abdul G. KOROMA*

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

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

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY  
THE DRAFTING COMMITTEE (continued)

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

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

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

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

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

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

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

<sup>1</sup> Reproduced in *Yearbook* . . . 1991, vol. II (Part One).

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

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

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

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

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

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

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

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

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

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

*Article 2 was adopted.*

ARTICLE 10 (Relationship between uses)

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

*Article 10. Relationship between uses*

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

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

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

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

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

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

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

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

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

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

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

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

21. With regard to the concluding part of paragraph 2, which referred to “vital human needs”, the Drafting Committee had considered that, among the factors to be taken into account in solving a conflict between uses, special attention should be given to the supply of water needed to sustain human life, including drinking water or water required for the production of food. While there had been general agreement on the addition of the phrase in question, some members of the Committee had said that, in order to ensure the internal cohesion of the draft, care should be taken to clarify the link between vital human needs and the criterion mentioned in article 6, paragraph 1 (b), namely, “the social and economic needs of the watercourse States concerned”. The commentary

would therefore indicate that the criterion of vital human needs was not a new criterion, but an accentuated form of the criterion set forth in article 6, paragraph 1 (b).

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

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

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

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

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

*Article 10 was adopted.*

#### ARTICLE 26 (Management)

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

#### PART VI

#### MISCELLANEOUS PROVISIONS

#### *Article 26. Management*

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

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

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

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

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

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

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

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

the concept of management in a synthetic rather than an analytical way. The title was self-explanatory.

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

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

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

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

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

<sup>4</sup> *Yearbook* ... 1987, vol. II (Part Two), pp. 27-30.

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

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

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

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

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

*Article 26 was adopted.*

#### ARTICLE 27 (Regulation)

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

##### *Article 27. Regulation*

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

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

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

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

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

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

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

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

<sup>5</sup> Signed at La Paz, Mexico, 14 August 1983. *International Legal Materials*, Washington, D.C., vol. 22, 1983, p. 1025.

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

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

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

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

*Article 27 was adopted.*

#### ARTICLE 28 (Installations)

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

##### *Article 28. Installations*

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

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

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

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

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

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

50. Secondly, it had been necessary to define the nature of the obligation to consult mentioned in the *chapeau* of paragraph 2 as originally proposed. Even though consultations normally resulted in an agreement or understanding, that was not a required outcome. The Com-

mittee had therefore decided to delete the phrase "with a view to concluding agreements or arrangements".

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

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

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

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

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

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

<sup>7</sup> See footnote 3 above.

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

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

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

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

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

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

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

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

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

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

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

*Article 28, as amended, was adopted.*

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

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

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

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

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

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

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

<sup>8</sup> Ibid.

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

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

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

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

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

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

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

77. Mr. CALERO RODRIGUES said that he would not object to the proposed change, but he shared

Mr. Graefrath's opinion that a mere inversion might not be enough. He would be quite satisfied with the existing text because, in view of the title of the topic, it would be justified to refer first to the uses of watercourses.

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

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

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

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

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

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

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

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

*It was so agreed.*

ARTICLE 30 (Indirect procedures)

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

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

*Article 30. Indirect procedures*

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

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

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

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

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

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

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

*Articles 30 and 31 were adopted.*

## ARTICLE 32 (Recourse under domestic law)

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

*[Article 32. Recourse under domestic law*

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

92. Mr. PAWLAK (Chairman of the Drafting Committee) recalled that, at the preceding session, the Special Rapporteur had introduced in his sixth report a set of

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

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

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

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

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

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

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

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

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

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

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

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

102. Mr. Sreenivasa RAO said that articles 32 and 33 had initially been included in the section on implementation (articles 3 and 2, respectively), which the members of the Commission had considered unacceptable on many counts. At the time the two articles had been sent to the Drafting Committee, there had been not only the problem of ambiguity, as stressed by Mr. Calero Rodrigues, but also other problems. He personally feared that, if the Commission discussed the issue of remedies available to private parties, it would soon find itself in the realm of private international law, with all the resulting dangers of conflicts of laws. The question of remedies available to private parties was already dealt with in other texts and it might be asked whether it really belonged in a draft convention which would be basically a

framework agreement designed to govern relations between States. He also did not think it reasonable to imagine that individuals or groups of individuals might, on the basis of that framework agreement, hamper bilateral or multilateral negotiations held by States with a view, for example, to regulating the management of natural resources. That was his main reservation with regard to articles 32 and 33.

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

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

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

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

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

*It was so agreed.*

*The meeting rose at 1.05 p.m.*

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## 2230th MEETING

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

*Chairman: Mr. Abdul G. KOROMA*

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

<sup>9</sup> This informal paper was never issued as an official document of the Commission.

Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY  
THE DRAFTING COMMITTEE (continued)

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

1. Mr. PAWLAK (Chairman of the Drafting Committee) recalled that, at the previous meeting, discussion on the article had been deferred as some members had felt that greater emphasis should be placed on the protection of watercourses in times of armed conflict. Of the many proposals made to meet that point, the simplest would be to reverse the two phrases in the original text of the article so as to refer first to the protection, and then to the use, of watercourses during armed conflict. The article, as reworded, would read:

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

2. Mr. McCAFFREY (Special Rapporteur) said that the text read out by the Chairman of the Drafting Committee was, in his view, a definite improvement and probably stood the best chance of commanding general support. He would add that, although some members found it difficult to understand how a watercourse could be used in contravention of the rules and principles governing armed conflict, it was certainly a possibility.

3. Mr. NJENGA said that the new text made sense and safeguarded what had been achieved in the Drafting Committee. He trusted that the Commission would accept it.

4. Mr. BEESLEY said that he was among those who considered that the draft articles being prepared by the Commission should ultimately take the form of a framework convention and he very much hoped that any such convention would lay down residual rules. For that reason, he assumed that any residual rules which might eventually evolve out of the convention would provide broader protection, particularly for the environment, than the protection available under the principles and rules of

international law applicable in international and internal armed conflict. On that basis, he could accept the proposed text.

5. The CHAIRMAN said that, in the absence of further comment, he would take it that the Commission agreed to adopt the amended text for article 29 read out by the Chairman of the Drafting Committee.

*It was so agreed.*

*Article 29, as amended, was adopted.*

ARTICLE 33 (Non-discrimination)

6. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 33, which read:

*Article 33. Non-discrimination*

Watercourse States shall not discriminate on the basis of nationality or residence in granting access to judicial and other procedures, in accordance with their legal systems, to any natural or juridical person who has suffered appreciable harm as a result of an activity related to an international watercourse or is exposed to a threat thereof.

7. Mr. PAWLAK (Chairman of the Drafting Committee) said that the article had been referred to the Drafting Committee as article 4 (Equal right of access), annexed to the Special Rapporteur's sixth report.<sup>2</sup> The basic purpose of the article was to impose an obligation on watercourse States not to discriminate between their citizens and foreigners when granting access to their courts and tribunals with respect to harm or threat of harm arising out of watercourse activities conducted on their territories. The wording of the original draft had, however, given rise to problems. It would imply, for example, that watercourse States were obliged to allow their citizens and foreigners to have access to their courts and tribunals even in cases where such access was not allowed under their domestic law. The effect of such an interpretation would be that States would have to change their domestic law, which was not the intent of the article. All that was intended was that, where the citizens of a watercourse State had access under the domestic law of that State, foreigners should also have access. The Committee, which had considered cases in which foreigners might be required under some systems of domestic law to post a bond in order to be allowed access to the courts, had not felt that that practice was discriminatory. The article prohibited discrimination on the basis of nationality and residence. The term “judicial and other procedures” included judicial courts and administrative tribunals. Non-discriminatory access, it would be noted, was permitted in the case of appreciable harm and also of a threat thereof.

8. The present formulation, in one rather than two paragraphs, was much simpler and also made it unnecessary to maintain the reference to “watercourse State of origin” in the original text. The title had been changed because the article dealt basically with a non-discrimination requirement and that concept was now more clearly reflected in the wording.

<sup>1</sup> Reproduced in *Yearbook . . . 1991*, vol. II (Part One).

<sup>2</sup> See 2229th meeting, footnote 3.

9. Lastly, the article had been adopted with the reservation of one, and later a second, member of the Drafting Committee.

10. The CHAIRMAN suggested that a decision on article 33 should be deferred pending a decision on article 32.

*It was so agreed.*

ARTICLE 32 (Recourse under domestic law) (*continued*)

11. Mr. McCAFFREY (Special Rapporteur) said that, in the light of the discussion held at the previous meeting, he had prepared a revised version of the title and text of the article, which read:

*“Article 32. Remedies under domestic law*

“A watercourse State shall ensure that compensation or other relief is available for appreciable harm caused in other States by activities within its territory related to an international watercourse to the same extent as for harm caused within its territory by such activities.”

