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Summary record of the 2167th meeting

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

Extract from the Yearbook of the International Law Commission:-
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2167th MEETING

Friday, 1 June 1990, at 10 a.m.

Chairman: Mr. Jiuyong SHI

Present: Mr. Al-Khasawneh, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Koroma, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/421 and Add.1 and 2,[1] A/CN.4/427 and Add.1,[2] A/CN.4/L.443, sect. F, ILC (XLII)/Conf.Room Doc.3)

[Agenda item 6]

FIFTH REPORT (*concluded*) AND SIXTH REPORT (*continued*) OF THE SPECIAL RAPPORTEUR

PARTS VII TO X OF THE DRAFT ARTICLES:

ARTICLE 24 (Relationship between navigational and non-navigational uses; absence of priority among uses)

ARTICLE 25 (Regulation of international watercourses)

ARTICLE 26 (Joint institutional management)

ARTICLE 27 (Protection of water resources and installations) *and*

ARTICLE 28 (Status of international watercourses and water installations in time of armed conflict) (*concluded*)

ANNEX I (Implementation of the articles)[3] (*concluded*)

1. Mr. BARBOZA said that the Commission had long before decided that the draft articles were to take the form of a framework agreement, and there was no going back on that decision. A framework agreement was an agreement of a general nature which set forth principles and other general rules in the form of obligations, not of recommendations. Other, more specific conventions could then be inserted within the frame provided by those rules and principles. The 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, along with other instruments on similar subjects, such as the 1972 Convention on International Liability for Damage Caused by Space Objects, provided examples; another was the 1985 Vienna Convention for the Protection of the Ozone Layer and the protocols thereto.

2. It was from that standpoint that he proposed to comment on the draft articles, starting with articles 24 and 25 submitted by the Special Rapporteur in his fifth report (A/CN.4/421 and Add.1 and 2).

3. Draft article 24, which elucidated the relationship between navigational and non-navigational uses, correctly defined the problem and supplied the correct answer: no single use enjoyed inherent priority over other uses, and any conflict that might arise had to be settled in accordance with articles 6 and 7 of the draft. Draft article 25, on regulation of international watercourses, was an appropriate application of the general obligation to co-operate set out in article 9, and was thus entirely acceptable.

4. Turning to the articles submitted in the sixth report (A/CN.4/427 and Add.1), he said that draft article 26, on joint institutional management, established an obligation which began as an obligation to consult, but which became an obligation of management as a result of the establishment of joint machinery. Management of an international watercourse was very important because it was the ultimate purpose of the sequence of obligations. Yet it was not defined anywhere, either in the earlier drafts prepared by Mr. Schwebel and Mr. Evensen or in the other instruments cited by the Special Rapporteur. The proposed text provided only an enumeration of functions, which were undoubtedly helpful in managing a watercourse but did not actually constitute management. The difference had to be clarified: management of the watercourse could not be defined through the functions of the organization concerned.

5. Furthermore, the obligation set out in article 26 was conditional only upon "the request of any" watercourse State. On that point, the draft diverged from previous proposals. The corresponding draft article submitted by Mr. Evensen, reproduced in paragraph (2) of the Special Rapporteur's comments on article 26, had specified that watercourse States had to deem it practical and advisable to establish permanent institutional machinery for the rational administration, management, protection and control of the waters of an international watercourse, and the obligation established had been further toned down by the use of the word "should" in paragraph 2. In Mr. Schwebel's draft, also reproduced in paragraph (2) of the comments, the commencement of negotiations was predicated not only upon "the request of any system State", but also on the additional condition: "where the economic and social needs of the region are making substantial or conflicting demands on water resources, or where the international watercourse system requires protection or control measures". Personally, he tended to agree with the Special Rapporteur's wording, which made the obligation stronger: the nature of the thing to be managed was such as to make joint institutional management a necessity.

6. Draft article 27, on protection of water resources and installations, established yet another obligation, namely to maintain and protect international watercourses. It called for two comments. The first was that the words "shall employ their best efforts", in paragraph 1, should be interpreted as establishing an

[1] Reproduced in *Yearbook ... 1989*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1990*, vol. II (Part One).

[3] For the texts, see 2162nd meeting, para. 26.

international standard. It had been argued that a State "naturally" protected related installations, facilities and other works. Article 27 was based on the view that that was not enough: a State had to employ its best efforts, not simply do what it deemed appropriate with regard to the way in which it normally treated its water resources.

