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Summary record of the 2029th meeting

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

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

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

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

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

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

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

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

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

The meeting rose at 6.10 p.m.

2029th MEETING

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

Chairman: Mr. Stephen C. McCAFFREY

later: Mr. Leonardo DÍAZ GONZÁLEZ

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

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

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

[Agenda item 8]

THIRD REPORT OF THE SPECIAL RAPPORTEUR
(concluded)

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

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

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

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

* Resumed from the 2027th meeting.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14. At the thirty-seventh session, he had indicated that, since the Commission had already approved the previous Special Rapporteur's plan of work, he had started out with the idea that it would be pointless to submit a new outline and had thought that the study would continue on that basis.⁶ Accordingly, it had been at the insistence of two members that he had submitted a schematic outline in his third report (A/CN.4/401, para. 34). However, no member who had spoken on the

subject had been opposed either to the outline or to the suggestions to restrict the topic to international intergovernmental organizations of a universal character, on the understanding, of course, that the Commission could always decide later to extend the application of the draft articles to regional organizations, or even some non-governmental organizations, such as ICRC.

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

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

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

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

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

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

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

⁷ *I.C.J. Reports 1949*, p. 182.

⁸ *Ibid.*, p. 183.

⁹ *Ibid.*, p. 179.

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

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

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

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

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

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

¹⁰ *Ibid.*, p. 186.

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

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

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

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

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

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

It was so agreed.

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

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

[Agenda item 6]

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

ARTICLE 2 (Scope of the present articles)¹⁴ (*concluded*)

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

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

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

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

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

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

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

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

31. Mr. Beesley said that he endorsed the proposed change, essentially for the same reasons as Mr. Hayes, and in view more especially of Principles 21 and 22 of the Stockholm Declaration. He hoped that the commentary would touch on the considerations set out in a book by Jan Schneider¹⁵ which he had mentioned in the Drafting Committee and which referred to measures of protection of anadromous species, including the halting of hydroelectric development projects. Lastly, he would like to make it clear that he could also have accepted the original formulation.

32. Mr. Eiriksson said that his proposal had been designed to bring article 2, paragraph 1, into line with the other provisions of the draft. Whether the proposal

by the Chairman of the Drafting Committee did so would be seen after consideration of the other articles. For the time being, he had no objection to the proposal.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

words it was not a question of general protection of the environment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the Drafting Committee as a compromise solution after lengthy consultations.

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

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

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

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

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

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

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

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

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

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

It was so agreed.

Article 2 was adopted.

ARTICLE 3 (Watercourse States)¹⁶

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

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

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

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

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

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

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

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

Article 3 was adopted.

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

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

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

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

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

¹⁷ For the text, *ibid.*

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

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

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

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

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

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

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

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

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

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

The meeting rose at 1.10 p.m.

2030th MEETING

Thursday, 9 July 1987, at 10.05 a.m.

Chairman: Mr. Stephen C. McCAFFREY

later: Mr. Leonardo DÍAZ GONZÁLEZ

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo,