

Document:-
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Summary record of the 2215th meeting

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

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

*Downloaded from the web site of the International Law Commission
(<http://www.un.org/law/ilc/index.htm>)*

20. Mr. ILLUECA said that, in an excellent report, the Special Rapporteur raised two basic issues, first, whether the draft articles should apply to all of the hydrographic components of international watercourses and all of the forms of those watercourses, including rivers, their tributaries, lakes, canals, reservoirs and groundwater, and, secondly, whether watercourses should be treated as having a "relative international character". The first question could, to some extent, be resolved if the Commission retained alternative A proposed by the Special Rapporteur for the article on the use of terms. As to the second question, the Special Rapporteur concluded that the concept of the relative international character of a watercourse should be dropped. If members agreed that the concerns that had led to the introduction of the idea of a relative international character had, as indicated by the Special Rapporteur, been addressed in articles that the Commission had already adopted provisionally, one could not but admit that his argument was well-founded.

21. Reference was made in the report to the Common Zambezi River System. He requested clarification regarding the scope of the term "common river system" and whether it differed from what the Commission was seeking to define as a "watercourse system". Of the alternatives proposed for the article on the use of terms, he was in favour of retaining alternative A, which defined a "watercourse system". He also supported the Special Rapporteur's proposal to incorporate article 3 in alternative A as paragraph (c).

22. Mr. SEPÚLVEDA GUTIÉRREZ expressed his appreciation for a scholarly and persuasive report. The present final chapter of the Special Rapporteur's work would be most useful for drafting bilateral and regional treaties between States whose territories included part of a hydrographic system, because it would enable them to appraise the importance of each of the components of the system and such treaties would make for certainty and for progress in international law.

23. He urged the Commission to conclude the first reading of the topic as soon as possible. Much time had already been spent on preparing the draft, and the opportunity arose to make considerable headway. When the Sixth Committee received the text, it would no doubt make comments and valid criticism, but once completed, the articles would help reduce points of friction between States that had come about in connection with the utilization and ecological conservation of international watercourses, an issue of growing importance throughout the world.

24. He was in total agreement with the Special Rapporteur's seventh report. With regard to the proposed article on the use of terms, he favoured alternative A, and found the suggestion to change the order of articles 1 and 2 acceptable.

25. As he had consistently stated in the Commission, it was his understanding that the document to be approved on first reading was to be considered as a draft "framework agreement", regardless of the scope of that term.

The meeting rose at 11.10 a.m.

2215th MEETING

Tuesday, 28 May 1991, at 10 a.m.

Chairman: Mr. John Alan BEESLEY

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Díaz González, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, 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.4/436,¹ A/CN.4/L.456, sect. D, A/CN.4/L.458 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.2)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR
(*continued*)

PART I OF THE DRAFT ARTICLES

ARTICLE [1] [2] (Use of terms)² (*continued*)

1. Mr. ROUCOUNAS thanked the Special Rapporteur for his very detailed report, which gave the Commission an overview of some of the main technical issues involved and dealt with three questions, namely, the use of the term "international watercourse system", the problem of groundwater and the concept of the relativity of the proposed regime.

2. Concerning the first question, it now seemed that the Commission had been right to adopt a unitary approach to the subject as concerned the regulations to be adopted and the regime to be applied. With regard to the "system" concept as such, the report reaffirmed the need to use that term, first of all because a watercourse was composed of interrelated elements and the modification of any one of those elements automatically affected all the others and, secondly, because only an overall approach to an international watercourse as a system in perpetual motion would allow for the full implementation of the principle of equitable and reasonable utilization, which was the basis of the Commission's draft. Thus, terms must be used that were consistent with physical reality and reflected the phenomenon of the hydrologic cycle. Moreover, in view of the ever-closer links between the science of law and the other scientific disciplines, the use of the term "system" was the least of the terminological changes that jurists owed scientists.

3. The use of the term "groundwater" in the draft articles was not only justified by physical reality but was

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

² For text, see 2213th meeting, para. 66.

also necessary from a legal point of view. If only for spatial reasons, it was impossible to say where the pollution of a river began and where it ended. The inclusion of references to groundwater in the draft would also improve the ability of national and international mechanisms to reduce the risk of causing appreciable harm to the system. Lastly, international law could not remain indifferent to the fact, as pointed out by the Special Rapporteur, that groundwater represented 97 per cent of the planet's fresh water and most of mankind depended upon it for its needs.