7. The second comment related to paragraph 2, which established an unconditional obligation for watercourse States to enter into consultations. In his view, the peremptory character of that provision was, as the Special Rapporteur said in paragraph (3) of his comments on the article, "made necessary by the disastrous consequences that could ensue from the failure of a major installation or from the contamination of water supplies".

8. Draft article 28, regulating the status of international watercourses and water installations in time of armed conflict, was also acceptable in that it represented a compromise position between two opposite approaches.

9. With regard to annex I, he doubted—despite the title—whether the eight articles it contained could be viewed as "implementation" provisions. Draft article 1, which defined a "watercourse State of origin", might well be incorporated in the main body of the draft; apparently, its only purpose in the annex was to introduce the concept of liability. Draft articles 2, 3 and 4 purported to implement the principle of non-discrimination. They provided for equality of States with regard to the harmful effects of certain activities, equality of foreign and local residents regarding recourse for prompt and adequate compensation and, lastly, equality of right of access to administrative and judicial procedures. An attempt to explain a principle through its various aspects always entailed the risk that some aspect might be omitted, thus creating a lacuna. In his opinion, it would be preferable to establish the principle of non-discrimination in the simplest and most direct terms possible.

10. Draft articles 5 and 6 related to two applications of that principle. Article 5 established the duty to provide information in order to ensure the smooth functioning of the preceding provisions. Article 6 ruled out the possibility of a State claiming immunity in respect of proceedings brought by an injured person. All those provisions were thus ruled by a common logic.

11. The same could not be said, however, of draft articles 7 and 8. Article 7 provided for the convening of a conference of the parties. Such a technique was advisable when the scope of a convention was strictly limited, as was the case with the numerous instruments referred to by the Special Rapporteur in his comments on article 7. But the draft under consideration was a framework agreement, and the watercourse States parties to a treaty relating to the watercourse in question could make any changes they considered appropriate, without having to go through a conference of the parties to the framework agreement. As for the question of amendment of the articles, dealt with in article 8, it should be left to the future codification conference.

12. Generally speaking, annex I as a whole raised a hidden problem with far-reaching implications, namely that of civil liability, in other words the obligation of reparation in respect of the harmful effects of certain activities. The draft articles had not so far dealt with actions which might be brought by individuals before the administrative or judicial organs of the State of origin. Obviously that possibility had existed, but the recourse opportunities for individuals had depended entirely on the domestic law of the State in question. Under article 3 of the annex, States were obliged to provide recourse opportunities in their domestic law so that individuals might obtain adequate compensation. In other words, article 3 imposed an international standard on States parties. It might well be that their domestic law did not offer such recourse opportunities even to their own nationals. If that was the case, those States would, by virtue of article 2 of the annex, on non-discrimination, be obliged to amend their domestic law so as to make such recourse opportunities available not only to foreigners, but also to their own nationals.

13. From the point of view of reparation machinery, it was to be noted that the draft articles said nothing about the relationship between reparation claims brought by private individuals and those which might be brought by States. However, the Special Rapporteur's position emerged very clearly from his sixth report, in which he stated that it was a major premise of annex I that "watercourse problems should be resolved at the private level, through courts and administrative bodies, in so far as possible", adding that "resolution at this level will usually bring relief to those actually suffering injury more rapidly than diplomatic procedures" (*ibid.*, para. 39). That view was not shared by all commentators, since it had been demonstrated—in the Bhopal case, for example—that private procedures could take longer than diplomatic procedures. Nevertheless, the Special Rapporteur obviously preferred private action.

14. Yet what would happen if both a State and a private individual resident in its territory could bring an action? Did States parties have to wait for resident private individuals to start any diplomatic action? Was their action confined to supporting the claims of their nationals? Article XI of the 1972 Convention on International Liability for Damage Caused by Space Objects opted for the opposite solution: it did not "require the prior exhaustion of any local remedies which may be available to a claimant State or to natural or juridical persons it represents". Furthermore, under that Convention, nothing prevented a State or one of its nationals from instituting judicial or administrative proceedings before the courts of the State of origin. In such a case, however, the State which might represent an injured individual could not support that individual's claim until local remedies had been exhausted. The State could also pursue a claim on behalf of other injured individuals who had not had recourse to the domestic procedures of the State of origin. The Convention thus regulated, expressly and in a most adequate manner, the relationship between actions brought at the diplomatic level and those brought at the judicial level. Without going so far as to

say that the Special Rapporteur's position was indefensible, he considered that the question of that relationship required further in-depth study.

