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Summary record of the 2228th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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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.¹⁷ 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. Roucounas, 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.4/437,¹ A/CN.4/L.456, sect. G, A/CN.4/L.465)

[Agenda item 6]

SEVENTH REPORT OF THE SPECIAL RAPporteur² (*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

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

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

¹⁷ See 2222nd meeting, footnote 7.

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.³

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.⁴ 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 Declaration⁵ 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.⁶

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

³ *Ibid.*, para. 472.

⁴ See 2223rd meeting, footnote 5.

⁵ See 2221st meeting, footnote 6.

⁶ 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. . . .⁷

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* rule⁸ 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

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

⁸ *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.⁹

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

⁹ 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.4/436,¹⁰ 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.

¹⁰ 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.4/436,¹ A/CN.4/L.456, sect. D, A/CN.4/L.458 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.2)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY
THE DRAFTING COMMITTEE (continued)

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

ARTICLE 2 (Use of terms) (concluded)

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

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

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

4. Mr. SEPÚLVEDA GUTIÉRREZ said that he shared the views of Mr. Díaz González and Mr. 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-