The Commission might also wish to consider the addition of the words “in accordance with its legal system” after the word “shall”.

12. In the original article, he had endeavoured to follow as closely as possible article 235 of the United Nations Convention on the Law of the Sea, which seemed to have been generally acceptable. The wording of the article had none the less given rise to considerable difficulty. For instance, some members, noting that the article itself dealt with a substantive matter, had felt that the word “recourse” was more procedural in essence than substantive, while other members had not been sure about the effect of the article under existing systems of domestic law. He had therefore departed altogether from the wording of the Convention on the Law of the Sea in an attempt to make the intent of the article clearer. The intent, of course, was that, if a source of harm arose within the borders of a watercourse State but the effect occurred outside those borders, the State in question would be able to ensure that there was no gap in the relief available under its domestic law. In other words, if a person had access under article 33, a remedy would be available: it would be pointless in the event of extraterritorial harm to provide for access but not for a remedy.

13. Mr. BARSEGOV said it had been stated that, if the source of the harm arose on the territory of a watercourse State, that State would give compensation for any harm caused in another country. The crucial question was, however, what precisely the source of the harm was. Was it caused by the activities of the watercourse State itself, which might, for instance, have been negligent in the construction of some building? Or was it caused by a drought that occurred on its territory or by the breaking up of ice with resultant flooding? It was essential to be quite clear about the sources of harm that were contemplated.

14. Mr. BEESLEY said the problem, as he saw it, could be divided into three parts: the first concerned the question of access or recourse, which was seemingly one

of process; the second concerned the question of remedy, which was a matter of law for individual States; and the third concerned the question of reparation or compensation, which could be monetary compensation but might also be some form of remedial action. It would be better to follow the precedent of the Convention on the Law of the Sea, which struck the necessary balance; in his view, it was directed at the first point to which he had referred—the process—and could possibly be interpreted as including the second—the remedy—but did not go so far as the third—compensation. For those reasons, he supported the intent of the proposed new version but thought that it might be a little over-ambitious. He would not object to it, however.

15. Mr. NJENGA said that the article in its new formulation was much easier to understand than the original. Its purpose, of course, was to provide that civil remedies would to some extent be available for harm caused to people outside the country that was the source of the harm. For instance, if the source of harm was State A but the effect extended to State B, nationals of State B could, under the terms of the article, have recourse in State A for any resultant harm. To that extent the article was a good one, but it could be improved further by adding the words “in accordance with its legal system”, as mentioned by the Special Rapporteur. They would facilitate acceptance of the article by all States since the phrase would enable them to implement the article in accordance with their own civil procedure. Should a State’s code of civil procedure not provide for remedies for damage occurring outside its jurisdiction, however, that did not mean that none would be available, for recourse could still be had via the machinery of State responsibility.

16. Mr. GRAEFRATH, endorsing Mr. Beesley’s remarks, said that he could not agree to the new provision as drafted. He would, however, be prepared to accept it if the words “in accordance with its legal system” were added after the word “shall” along with the words “recourse for” before “compensation”, since it was important to keep the provision at a procedural level. The inclusion of a substantive rule on compensation in a framework agreement would not be acceptable to many States, and it would perhaps be better therefore to stick to the formula of the United Nations Convention on the Law of the Sea.

17. Mr. BARSEGOV said that Mr. Graefrath had made a reasonable proposal and the new provision should be discussed only if the phrase “in accordance with its legal system” was included. The question he had raised earlier should also be clarified, since it was evident that the provision was concerned with activities which could, of course, have various consequences involving liability or responsibility. A further point was what would happen if, say, the ice melted in an Arctic country and flooded a country farther south? Could other States then contend that the Arctic country had failed to do everything possible to prevent flooding in a lower riparian State? Would that situation be covered, bearing in mind that it had been said that both an act and an omission should be taken into account? It was essential to be clear about exactly what was meant by the word “activities”.

18. Mr. TOMUSCHAT said that, while he essentially agreed with the new version proposed for article 32, he had reservations about the use of the word "remedy". First, how would that word be translated into French: did it correspond to *un droit* or to *un recours*? Furthermore, it was not clear whether the word "remedy" related to the procedural or substantive aspects of the law. According to the new version, a watercourse State "shall ensure that compensation or other relief is available", wording that involved a claim for compensation and, accordingly, was presumably related to the substantive aspect of the law. Mr. Graefrath had suggested that the words "recourse for" should be inserted in the first line. With the addition of those words, the article would then include both the claim and the procedure for making that claim.