15. Mr. BEESLEY said that, in his fifth and sixth reports (A/CN.4/421 and Add.1 and 2 and A/CN.4/427 and Add.1), the Special Rapporteur had once again submitted draft articles that pointed the way to generally acceptable texts and had supported his proposals with authoritative precedents and formulations taken from treaty law and legal opinion. As he himself had pointed out on a previous occasion, bilateral and multilateral conventions and related agreements could serve as sources of law in the matter, perhaps to a greater extent than in other fields, because the nature of the present topic lent itself to the conclusion of bilateral and multilateral agreements.

16. He wished to begin with a general observation. Should the draft articles under consideration take the form of a framework agreement or of some other kind of instrument? The members of the Commission were clearly unanimous in favouring a framework agreement. He had doubts, however, as to whether that expression had the same meaning for all of them. For him, the meaning of the expression was very close to that attached to it by Mr. Barboza: a framework agreement was one which laid down general principles, but which was nevertheless binding upon the parties and which occasionally reflected rules of customary international law. In any event, a framework agreement was much more than a mere set of recommendations. Article 4 of the draft, entitled "[Watercourse] [System] agreements", and more particularly its paragraph 1, appeared to support that interpretation. Possibly the opinions of other members had evolved on that point as the need for a framework agreement of that type had become gradually more apparent.

17. He shared Mr. Barboza's view of the framework-agreement nature of the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, which had led to several treaties, such as the 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space. The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, as well as part XII (Protection and preservation of the marine environment) of the 1982 United Nations Convention on the Law of the Sea, were similarly of a framework-agreement nature. For the participants in the negotiations on the United Nations Convention on the Law of the Sea, part XII had represented a framework or umbrella agreement within the Convention itself. Actually, later events had shown that they had been right: numerous regional agreements had been concluded on the basis of that part of the Convention, which had laid down the essential rules to be followed in the matter. Indeed, the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, though adopted before the Convention on the Law of the Sea, had incorporated almost by reference certain provisions of the future convention, which was then still in the negotiating stage. Similarly, part XII of the Convention on the Law of the Sea contained a number of provisions which were of direct concern to the draft articles now under consideration. He had in mind article 195 (Duty not to transfer damage or hazards or transform one type of pollution into another), article 207 (Pollution from land-based sources) and article 213 (Enforcement with respect to pollution from land-based sources).

18. It was clear from the discussion and from the Special Rapporteur's reports that, at one time, it could have been said that, among the various uses of watercourses, navigation was regarded as having priority. Because of technological advances which, in many respects, had completely altered the perspective from which those uses were viewed, he had no objection to the Special Rapporteur's proposal not to attach priority to any one use over another. There now seemed to be a tendency within the development of technology and the parallel development of the law to review the many uses to which rivers could lend themselves—they had always served as sewers and as sources of drinking-water, but had gradually been developed for many other uses—perhaps not in order to give priority to ecological and environmental considerations, but, rather, to emphasize such considerations in order to restore an earlier balance. In that respect, too, the Special Rapporteur had dealt wisely with the question and put forward solutions which should make it possible to deal with the problems raised by conflicting uses. Draft articles 24 and 25 did not present any difficulty, but it was his intention to submit a few drafting amendments to the Drafting Committee.

19. One question remained. To what extent would the Commission codify and to what extent would it contribute to the progressive development of the law on the topic? In the present case, the problem was complicated by the fact that some members of the Commission, as well as some representatives in the Sixth Committee of the General Assembly, would not be prepared to go ahead unless the draft articles were dealt with as a framework agreement or a draft code. He hoped that the discussion would lead them to modify their views in favour of what might be regarded as work of progressive development and not simply codification. The Commission should be able to incorporate into the draft those considerations which were deemed to be universally desirable and, indeed, imperative. Once again, he was thinking of the interaction which was becoming increasingly apparent in the elaboration of the law, whether in connection with outer space, the ozone layer, the marine environment or watercourses. In the final analysis, the Commission would also have to tackle a problem which arose in several topics, more especially the one under consideration, namely the relationships between sovereignty, the now widely accepted duty of co-operation and the less widely accepted notion of custodianship or stewardship which was gaining ground in the law. That question had already arisen during the discussion on the need to protect watercourse systems from pollution, but the interaction called for more thorough examination when the time came to consider the provisions dealing with management and the draft articles of annex I, which went

beyond the mere concepts of management and implementation and were at the forefront of the elaboration of the law in that field.

20. In short, he was inclined to share the view that it was not possible to legislate in the matter of institutionalized management but believed that the Special Rapporteur had succeeded in showing that there was an intrinsic connection between any attempt at the management of an international watercourse and the need for some institutional process. It was essential to include a substantive article on that subject. If, however, difficulties were to arise in that connection, such a provision could find a place in an optional protocol, which would in due course not fail to command general support. It would be remembered in that regard that North America had some experience in the search for solutions through international joint commissions or recourse to arbitration for the purpose of ensuring the efficient management of its international watercourses.