4. With regard to the "relative international character" of watercourses, he agreed with the Special Rapporteur that that concept would create doubts about the Commission's work and uncertainty about the real scope of the draft, while failing to have the restrictive effect that its authors had intended. The concept, whose origins were lost in the intricacies of the Drafting Committee, was now irrelevant because the articles adopted on first reading defined the scope of the text as a whole.

5. Lastly, he expressed his preference for alternative A of the draft article on the use of terms. He also noted that the term "surface waters" was translated in French both as *eaux de surface* and as *eaux superficielles* and he wished to know which term was preferred.

6. Mr. TOMUSCHAT said that the Special Rapporteur's report gave a very clear picture of the international situation with regard to the regulation of the use of international watercourses. He agreed with the Special Rapporteur's recommendation that the order of draft articles 1 and 2 should be reversed to bring part I of the draft articles into line with other conventions drafted by the Commission.

7. Concerning the use of terms, it would appear that the Special Rapporteur considered the difference between the expressions "watercourse" and "watercourse system" to be only semantic in nature. Although all the components of an international watercourse could be regarded as a unitary whole for the purposes of the draft articles, he himself wondered whether special rules should not be drafted for groundwater, even though it was part of the hydrologic cycle, as depicted graphically in the report. The draft articles dealt primarily with surface water and did not contain a single provision that focused on the specific characteristics of groundwater. Inasmuch as the subject-matter of the draft articles was surface watercourses, its scope was fairly limited. Adding groundwater might well have a fundamental impact on the nature of the draft, which would then become a set of rules applicable anywhere in the territory of States parties, with far-reaching consequences for the concept of sovereignty. In a word, such an instrument would be a treaty not on watercourses, but on water resources. It might, for example, be worthwhile to consider whether the scope of article 11³ included surface water only or also encompassed groundwater. Clearly, the extent of the obligations of States would vary according to whether article 11 was given a broad or a restrictive interpretation.

³ For text and commentary, see *Yearbook... 1988*, vol. II (Part-Two), pp. 45-46.

8. He drew the Special Rapporteur's attention to that point because it was important to know exactly what areas the draft articles covered. If the watercourse system was extended to cover groundwater, practically all the territory of Germany would fall within the purview of the proposed articles.

9. Mr. NJENGA congratulated the Special Rapporteur on his scholarly report, which would certainly help speed up the Commission's work on a topic which was of great importance, especially in the light of current international activities in the field of the environment. He said that the General Assembly in its resolution 44/228 of 22 December 1989 had decided to convene UNCED in Brazil in June 1992 and to establish a Preparatory Committee for the Conference, which had already held two sessions. It should be noted that one of the working groups set up by the Preparatory Committee (Working Group II) had placed on its agenda an item on the protection of freshwater resources and that a number of delegations at both sessions had referred to the work of the Commission and had expressed the hope that it would contribute to the preparatory process and the success of the Conference itself. At the session held at Geneva from 18 March to 5 April 1991, the Working Group had recommended that the Secretary-General of UNCED should report on progress achieved by the Commission. He therefore suggested that the Chairman of the Commission should contact the Secretary-General of UNCED in that regard before the third session of the Preparatory Committee, to be held in Geneva in August 1991. An international conference, scheduled to be held in Dublin as part of the preparations for the 1992 Conference, at which freshwater resources would be among the topics discussed, could also benefit from the results of the Commission's work at its forty-third session.

10. Turning to the report itself, he endorsed the Special Rapporteur's proposal to reverse the order of articles 1 and 2 and considered that the Commission could approve it forthwith. The section of the report dealing with the use of terms gave rise to more difficult problems. As the Special Rapporteur rightly stated:

Now that the Commission has adopted the bulk of the provisions of the draft... the time has come to decide upon the scope of the term "international watercourse"... The first [issue] is whether the draft articles should apply to all of the hydrographic components of international watercourses... The second is whether, for the purposes of the draft articles, watercourses should be treated as having a "relative international character".