19. Under private international law, the place where the harm occurred was not relevant to any claim for reparation. In article 32, the Commission was confirming that legal principle. However, it was broadening the scope of the principle so that it applied to activities carried out by States. In consequence, caution was in order. In affirming that compensation or other relief must be ensured, the article was leaving the way open for preventive injunctions and other legal actions. In his opinion, the article should be limited to ensuring that compensation was available, rather than compensation or other relief.

20. Mr. BEESLEY said that the issues under discussion had a direct bearing on the topics of international liability and of State responsibility. That interrelationship among the topics should be brought to the attention of the Special Rapporteurs concerned, and should be noted in the commentary.

21. Mr. CALERO RODRIGUES said that the new version of the article clarified the issues involved. He endorsed the idea of adding the words "in accordance with its legal system"; although not absolutely necessary, the phrase could allay fears certain States might have about article 32. He was also in favour of adding the words "recourse for", although doing so might make translation into the other languages more difficult. Article 33 might then become irrelevant because, with the proposed additions, article 32 would encompass both the procedural and substantive aspects of the matter.

22. In his opinion, the issue of ensuring compensation as opposed to compensation or other relief was not an essential one. The main concern of article 32 was that any remedies which applied to harm caused within the territory of a State should apply equally to harm caused outside that territory. Any such remedies would be based on the national legislation of the State concerned.

23. Mr. MAHIU said that, in elaborating the article, the Commission was simply drawing the logical inferences from article 7 which provided that "Watercourse States shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States". The exact scope of article 32 still had to be determined. In that connection, he fully endorsed the comments by Mr. Beesley and Mr. Graefrath, who had pointed out the merits of basing that article on the United Nations Convention on the Law of the Sea, which, in referring to procedural consequences, established that the

States concerned must ensure that recourse was available in accordance with their legal systems. That idea was in fact embodied in article 32, as originally proposed by the Special Rapporteur, and should also be expressed in the new version which, by and large, met with his approval.

24. The Commission should be flexible on the question of providing for compensation alone or for compensation as well as other relief. Compensation was one possibility; however, that did not mean that other possibilities should be excluded. He therefore saw no reason to delete the words "or other relief".

25. Mr. Sreenivasa RAO said that, as a result of the discussion on the new text of article 32, he was more able, in contrast to his earlier position, to accept whatever compromise text the Commission might agree on. At the same time, he believed that the issues raised under article 32 fell within the realm of liability and should be developed under that topic. As it stood, the article did no more than emphasize the obligation to use existing domestic remedies. Actually, it had no real meaning unless it established that, in so far as existing remedies were inadequate, States should provide remedies, either by amending existing legislation or enacting new laws. Yet that would cause difficulties for States which did not envisage such possibilities.

26. Of more concern was the fact that the article might be taken to mean that private individuals had the right to interfere in matters which primarily concerned inter-State relations. For example, in the case of a negotiated agreement between two States concerning management of a watercourse system, private individuals might use legal means to block implementation, even though the agreement had been concluded between States in the interests of large sections of the population. He was certainly not opposed to the basic principle that every individual, whether a national or a foreigner, should have the same rights in regard to a State's legal system. The idea was one to which all democratic countries subscribed. He was merely pointing out that the article seemed not to be addressing other more important aspects, such as cooperation between States.

27. Mr. TOMUSCHAT said that articles 33 and 32 were both concerned with non-discrimination. Article 33 prohibited States from discriminating on the basis of nationality or residence in granting access to judicial or other procedures. The new version of article 32 specified that States, in granting access to judicial and other procedures, should not discriminate on the basis of the place where the harm had occurred. As it was currently being interpreted, the article cast the issue of non-discrimination in a slightly different light, implying that appropriate remedies should be provided if they were not already available under existing legislation. That aspect of the article should be made more explicit.

28. Mr. EIRIKSSON said that he agreed with the observations of Mr. Tomuschat on the link between articles 32 and 33. Furthermore, he personally thought that the article of the United Nations Convention on the Law of the Sea on which article 32 was based had sought to establish the requirement that States, if they had not already done so, should provide for the possibility of suing for environmental damage. Accordingly, the wide scope

of article 32 as originally proposed had never been a matter of concern. At the present stage in the debate, article 32 seemed to deal essentially with equality of treatment as between harm caused inside and outside the territory of a State, while article 33 dealt with equality of treatment as between nationals and non-nationals. He could accept those two articles as they were currently being interpreted, but a more narrow interpretation would be unacceptable.