21. As to annex I, the various ideas it contained had given rise to a useful discussion. It ought not to be too difficult to include provisions on non-discrimination in the main body of the draft. He was somewhat reluctant to forgo the provisions on equal right of access because it was becoming increasingly clear that they constituted the very essence of the topic.

22. Mr. AL-KHASAWNEH said that he felt compelled to revert to the question of the approach to the topic, because many forward-looking and interesting ideas proposed by the Special Rapporteur had been criticized for their alleged incompatibility with the framework-agreement approach. However, if such incompatibility existed, it argued for abandoning not those ideas, but the framework-agreement approach, which was not an end in itself. There was also nothing in the Commission's terms of reference that required it to follow that course. In addition, such incompatibility was more apparent than real, for the difference between a framework agreement and a treaty in the ordinary sense was one of degree rather than of kind. It was perfectly possible for a framework agreement to contain relatively detailed rules. A framework agreement did not have to be an exercise in generality.

23. On reading the Special Rapporteur's comments on draft article 24 in his fifth report (A/CN.4/421 and Add.1 and 2), he had had the same impression as Mr. Thiam (2166th meeting). The priority that navigational uses of international watercourses had allegedly had in the past might, on closer analysis, have been the result of economic and social needs rather than of an established legal régime. Article 10 of the 1921 Barcelona Convention and Statute on the Régime of Navigable Waterways of International Concern, quoted in the fifth report (A/CN.4/421 and Add.1 and 2, para. 122), did not provide a firm basis in support of the proposition that navigational uses had formerly enjoyed priority. It simply laid down the duty of riparian States "to refrain from all measures likely to prejudice the navigability of the waterway".

24. At any rate, paragraph 1 of draft article 24 appeared to state the obvious and might therefore not be necessary. Paragraph 2 extended the rule of weighing the relevant factors, as provided for in articles 6 and 7 of the draft with regard to equitable utilization, to the new field of resolving conflicts between several uses. Perhaps that was the only possible solution, but the inherent elasticity of the rule and the fact that the relationship between the avoidance of appreciable harm and the determination of equitable utilization was not free from problems would reduce the usefulness of the articles, which were intended to serve as a clear yardstick against which disputes concerning the interpretation or application of the future convention could be measured.

25. The obligation to co-operate provided for in draft article 25 should be cast in less rigid terms. That could be done by adding the words "as appropriate" between the word "co-operate" and the words "in identifying" in paragraph 1. States could co-operate through a regional or international organization as well as directly. In an instrument intended for world-wide use it was important that the modalities for co-operation should be flexible, so as to allow for the discharge of the duty of States to co-operate even in cases where political realities did not favour direct co-operation. The article was, however, acceptable.

26. Draft article 26 raised similar problems. In the first place, he wished to know how the obligations it embodied could be harmonized with article 21 as provisionally adopted by the Commission.[4] Secondly, he shared the view that the obligation to enter into consultations should not be triggered simply by a request by one watercourse State: an objective element should be involved. He therefore preferred the wording used in the corresponding provision submitted by the previous Special Rapporteur, Mr. Evensen, which was reproduced by the Special Rapporteur in paragraph (2) of his comments on article 26 in his sixth report (A/CN.4/427 and Add.1), namely "where it is deemed practical and advisable", or some similar wording. Thirdly, he had no difficulty in accepting paragraph 3, but he believed it was of the utmost importance that the conferring of such functions as fact-finding and peaceful settlement on joint organizations should not obscure the need for third-party fact-finding and the compulsory settlement of disputes. In his sixth report, the Special Rapporteur recognized the "generality and flexibility" of the rule of equitable utilization (*ibid.*, para. 19). Those qualities were clearly evident with regard to the other substantive obligations. The ultimate success or failure of the work now in progress would depend on whether the Commission could provide the necessary mechanisms to verify the fulfilment of the substantive obligations. Otherwise, given the generality of those obligations, the Commission's contribution to the avoidance of conflict would be very limited.

27. With regard to the security of hydraulic installations, the Special Rapporteur had more or less followed Mr. Evensen's suggestion to avoid dwelling on the issue in order not to reopen the lengthy negotiations that had preceded the adoption of the 1977 Additional

[4] *Yearbook ... 1988*, vol. II (Part Two), p. 54.