11. Recalling in that connection that the Commission had been working since 1980 on the basis of the provisional working hypothesis⁴ reproduced in the report, he said that any attempt at the present late stage to enlarge the scope of the draft articles might wreck the whole draft. The Special Rapporteur had given a very detailed explanation of the hydrological cycle and the interdependence of the various components of watercourses, but it should not be forgotten that the scientific definition of a hydrological basin did not necessarily have to correspond to the legal definition. In that connection, the Special Rapporteur quoted extensively from international agreements relating to groundwater and, in par-

⁴ See 2213th meeting, footnote 12.

ticular, the agreements between Yugoslavia and Hungary, Albania and Bulgaria, as well as the 1964 Treaty between Poland and the Soviet Union which defined frontier waters as including groundwaters intersected by the State frontier; he further cited the 1968 African Convention on the Conservation of Nature and Natural Resources, which recognized the importance of common groundwater, as well as the Helsinki Rules, which spoke of "surface and underground waters", and the Bellagio Draft, which stressed the need to ensure "... the reasonable and equitable development and management of groundwaters in the border region for the well-being of their [the States Parties] Peoples." It was clear that in all those cases recognition was given to the unitary character of water resources for legal purposes and that groundwater, whether or not it was connected with surface water, formed part of that unitary whole. He therefore endorsed the idea of extending the draft articles to groundwater as one of the components of the watercourse system. It was equally clear, however, as stated in the working hypothesis adopted by the Commission in 1980, that the system was international only to the extent that the uses of the waters of the system had an effect on one another and that, accordingly, there was not an absolute, but a relative, international character of the watercourse. In his view, that was an essential point. He therefore hoped that the concept of relativity would be maintained and that the Special Rapporteur would not insist on dropping it.

12. Having also studied with care the section of the report dealing with the use of the "system" or related concepts in international agreements and, in particular, the Special Rapporteur's conclusions, he was prepared to endorse the "system" approach now that the Commission had defined the scope of the draft articles.

13. He said that, subject to the comments and proposals he had made, he would have no difficulty in supporting the adoption of the article on use of terms as proposed in the report. For the reasons stated by the Special Rapporteur himself, he preferred alternative A. He likewise supported the suggestion that all definitions should eventually be consolidated in a single article entitled "Use of terms".

14. It was to be hoped that the Drafting Committee would devote all the time necessary to the consideration of the draft articles so that the Commission might complete the first reading at the present session. It would also be useful if, at the next session of the General Assembly, the Special Rapporteur could attend those meetings of the Sixth Committee at which the topic was discussed in order to ensure that the draft articles and the intentions of the Commission were not misunderstood.

15. Mr. MAHIU said that he agreed with the Special Rapporteur's idea of reversing the order of draft articles 1 and 2 and consolidating all the definitions in what would become article 2, except where a definition would remain in a specific article when it was closely linked to that article or did not belong elsewhere.

16. The definition of the term "international watercourse" gave rise to three problems, namely, the "system" concept, the "relative international character" of the watercourse and the applicability of the draft articles

to groundwater. With regard to the "system" concept, the Special Rapporteur had considered that it was in conformity with both the natural characteristics of watercourses and the spirit of the draft articles as a whole. He himself recognized that it had the merit of introducing flexibility, clarity and consistency into the draft, but he still did not consider it absolutely necessary. The essential point was that of the rights and obligations established in the provisions which had been adopted. Those rights and obligations appeared to be relatively well balanced and respected the sovereignty of States, perhaps excessively in some cases.

17. The Special Rapporteur was proposing that the concept of the "relative international character" of the watercourse should be dropped and, in that connection, it might well be asked why the rights and duties of States should be codified in such detail if that meant running the risk of neutralizing many of the provisions adopted and, in particular, all of part III of the draft. The caution the Commission had displayed at the outset had been understandable: the concept of relativity had been a kind of counterweight designed to keep the "system" concept within reasonable bounds because its globalizing aspect and unforeseeable consequences could create concern among States. Now that the tenor of the draft articles was known and everyone could assess their consequences, there was no longer any reason to say that the internationality of the watercourse was relative, especially if alternative B proposed by the Special Rapporteur for article 1 (or 2) was adopted. If the "system" concept was dropped, the relativity concept, which went with it, must also be dropped.