29. Mr. NJENGA said that there was really no need for two articles on non-discrimination. With the addition of the words "in accordance with its legal system", the new version of article 32 would adequately cover the entire issue, thus making article 33 irrelevant.

30. Mr. DÍAZ GONZÁLEZ pointed out that he had entered a general reservation in regard to the draft articles. As far as article 32 was concerned, he wished to draw attention in the first place to the need to correct the Spanish version. In particular, the term *remedio* was never used in Spanish legal terminology; the proper term was *recurso*.

31. He could not agree with the formula in the new version of article 32 to the effect that a watercourse State had an obligation to ensure that compensation was available for appreciable harm, a form of words which appeared to suggest that the watercourse State would have to set up a fund from which compensation would be paid in such cases. That could not be the intention of article 32, the purpose of which was to ensure that there should be no denial of justice and that a judicial remedy should exist for the benefit of the victim of appreciable extraterritorial harm.

32. The CHAIRMAN, speaking as a member of the Commission, said he was opposed to the new version of the article, which represented a step backwards. The Commission had formulated a set of draft articles to reflect the rules of international law on the subject. Article 32 bypassed that body of international law and entered into the realm of domestic law. The present draft was concerned with the relations between States, not with the relations between a State and private individuals under domestic law.

33. The intention of the Special Rapporteur had been to frame a rule based on the result of the *Trail Smelter*<sup>3</sup> arbitration. The text now proposed went beyond that particular precedent. In that instance, the two countries concerned, the United States of America and Canada, had had to enter into a special agreement to deal with claims by United States citizens who had no appropriate remedies under Canadian law. The United States had had to take up the claim against Canada. The case was one of State responsibility.

34. In the case envisaged under article 32, remedies under domestic law had to be available for the victim of appreciable extraterritorial harm and he could not accept that approach, since a body of international law was being framed on the subject. It would be going too far to suggest, as article 32 appeared to indicate, that the State

was responsible for ensuring compensation was available to the victim of appreciable harm, something which would seem to imply a subsidiary responsibility on the part of the State in the event, for example, of the operator responsible for the harm being unable to pay compensation because of bankruptcy. In the *Trail Smelter* case, more than compensation had been at stake. The company responsible for the harm had also been asked to put an end to the pollution.

35. As he saw it, the victim of the appreciable harm should be able to have recourse to judicial process for compensation or relief in accordance with the legal system of the State concerned. The wording of article 32 should make that position clear.

36. Mr. FRANCIS said that he would have found it difficult to accept the version proposed for article 32, in particular the very rigid notion of compensation it embodied, but that defect was largely remedied by introducing the words "in accordance with its legal system". The watercourse State should be required to make a recourse available to the victim of appreciable harm, so that the victim could institute legal proceedings. With the changes proposed by Mr. Njenga and Mr. Graefrath, article 32 should be acceptable and there was no need to defer a decision on it.

37. Mr. PAWLAK (Chairman of the Drafting Committee) proposed that a small informal group should be set up to prepare a combined text for articles 32 and 33 during a recess.

38. Mr. McCAFFREY (Special Rapporteur) said he believed that both article 32 and article 33 were necessary, one being substantive and the other procedural. The question had been raised of omissions, in connection with such events as floods. His own intention had been to cover only human activities that caused harm in another State.

39. With reference to a point raised by Mr. Tomuschat, if the domestic legislation of the State concerned provided remedies for the victims of appreciable harm within the State, the provisions of article 32 would require it to make the same remedies available to victims of appreciable harm outside the country. Its laws would have to be changed to arrive at that result. If, on the other hand, no such remedies were available to victims of appreciable harm within the country, the State would not be under any obligation to make them available for extraterritorial harm.

40. In the *Trail Smelter* case, the position had been that the victims in the United States had had no recourse or remedy in Canadian law because of a rule in English common law—valid in Canada—to the effect that an action for damage to land could only be brought in the courts of the place where the land was located. Consequently, the victims had had to ask the United States Government to take up their claim since they had exhausted local remedies, which was of course a requirement under the law of diplomatic protection. Article 32 did not mean that the State concerned had to set up a special fund to ensure compensation. The State was only required to make the possibility of compensation available, i.e. ensure the existence of legal recourse.