Protocols to the 1949 Geneva Conventions. The difficulties faced by the Geneva Conference had, however, not had anything to do with the question of the security of hydraulic installations. Perhaps there was a need for developing humanitarian law in that particular area. Obviously, if the exercise was going to be meaningful, the draft articles should go beyond what was contained in articles 54 and 56 of Additional Protocol I. Draft articles 27 and 28 nevertheless dealt with the question only perfunctorily and did not add anything to Protocol I. He admitted, however, that any solution that might be adopted would give rise to objections.

28. Draft articles 7 and 8 of annex I should form part of the miscellaneous provisions to be worked out by a conference of plenipotentiaries. Nevertheless, the idea of a permanent conference of the parties could not be completely ruled out and it would be interesting to see the reaction of the Sixth Committee of the General Assembly on that point. The annex raised two other problems. First, it had been suggested that the obligations for which it provided were more appropriate for a small group of integrated States and were therefore somewhat out of place in an instrument intended for world-wide use. There was an element of truth in that statement, but it also applied to a number of other obligations, such as that of co-operation. Secondly, the view had been expressed that the specific obligations set forth in the annex might have a bearing on the prospects of acceptance of the draft by States. Perhaps the Special Rapporteur might consider making the annex optional. On the other hand, there was something to be said against the idea of making implementation—which Mr. Graefrath (2165th meeting) had rightly described as the instrument's "moment of truth"—optional. He could, however, support the other provisions contained in the annex.

29. Mr. EIRIKSSON said that he, too, wished to thank the Special Rapporteur for having complied with the schedule he had outlined in his fourth report and for presenting the Commission with the final draft articles on the topic.

30. As a general point, he considered that the draft articles under consideration should be read in the light of the articles already adopted and possibly be brought into line with, or incorporated into, those articles.

31. In his view, there was a need for a statement on non-priority of uses of international watercourses, as contained in draft article 24. He wondered, however, whether regulation of international watercourses, as dealt with in draft article 25, should in fact be the subject of a separate article or whether it could not be incorporated into earlier articles.

32. The obligation stated in draft article 26, on joint institutional management, was set forth in very loose terms. It was in effect no more than an appeal, and he wondered, on the basis of his own experience, whether that appeal, which might well go unheeded, was really necessary. He would therefore suggest that the type of co-operation envisaged should be provided for in article 9, which dealt with the general obligation to co-operate, and that the forms of co-operation which the management of international watercourses should take could be spelt out in the commentary.

33. Draft article 27, on protection of water resources and installations, should be considered in the light of the draft articles on protection and preservation of international watercourses already referred to the Drafting Committee. He agreed in principle on the need to have a separate article on installations, but the reference to international watercourses themselves should, in his view, be reconsidered.

34. He shared the view of other members that the Commission should proceed with caution in the case of the status of international watercourses and water installations in time of armed conflict—the subject of draft article 28—and take care to comply with existing law on armed conflict. As to the suggestion that an admonition that international watercourses be used for peaceful purposes should be included in the general principles, he would refer members to article 88 of the 1982 United Nations Convention on the Law of the Sea, which reserved the high seas for peaceful purposes and which, under the terms of article 58, paragraph 2, also applied to the exclusive economic zone; to article 301 of that Convention, which established the principle of the peaceful uses of the seas and derived from the Definition of Aggression adopted by the General Assembly in 1974; and, lastly, to article 35 of Additional Protocol I to the 1949 Geneva Conventions, which dealt with protection of the environment in times of armed conflict.

35. He welcomed the articles in annex I on private remedies, particularly draft articles 3 and 4, which the Drafting Committee should study carefully. He also welcomed the Special Rapporteur's efforts to provide a framework of dispute-settlement mechanisms, the consideration of which, if it was to be really fruitful, should depend on the progress of work. Traditionally, such questions had been taken up in the final stage of the consideration of topics.

36. Finally, he trusted that, at its next session, the Commission would complete its consideration of the draft articles on first reading.

37. Mr. McCAFFREY (Special Rapporteur), summing up what had been a very rich debate, said that he would endeavour to refer to the broad lines of the discussion and to make certain proposals on the basis of the conclusions he had drawn from that discussion. He would not dwell on the general comments that had been made at various points in the discussion, but would note that it had never been his intention to propose anything other than a framework agreement. He apologized to any members of the Commission who felt that he had sometimes gone into too much detail.