18. He was grateful to the Special Rapporteur for providing the Commission with the elements which would enable it better to understand the problem of groundwater and for having drawn attention to the quantitative importance of those waters and their vital importance for all countries, in particular in desert regions. Those factors lent weight to the argument for an international regime for aquifers. The question was, however, whether aquifers should be covered by the draft articles. It was natural and logical to answer that question in the affirmative in the case of aquifers which were connected to surface waters, but it might seem artificial or excessive when the connection between groundwater and surface water was insignificant or non-existent. For example, did the draft under consideration really apply to the situation with regard to the confined aquifers in the Sahara, which were undeniably international, but nevertheless of a special nature that would call for a particular status? Perhaps the Special Rapporteur could deal with that question in greater detail in order to determine whether that category of groundwater should be covered by the draft articles, in which case some amendments might have to be made to the draft, or whether additional separate codification work should be done on it.

19. Mr. GRAEFRATH said that the purpose of the Commission was not to make a contribution to hydrologic research, but to draw up a framework agreement whose provisions would promote the adoption of specific regimes for individual international rivers, while also possibly having a residual character. The definition drafted must therefore take account of the wide variety

of international watercourses and of their different components. In that connection, the two versions of a draft article proposed by the Special Rapporteur were not alternatives: both were concerned with the definition of the watercourse system, even though alternative B spoke only of a watercourse. Nobody would question the fact that any watercourse was a system consisting of hydrographic components which, by virtue of their physical interrelationship, constituted a unitary whole. But was that concept, which was borrowed from the hydrologists, sufficiently precise for the limited legal purposes of a convention whose purpose was not to protect water resources?

20. It was not clear from the Special Rapporteur's proposed definition that the draft articles would cover certain components only, and only in so far as those components related to a watercourse or to the parts of that watercourse that were in two or more States. That defect was even more marked if the third paragraph of the Commission's working hypothesis was deleted, since the very purpose of that paragraph had been to counterbalance the extremely broad "system" concept. As the definition stood, it would mean that the draft articles would include all the watercourses of a country and would, for instance, have repercussions on the entire territory of a small State crossed by an international watercourse. Another problem was whether two international watercourses connected by a canal would be regarded as one system. Would the link between surface water and groundwater mean that the two could not be separated in legal instruments? Notwithstanding the examples of the Seoul Rules and the Bellagio Draft, to which the Special Rapporteur had referred, matters relating to transboundary groundwater which were not directly connected with an international watercourse should not come under the Commission's draft. That should be clear from the definition, particularly since the object was a framework agreement whose scope and limits should be specified. Unless it was combined with the necessary restrictions, the concept of the unity of hydrographic components was perhaps not the best way of achieving that end.

21. He agreed with the proposed change in the structure of part I of the draft articles and with the inclusion of existing article 3 in the draft article on use of terms.

The meeting rose at 11.10 a.m.

2216th MEETING

Thursday, 30 May 1991, at 10 a.m.

Chairman: Mr. John Alan BEESLEY

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Díaz González, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa

Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

PART I OF THE DRAFT ARTICLES

ARTICLE [1] [2] (Use of terms)² (continued)

1. Mr. BARBOZA said that the seventh report, like the previous ones, was praiseworthy for its lucidity and intelligent approach. It reflected the commendable pragmatism and spirit of compromise that were features of the Special Rapporteur's work.

2. Previously, the Special Rapporteur had rightly placed special emphasis on conservation of the environment of the watercourse system and of the marine environment, in which rivers played a major role. The current report now focused attention on the all-important issue of groundwater, which constituted 97 per cent of the planet's available fresh water, excluding water in the form of ice in the polar caps and in glaciers, which was not, in any case, available to satisfy human needs.

3. He supported the idea of reversing the order of the articles on the use of terms and on scope, for the reasons given by the Special Rapporteur.

4. The first question of substance dealt with in the report was the definition of international watercourses, and the Special Rapporteur, in the light of international practice, recommended that the "system" concept should be retained. For his own part, he endorsed that conclusion, for without the "system" concept the present exercise would be futile. It was essential to take account of the 1980 provisional working hypothesis,³ which had guided the Commission's work to date. The essence of the definition of a watercourse system was the interdependence of its various components, which made the system a unitary whole.

5. That interdependence was not an invention of the Special Rapporteur. It was a reality and had to do with the actual nature of water: most of the uses of the water in one part of the system affected the uses of the water in other parts. It happened not only within one and the same component—for instance, in the upper or lower portion of a stream—but between different components: what was done to a lake could affect a river and what

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

² For text, see 2213th meeting, para. 66.

³ See 2213th meeting, footnote 12.