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Summary record of the 2030th meeting

Topic:
<multiple topics>

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

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

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

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

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

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

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

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

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

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

The meeting rose at 1.10 p.m.

2030th MEETING

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

Chairman: Mr. Stephen C. McCAFFREY

later: Mr. Leonardo DÍAZ GONZÁLEZ

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

Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Tribute to the memory of Mr. Nicolas Teslenko, former member of the Commission's secretariat

1. The CHAIRMAN announced with deep regret the death of Mr. Nicolas Teslenko, who had been a distinguished member of the staff of the Codification Division and, for many years, Deputy Secretary to the Commission.

At the invitation of the Chairman, the Commission observed one minute's silence in tribute to the memory of Mr. Nicolas Teslenko.

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

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

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE
DRAFTING COMMITTEE (continued)

ARTICLE 4 ([Watercourse] [System] agreements)³ (concluded)

2. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that several amendments to draft article 4 had been proposed at the previous meeting. Mr. Tomuschat had proposed that, in the first sentence of paragraph 2, the word "shall" should be replaced by "should"; Mr. Koroma had proposed that the last part of paragraph 3 should be amended; Mr. Eiriksson had proposed that the order of the paragraphs should be changed; and Mr. Bennouna had proposed that, in paragraphs 1 and 3 of the French text, the verb *mettre en œuvre* should be used in place of *appliquer*.

3. Following a procedural debate in which Mr. MAHIOU proposed that the Commission should proceed paragraph by paragraph and Mr. BARSEGOV regretted the fact that the written text of the proposed amendments had not been made available, the CHAIRMAN suggested that, in order save time, drafting amendments relating only to one language version should be transmitted direct to the secretariat, after consultation between the members of the Commission concerned by that language version.

4. Mr. GRAEFRATH said that all members were entitled to propose amendments and explain the reasons for them. It was then up to the Commission to decide

whether such amendments related to drafting or to substance.

5. Mr. BARSEGOV, stressing the need to consider substantive amendments, recommended that members should refrain from proposing amendments of a purely drafting nature.

6. The CHAIRMAN proposed that draft article 4 should be considered paragraph by paragraph.

Paragraph 1

7. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that he had no objection to Mr. Bennouna's proposal that, in paragraphs 1 and 3 of the French text, the verb *appliquer* should be replaced by *mettre en œuvre*.

8. Mr. AL-QAYSI said he feared that, in the English text, the effect of that amendment would be that the words "apply" and "application" would be replaced by "implement" and "implementation", respectively.

9. Mr. McCAFFREY (Special Rapporteur) said that the change proposed by Mr. Bennouna affected the substance of the article, for there was a difference between "applying" the binding provisions of a régime and giving effect to them through subsidiary agreements designed to "implement" them.

10. Mr. CALERO RODRIGUES said that, in Spanish, the same word was used to translate *appliquer* and *mettre en œuvre*.

11. The CHAIRMAN, noting that the proposed amendment related only to the French text, requested the French-speaking members of the Commission to decide which wording they preferred.

12. Mr. EIRIKSSON said that the English text of article 4 sometimes used the verb "to conclude" and, at other times, "to enter into". He proposed that the text should be harmonized by using the verb "to conclude" throughout.

13. Mr. AL-BAHARNA said that there was a difference between those two terms and that the term "to enter into" was preferable. The "conclusion" of an agreement was a specific formality, usually the last one leading up to the entry into force of the agreement.

14. Mr. ARANGIO-RUIZ said that, since the Spanish text used the verb *celebrar* throughout, the problem was one of a drafting nature.

15. Mr. EIRIKSSON proposed that the second sentence of paragraph 1 should be deleted and that the idea to which it referred should be reflected in the first sentence, which would read: "Watercourse States may enter into one or more agreements, hereinafter referred to as [watercourse] [system] agreements, which apply and adjust the provisions . . ."

16. He also proposed that the first sentence of paragraph 2 should form a separate paragraph.

17. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that he objected to Mr. Eiriksson's second proposal because paragraph 2 had a logic of its own.

¹ Reprinted in *Yearbook . . . 1986*, vol. II (Part One).

² Reprinted in *Yearbook . . . 1987*, vol. II (Part One).

³ For the text, see 2028th meeting, para. 1.

18. Mr. ARANGIO-RUIZ said he agreed that paragraph 2 should not be changed. Mr. Eiriksson's proposal would be more elegant, but it would mean that the rest of paragraph 2 would have to be reformulated.

19. Mr. EIRIKSSON said that, since he did not wish to waste the Commission's time, he withdrew his proposals.

20. Mr. AL-BAHARNA said that there was a problem with the tenses of the verbs at the beginning of the first sentence of paragraph 1 of the English text, which should read: "... one or more agreements which would apply and adjust ...".

21. The CHAIRMAN said that drafting amendments should be drawn to the attention of the secretariat.

22. If there were no objections, he would take it that the Commission agreed provisionally to adopt paragraph 1 of article 4 as proposed by the Drafting Committee.

It was so agreed.

Paragraph 2

23. Mr. EIRIKSSON proposed that the first sentence should be amended to read: "A [watercourse] [system] agreement shall define the waters to which it applies."

24. He further proposed that the proviso in the second sentence should form a separate sentence, reading: "A [watercourse] [system] agreement shall not adversely affect to an appreciable extent the use of the international watercourse [system] concerned by any watercourse State which is not a party to the agreement."

25. Mr. AL-QAYSI said that he could not comment on Mr. Eiriksson's proposals until he had seen them in writing. Since the Commission did not have enough time to engage in a debate on those proposals, he considered that the text of paragraph 2 should be adopted as it stood and that any drafting exercise should be left to a later stage.