<sup>3</sup> See 2222nd meeting, footnote 7.

41. The article was not intended to bypass the rules set out in the other articles but to try to keep disputes from escalating into inter-State conflicts when they could be easily solved through judicial proceedings.

42. The debate had revealed differences in views regarding article 32 and the Commission needed more time to thrash out those differences. In the circumstances, he suggested that the article should not be included in the draft adopted on first reading, but kept for the second reading. A short paragraph on the subject could also be included in the report. In that way, the Commission might perhaps arrive at an article which all the members could understand.

43. Lastly, article 33 should have a place in the draft, since it laid down the non-controversial rule that the State should not discriminate.

44. Mr. EIRIKSSON said that, further to the clear explanations by the Special Rapporteur, he was more comfortable with article 32. As to the wording, he agreed that the proper term to use was "recourse". He would suggest that articles 32 and 33 should be included in the draft between square brackets in order to invite the views of Governments.

45. Mr. ARANGIO-RUIZ said that, following the suggestion to merge articles 32 and 33, it should be possible to devise wording to specify that the rule of non-discrimination applied not only to judicial proceedings but also to substance, namely to compensation, which was the subject-matter of both articles.

46. Mr. TOMUSCHAT said he was opposed to the suggestion to merge articles 32 and 33, for a merger would only combine all of the difficulties which were inherent in those two provisions. Special care should be taken with the French version of article 33, which should be prepared at the same time as the English version.

47. The CHAIRMAN, speaking as a member of the Commission, said that the question of access was particularly important for the plaintiff.

48. Speaking as Chairman, he invited the Commission to go into recess to enable a small informal group to work out a new text for articles 32 and 33.

*The meeting was suspended at 11.40 a.m. and resumed at 12.35 p.m.*

49. Mr. PAWLAK (Chairman of the Drafting Committee) said that the small informal group had examined the possibility of revising article 32 but had decided to prepare a new text which combined articles 32 and 33 and which read:

*"Article 32. Non-discrimination"*

"Watercourse States shall not discriminate on the basis of nationality or residence:

"(a) in ensuring that compensation or other relief is available for appreciable harm caused to other States by activities within their territories related to an international watercourse to the same extent as for harm caused within their territories by such activities;

"(b) granting access to judicial or other procedures to any natural or juridical person who has suffered appreciable harm as a result of an activity related to an international watercourse or is exposed to a threat thereof."

50. In the proposed new text, subparagraph (a) dealt with non-discrimination with regard to access to compensation and reflected the contents of the former article 32. Subparagraph (b) dealt with non-discrimination with regard to access to judicial and other procedures and embodied the contents of the former article 33.

51. Mr. CALERO RODRIGUES said that, despite their efforts, for which he was grateful, the members of the informal group had not succeeded in producing a satisfactory text. The wording of the new article contained many of the earlier ambiguities, and was not at all clear. He would have been prepared to accept article 32 as revised and as further amended during the discussion, but he could not accept the new text, which merged articles 32 and 33. He suggested that article 32 should be approved in its amended form and that both article 32 and article 33 should be placed in square brackets.

52. Mr. RAZAFINDRALAMBO said he agreed with the suggestion by Mr. Calero Rodrigues, although he was not, *a priori*, opposed to the new article 32. There was a difference between the article's two provisions in that subparagraph (a) referred to the right to compensation in the event of appreciable harm being caused, while subparagraph (b) dealt with the principle of access to judicial procedures. That difference explained why the last words "or is exposed to a threat thereof" appeared in subparagraph (b) and not in subparagraph (a). As a matter of drafting, he suggested that the last part of subparagraph (b) "as a result . . . threat thereof" should be deleted.

53. Mr. SOLARI TUDELA said he had misgivings about the new formulation. The reference in subparagraph (a) to compensation being made available for appreciable harm would appear to impose on the watercourse State an international obligation to set up a fund to guarantee payment of the compensation. The new text obviously went much beyond the framework agreement under consideration.

54. The phrase "in accordance with their legal systems", which formed part of the original text of article 33, was no longer found in subparagraph (b). It was fundamental and he could not accept its elimination. He proposed that article 32 should be left aside for the time being, as had indeed been suggested by the Special Rapporteur, and article 33 should be retained in the draft.