38. Commenting first on the articles submitted in his fifth report (A/CN.4/421 and Add.1 and 2), he noted that draft article 24 had received general support and that, on the whole, members agreed that there should be no priority between the different uses of an international watercourse. Mr. Thiam (2166th meeting) and Mr. Al-Khasawneh had even expressed some doubt that navigation had ever had priority over other uses. Some speakers, however, such as Mr. Koroma (2164th

meeting), had stressed that the significance of navigation for certain States should not be underplayed. For that very reason, he had attempted, in article 24, to strike a fair balance between the various considerations at issue and trusted that he had succeeded in doing so. Mr. Koroma had also rightly pointed out that the word "absence" in the title of the article was used in a different context in paragraph 1. Mr. Njenga (2163rd meeting) and Mr. Razafindralambo (2165th meeting), for their part, had suggested that, in paragraph 2 of article 24, a reference should be added to article 8. Those comments and suggestions would duly be taken into account.

39. Draft article 25 had likewise received general support, although most members felt that the term "regulation" should be defined. He agreed on that point and considered that, as had been suggested, the Commission could look for guidance to the articles on the subject adopted by the International Law Association at Belgrade in 1980 (see A/CN.4/421 and Add.1 and 2, para. 139) and also to the third report of the former Special Rapporteur, Mr. Schwebel.[5]

40. Some members had expressed doubts with regard to paragraph 2 of article 25, querying the extent to which watercourse States could be required to "participate" in regulation works from which they derived no benefit. What he had had in mind was that the wording which he had used ("watercourse States shall participate on an equitable basis . . .") and which was drawn from article 6 of the draft would denote that such participation would be proportional to the benefits received. That point was in fact addressed in paragraph (2) of his comments on article 25.

41. Turning to the articles submitted in his sixth report (A/CN.4/427 and Add.1), he said that draft article 26, regarded by most members as important, had attracted the most comments. In the first place, it had been suggested that the word "organization", which had been the subject of criticism, should be replaced by "commission". He would have no objection to that. He would also have no objection to the proposal by Mr. Njenga and Mr. Razafindralambo that action to combat water-borne diseases should be added to the list of functions for which the organization or commission contemplated could be responsible, in view of the seriousness of that problem, particularly in Africa. He was also prepared to reformulate paragraph 3, in particular subparagraph (*a*), which referred to fact-finding functions and the submission of reports and recommendations.

42. As to the stringent nature of the provisions relating to consultations, some members thought that it was going too far to provide that "Watercourse States shall enter into consultations, at the request of any of them . . ." (para. 1); others, including Mr. Eiriksson and Mr. Thiam, considered, on the contrary, that that point could not be made too strongly. It had even been suggested that existing watercourse commissions should actually be required to meet, which was not always the case. One member had said that the obligation to consult applied above all in the case of contiguous watercourses, while another believed that it also applied to successive watercourses.

43. His object had been to formulate paragraph 1 in such a way as to strike a fair balance between a simple recommendation to enter into consultations and an obligation to enter into "negotiations", as proposed by Mr. Schwebel in his third report. Furthermore, some members had proposed that the obligation to consult should be made subject to certain conditions. While he was prepared to give consideration to that proposal, his fear was that it would provide States with an excuse that would make the obligation to enter into consultations—which was already not very stringent—practically illusory.

44. Some members considered that the term "management" in paragraph 2 should be properly defined and that a list of management functions was not enough. Others, however, took the view that the parties should be free to define management in the particular context. He was not opposed to the latter suggestion. He also agreed with Mr. Graefrath's comment (2165th meeting) that a list of management functions could only be indicative. He would have no objection to such a list appearing in an annex, as some members had proposed, or to action to combat water-borne diseases being added to the list, as requested.

45. In reply to those members who had questioned the value of article 26, having regard to the number of watercourse commissions that already existed, he would point out, first, that many of them were very specialized and were not necessarily concerned with management and, secondly, that specialists involved in the day-to-day operation of international watercourses who had had occasion to express their views at regional meetings held under United Nations auspices, such as the one at Addis Ababa in 1988, had called for the establishment of such bodies.

46. He also welcomed the quality of the drafting amendments which had been proposed, in particular for article 26, paragraphs 2 and 3, and which bore witness to the time and thought that had gone into them. He was not opposed to Mr. Al-Khasawneh's suggestion to harmonize draft article 26 and article 21,[6] and that could perhaps be accomplished by adding a cross-reference to article 21 in article 26.

47. With regard to draft article 27, he noted that some members believed that the question of protection was already amply covered by other articles; other members, while stressing the importance of the subject, had asked whether the article should not be confined to protection of installations without mentioning protection of watercourses. Mr. Graefrath had even suggested referring only to existing installations, as new installations would be covered by part III of the draft (Planned measures); he had also suggested that article 27 should be placed between article 10, on regular exchange of data and information, and part III, and that seemed to make sense.