55. Mr. HAYES said he understood that, in the new version of article 32, subparagraph (a) replaced article 32 itself and subparagraph (b) replaced article 33. The effect of the two articles, as they had stood previously, was to remove the obstacle to non-nationals obtaining access to the courts to present their claims on an equal footing with nationals. The same remedies were, moreover, to be provided for harm caused both outside and inside the State where the activity took place. The new text was likewise based on the principle of non-discrimination. However, subparagraph (a) of the new

text did not convey the same meaning as article 32 in the version presented by the Special Rapporteur. In combination with the *chapeau*, its effect was to prohibit discrimination on the basis of nationality or residence in respect of harm occurring outside the watercourse State. However, a State could comply with the new article 32 by providing no remedy at all for harm occurring outside it, if none was available to its own nationals. Certainly, that would be non-discrimination in the literal sense, but it would not be very helpful to non-nationals, who were more likely to be affected. If the Commission now decided to abandon the original article 32, he did not consider that subparagraph (a) of the new draft would be a satisfactory substitute.

56. Mr. Sreenivasa RAO said he agreed with Mr. Calero Rodrigues that, instead of adopting the new draft article 32, the two previous drafts should be adopted together with the amendments proposed, and placed in square brackets. There was no disagreement on the principle of compensation, although the harm itself was not defined: it could consist of environmental or industrial damage, personal injury, loss of property, forfeiture of a private right, among other things, and as yet there was no agreement on a common threshold. The real problems of compensation began only at the stage of implementation. Those difficulties were the stuff of inter-State relations, and there was no need for private remedies to be included. In some cases, the State concerned would be unable to provide compensation, even if it was willing to do so. The draft ignored all the difficulties associated with compensation, including the issue of liability. Those problems could not be resolved in a single text.

57. Mr. ARANGIO-RUIZ supported the solution proposed by Mr. Calero Rodrigues.

58. Mr. NJENGA suggested that the Commission, instead of placing the two articles in square brackets, should insert a footnote in its report stating that they had not received the full endorsement of the Commission, and that further discussion was needed in the Sixth Committee.

59. Mr. SHI said the new text offered no real improvement and might even make matters worse. At the Commission's forty-second session, he had commended the efforts of the Special Rapporteur to avoid politicizing disputes concerning harm caused to individuals or juridical persons; but he had also warned that the two draft articles would be very difficult for some States to accept, and it would be best to present them in the form of an optional protocol.<sup>4</sup> He now felt that the best solution would be to delete them altogether. However, he could agree to the proposal of Mr. Calero Rodrigues, if it commanded general support.

60. Mr. EIRIKSSON said he had no objection to either of the two articles, or to the proposed merger. As a solution to the present impasse, however, he could willingly agree to both articles being placed in square brackets.

61. Mr. BEESLEY urged that the two articles should be kept separate. The new text would lead to a kind of internal discrimination, since it gave access to the courts in cases of appreciable harm, or risk of harm, but provided compensation only for the former. Certain situations might fall between the two stools. The Commission should perhaps allow itself some time for reflection before making a decision.

62. Mr. TOMUSCHAT said it would be best to place the earlier versions of article 32, as amended, and of article 33, in square brackets. It was the only practicable solution, short of abandoning both articles, which would be regrettable. He was not satisfied with the new draft, which had given rise to misunderstandings; it was not correct, as Mr. Solari Tudela had implied, that States would have a subsidiary duty to compensate for harm caused.

63. Mr. BARSEGOV said that the draft produced by the informal group illustrated the complexity of the subject. However, it also ran counter to the thrust of the draft articles, and tended to undermine the Commission's previous work on the topic. States should themselves be invited to consider the problems associated with articles 32 and 33, which should therefore be placed in square brackets in the Commission's report.

64. Mr. SEPÚLVEDA GUTIÉRREZ said he could not accept the informal group's text. Moreover, article 32 had already led to serious reservations in its previous form. He agreed with the solution proposed by Mr. Calero Rodrigues.

65. Mr. MAHIOU said he shared that view. No satisfactory compromise text had yet emerged; indeed, it was not yet clear whether it was possible to combine articles 32 and 33.

66. Mr. CALERO RODRIGUES suggested another solution: to refer the two articles back to the Drafting Committee.

67. Mr. PAWLAK (Chairman of the Drafting Committee) suggested that the two articles could be taken up by the Drafting Committee when the rest of the Committee's work was completed. If the Commission was unable to accept it, article 32 should be abandoned and a paragraph should be included in the report reflecting the discussion on the article and the differences of view that had emerged. He noted that no fundamental objections had been voiced in connection with article 33.