[5] See para. (3) of the Special Rapporteur's comments on draft article 25 in his fifth report (A/CN.4/421 and Add.1 and 2).

[6] See footnote 4 above.

48. Mr. Calero Rodrigues (2163rd meeting) considered that paragraph 2 of article 27 went too far, since its provisions would apply even if there were no effect on another State. He recognized that that comment was justified.

49. Some members had said that the text of paragraph 3 of article 27 should be harmonized with that of article 20 (Data and information vital to national defence or security), as provisionally adopted by the Commission. The idea of stating that the provisions of paragraph 3 were without prejudice to the exception set forth in article 20 was well worth considering.

50. Draft article 28, on the status of international watercourses and water installations in time of armed conflict, had also produced mixed reactions, some members considering it superfluous and others, on the contrary, viewing it as very important. A majority of members seemed to be in favour of at least trying to address the subject, although some had questioned the meaning of the word "inviolable", which was indeed somewhat problematical and should perhaps be replaced by a more felicitous term. The point made by several members, including Mr. Mahiou (*ibid.*) and Mr. Bennouna (2164th meeting), that reference might be made to the rules of international law governing armed conflicts was well taken. He had no objection to the suggestion that a paragraph 2 should expressly refer to the poisoning of watercourses, which, according to several members, constituted both a war crime and a crime against humanity. The suggestion that the article should be divided into two parts, one on peaceful uses and the other on armed conflicts, was also acceptable.

51. He had thus concluded his summing-up of the discussion on draft articles 24 to 28, and recommended that they be referred to the Drafting Committee.

52. With regard to annex I, on implementation of the articles, he noted that several speakers had criticized the title. There seemed to be general agreement that draft articles 6 to 8 went beyond the scope of a framework agreement. Differing views had been expressed on draft articles 1 to 5, but, on the whole, there had been substantial support for the ideas of non-discrimination and equal right of access as expressed in article 3, paragraph 1, and article 4, respectively. Draft article 2, on the other hand, had been quite heavily criticized and, although some members had been in favour of referring articles 1 to 5 to the Drafting Committee *en bloc*, he had come to the conclusion that annex I was not yet ripe for such action. He therefore recommended that only article 3, paragraph 1, and article 4 be referred to the Drafting Committee, without prejudice to whether they would ultimately be incorporated in the body of the draft articles or be included in an optional protocol, as some members had suggested. Article 3, paragraph 2, could be considered to go beyond the scope of the topic and might therefore be omitted. He reserved the possibility of submitting proposals on the other articles of annex I at the next session, subject to the demands of brevity which would have to be borne in mind if the Commission was to complete the consideration of the draft articles in 1991.

53. The CHAIRMAN thanked the Special Rapporteur for his clear and excellent summing-up. He invited the Commission to indicate whether it wished to refer draft articles 24 to 28 and draft article 3, paragraph 1, and draft article 4 of annex I to the Drafting Committee, as recommended by the Special Rapporteur.

54. Mr. KOROMA also thanked the Special Rapporteur for his excellent summing up. He agreed with the Special Rapporteur's recommendation, on the understanding that it was without prejudice to whether draft article 4 of annex I would eventually be placed in the body of the future instrument or in an annex.

55. Mr. DÍAZ GONZÁLEZ also thanked the Special Rapporteur for his excellent summing-up of what had certainly been a most fruitful debate. He was not, in principle, opposed to the Special Rapporteur's recommendation, subject to the reservation expressed by Mr. Koroma, especially as it was in any case the Commission's tendency to refer to the Drafting Committee all the draft articles that had been submitted to it, whether or not it had approved them.

56. In the case under consideration, however, he failed to see how it was possible to refer to the Drafting Committee a paragraph of a draft article whose full wording was still completely unknown and another draft article of which it was not known whether—if it was to be retained—it would appear in the part of the draft devoted to general principles, in a special part, in an annex or in a protocol.

57. It would have been more logical for the Commission to start by deciding on the fate of annex I before referring some of the articles it contained to the Drafting Committee. The matter could hardly be considered urgent, since the Drafting Committee already had more than enough work to do.

58. Mr. BARBOZA asked why the Special Rapporteur was not recommending that draft article 2 of annex I, which was closely connected with draft articles 3 and 4, should also be referred to the Drafting Committee.

59. Mr. McCAFFREY (Special Rapporteur) said that the reason was not that he personally did not wish to recommend the referral of draft article 2 to the Drafting Committee. The recommendations he made were meant to reflect the Commission's debate and article 2 of annex I had given rise to serious reservations, not as to its title or to the principle of non-discrimination, but as to substance, since the provision might require amendments to national legislations and might go beyond the limits of a framework agreement. He had considered that recommending the referral of all the provisions of annex I to the Drafting Committee would be going too far, since some of them had been approved, while others had not.

60. Mr. BENNOUNA said that he, too, wished to thank the Special Rapporteur, who had once again displayed his constructive spirit and talent for compromise.

61. Since the Commission had set itself the goal of completing the first reading of the draft articles at the following session, he wondered whether it was intended to resume their consideration at the present session. He

also wished to know whether the Special Rapporteur intended to submit any provisions on the settlement of disputes. Lastly, he asked whether the Special Rapporteur, having recommended the referral of draft article 3, paragraph 1, and draft article 4 of annex I to the Drafting Committee, had given up the other provisions of the annex. Did he intend to incorporate them in the body of the draft and to set the annex aside for the question of the settlement of disputes? Those were important questions and the progress of work on the topic would depend on the answers to them.

62. The CHAIRMAN said that, as he understood the situation, the Special Rapporteur had not recommended that all the draft articles submitted in annex I should be referred to the Drafting Committee because he wished to have more time for reflection, possibly with a view to submitting new draft articles at the next session.

63. Mr. McCAFFREY (Special Rapporteur) said that he did wish to give further consideration to the draft articles in annex I whose referral to the Drafting Committee he was not recommending, but he was not sure that he would be able to submit revised texts at the next session.

64. Replying, in particular, to Mr. Bennouna, he said that he had not given up the other provisions of annex I and had in fact submitted to the Secretariat a chapter IV of his sixth report (A/CN.4/427 and Add.1) containing several articles on the settlement of disputes. He hoped that that part of the report could be made available during the current session so that members would have time to study it with a view to discussing it at the next session.

65. Mr. BARBOZA said that the reason given by the Special Rapporteur as justification for his decision not to recommend the referral of draft article 2 of annex I to the Drafting Committee applied even more to paragraph 1 of draft article 3, which would undoubtedly require changes in national legislations. If draft article 3, paragraph 1, and draft article 4 of annex I were to be referred to the Drafting Committee, draft article 2 should also be so referred in order to give the Committee all the elements it needed to find a solution concerning the principle of non-discrimination.

66. Mr. KOROMA said that, if the Commission so decided, he would have no objection to draft article 2 of annex I also being referred to the Drafting Committee, without prejudice, of course, to the place it would ultimately occupy in the future instrument.

67. Mr. McCAFFREY (Special Rapporteur) said that he was, of course, not opposed to draft article 2 of annex I being referred to the Drafting Committee, especially if that were done on the understanding that it was without prejudice to the article's final place in the future instrument—in the body of the instrument, in an annex or in an optional protocol. Such a course would in fact be compatible with his recommendation that draft article 3, paragraph 1, and draft article 4 of the annex should be referred to the Drafting Committee.

68. He did not agree with Mr. Barboza's comment concerning paragraph 1 of draft article 3 of annex I.

69. Mr. BENNOUNA said that the discussion had shown that the time was not yet ripe for the referral of draft article 2 of annex I to the Drafting Committee. That article, which had not yet been thoroughly discussed, gave rise to some very thorny problems and, as some members of the Commission had pointed out, did not even deal with non-discrimination. He supported the original recommendation which the Special Rapporteur had made in concluding his summing-up (see para. 52 above).

70. Mr. TOMUSCHAT said that he agreed with Mr. Bennouna.

71. The CHAIRMAN said that, if there were no objections, he would take it that the Commission accepted the Special Rapporteur's recommendation that draft articles 24 to 28, as well as draft article 3, paragraph 1, and draft article 4 of annex I, should be referred to the Drafting Committee, without prejudice to the final place of the last two provisions in the future instrument.

It was so agreed.

The meeting rose at 11.50 a.m. to enable the Drafting Committee to meet.

2168th MEETING

Tuesday, 5 June 1990, at 10.05 a.m.

Chairman: Mr. Jiuyong SHI

later: Mr. Juri G. BARSEGOV

later: Mr. Julio BARBOZA

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Razafindralambo, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Welcome to a new member

1. The CHAIRMAN extended a warm welcome to Mr. Pellet, the newly elected member of the Commission.

State responsibility (A/CN.4/416 and Add.1,[1] A/CN.4/425 and Add.1,[2] A/CN.4/L.443, sect. C)

[Agenda item 3]

[1] Reproduced in *Yearbook ... 1988*, vol. II (Part One).

[2] Reproduced in *Yearbook ... 1989*, vol. II (Part One).