68. Mr. Sreenivasa RAO said that, in view of the limited time available, the only realistic solution was to put both texts in square brackets, incorporating in the report the suggestions made about courses of action under domestic law.

69. Mr. CALERO RODRIGUES, speaking on a point of order, withdrew his suggestion to refer the texts back to the Drafting Committee.

70. Mr. BARSEGOV said that it would be useful to refer the texts, in square brackets, to the Sixth Committee, with a full explanation of the difficulties. Governments could then assist in solving the complex problems involved.

<sup>4</sup> See *Yearbook* . . . 1990, vol. I, 2164th meeting, para. 45.

71. Mr. TOMUSCHAT said that, since the Special Rapporteur would have to reply fully to the points raised, the debate should be adjourned until the next meeting.

72. Mr. BARSEGOV supported that proposal, adding that the Commission could continue its discussion later in the day.

73. The CHAIRMAN suggested that the discussion should be held over until the next meeting.

*It was so agreed.*

*The meeting rose at 1.20 p.m.*

## 2231st MEETING

*Thursday, 27 June 1991, at 10.10 a.m.*

*Chairman:* Mr. Abdul G. KOROMA

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

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

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY  
THE DRAFTING COMMITTEE (continued)

1. The CHAIRMAN, recalling that, at the previous meeting, article 32 had been left pending, since no agreement had been reached despite an extensive debate, suggested that the Commission should deal first with article 33, which had already been introduced by the Chairman of the Drafting Committee.<sup>2</sup>

ARTICLE 33 (Non-discrimination) (concluded)

2. Mr. PAWLAK (Chairman of the Drafting Committee) said that the basic purpose of the article was to oblige watercourse States not to discriminate between

their own citizens and foreigners in granting access to their courts in respect of harm or threat of harm arising from watercourse activities carried out in their territories. In that connection, the Drafting Committee did not consider that the practice in the domestic law of some countries of requiring foreigners to post a bond in order to be given access to the courts was discriminatory. The article merely prohibited discrimination on the basis of nationality or residence. The wording adopted by the Committee was much simpler than that of article 4 (Equal right of access) which had been proposed by the Special Rapporteur in the annex to his sixth report.<sup>3</sup> Article 33 now consisted of only one paragraph and the reference to "the watercourse State of origin" had been omitted.

3. Article 33 had been adopted by the Drafting Committee with a reservation by one of its members, but it had not been placed in square brackets.

4. Mr. McCAFFREY (Special Rapporteur) said it was clearly understood that watercourse States were required to grant nationals or residents of other States access to judicial procedures only where such access was provided for their own nationals. There was no question of requiring them to amend their internal law to enable individuals from other countries to obtain easier access to their courts.

5. The principle of non-discrimination, which was already part of State practice, had been formally enshrined in almost all modern-day instruments adopted in the environmental field. For instance, article 2, paragraph 6, of the Convention on Environmental Impact Assessment in a Transboundary Context, adopted in 1991 by ECE, stipulated that:

The Party of origin shall provide ... an opportunity to the public ... to participate in relevant environmental impact assessment procedures ... and shall ensure that the opportunity provided to the public of the affected party is equivalent to that provided to the public of the Party of origin.

Another example was to be found in the Guidelines on responsibility and liability regarding transboundary water pollution, which had also been prepared by ECE and which provided that victims of pollution had the right to institute proceedings in the competent courts of the place where the harm had occurred.<sup>4</sup> The Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements and Disposal of Hazardous Wastes and Other Wastes, which was currently under consideration and would be annexed to the Basel Convention on the same subject, also provided for equal access to the courts of the State of origin.

6. The basic idea contained in article 33 should not prove too controversial.

7. Mr. SHI said that it would certainly be a valuable achievement if the Commission could adopt article 33 on first reading. In a spirit of cooperation, he would therefore withdraw the proposal he had made at the 2230th meeting that the article should be deleted altogether. He was willing to accept it as it was.

<sup>1</sup> Reproduced in *Yearbook ... 1991*, vol. II (Part One).

<sup>2</sup> For text, see 2230th meeting, para. 6.

<sup>3</sup> See 2229th meeting, footnote 3.

<sup>4</sup> See document ENVWA/R.45, annex.