26. Mr. CALERO RODRIGUES said that Mr. Eiriksson's proposals were a definite improvement on the original text and, if they had been submitted to the Drafting Committee, he would have supported them. At the present stage, however, a debate on those proposals would prevent the Commission from completing its work. He therefore favoured the retention of paragraph 2 as it stood.

27. Mr. BARSEGOV said that, while Mr. Eiriksson's proposals made the text of paragraph 2 clearer, it was not possible for the Commission to examine them at the present time. In any event, the text proposed by the Drafting Committee sufficed for the purposes of a first reading. Mr. Eiriksson's proposals should therefore be referred to the Drafting Committee for discussion at a later stage.

28. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that, if a member had an entirely new form of wording to propose, the Special Rapporteur could always mention that fact in the commen-

tary and, if necessary, include the new text either in the commentary itself or in a footnote.

29. Mr. ARANGIO-RUIZ said that Mr. Eiriksson's first proposal was of a purely cosmetic nature. As to the second, Mr. Eiriksson had only to make it available to the Special Rapporteur, so that he might take it into account when he came to draft the commentary to article 4.

30. Mr. OGISO noted that the Chairman of the Drafting Committee had stated in his introductory remarks (2029th meeting) that the proviso in the second sentence of paragraph 2 would be explained in the commentary to article 4. He would appreciate it if the Special Rapporteur could read out the relevant part of the commentary.

31. Mr. McCAFFREY (Special Rapporteur) said that the final version of the commentary would not be available until the article itself had been adopted. The Drafting Committee's main concern had been to ensure that two States could not enter into an agreement with regard to a part of a watercourse which would adversely affect a third State. He would do his best, with Mr. Eiriksson's help, to reflect that point in the commentary.

32. Mr. Sreenivasa RAO said that, in his view, Mr. Eiriksson's proposals were useful and should be referred to the Drafting Committee. On that understanding, he could agree to the adoption of paragraph 2 in its present form.

33. Mr. KOROMA said that the Commission had not had an opportunity to examine the Drafting Committee's reports properly in plenary. Although it should not examine drafting points at the present stage in its work, it should not be rushed into approving texts where matters of substance were involved. In the case under consideration, he agreed that the proviso in the second sentence of paragraph 2 was in a category by itself and that it should therefore form a separate clause or article. Mr. Eiriksson's amendments were thus valid and should be duly taken into account.

34. Mr. AL-KHASAWNEH said that draft article 4 was very important because it introduced for the first time the concept of an umbrella agreement or the framework agreement approach. That approach, which had been adopted in 1980, had, however, not been debated in plenary as fully as its importance warranted. He had doubts about the appropriateness of that approach, the declared rationale for which was that watercourses differed in terms both of their geographical and natural characteristics and of the human needs they served, whereas such differences, even if they did exist, were for the most part immaterial for the purposes of the progressive development and codification of international law. He did not wish to delay the Commission's work any further, but would like his views to be placed on record.

35. Mr. AL-QAYSI said that, although Mr. Eiriksson's proposal concerning the proviso in the second sentence of paragraph 2 appeared to have some merit, he could not comment on it until he had seen it in writing and had been able to determine what effect it

would have. Paragraph 2 contained two parameters: the first was geographical, and the second substantive. The substantive one was the subject of draft article 9 and in draft article 4, paragraph 2, it appeared only as a parameter of the future agreement.

36. He formally proposed that the Commission should adopt paragraph 2 as proposed by the Drafting Committee, on the understanding that it would be reconsidered later in the light of the draft as a whole.

37. Mr. BEESLEY supported that proposal. He nevertheless stressed that the issue raised by Mr. Eiriksson's proposal was a substantive one.

38. Mr. KOROMA said that he would be prepared to accept paragraph 2 in its present form, on the understanding that it would be re-examined at a later stage in the Commission's work.

39. Mr. ARANGIO-RUIZ said that, like other members, he wished to reserve his position on the second sentence of paragraph 2 and to have his reservation reflected in the summary record of the meeting. In his view, the matter could not simply be dealt with in the commentary.

40. Mr. YANKOV said it was important that the reservations expressed by members of the Commission should be reflected in the summary record of the meeting. Moreover, the Special Rapporteur always had the possibility of suggesting amendments to his text in the light of comments made by members during the discussion.

41. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt paragraph 2 of article 4 as proposed by the Drafting Committee.

It was so agreed.

Paragraph 3

42. Mr. EIRIKSSON proposed that the first part of paragraph 3 should be deleted and that the paragraph should begin with the words "Watercourse States shall, at the request of any watercourse State, consult . . .".

43. He also proposed that the last part of the paragraph should be replaced by the words "with a view to negotiating in good faith a [watercourse] [system] agreement". That wording would be closer to that used in the 1969 Vienna Convention on the Law of Treaties.

44. Mr. BARSEGOV said he had no objection to the adoption on first reading of paragraph 3 as proposed by the Drafting Committee, on the understanding that the drafting improvements proposed by Mr. Eiriksson would be considered at a later stage in the Commission's work.

45. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt paragraph 3 of article 4 as proposed by the Drafting Committee.

It was so agreed.

Article 4 was adopted.

ARTICLE 5 (Parties to [watercourse] [system] agreements)⁴

46. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that the title of draft article 5 had been simplified and that the text was based on article 4 as provisionally adopted in 1980 and on draft article 5 as submitted in 1984.

47. Paragraph 1 closely followed the previous texts, with two basic exceptions. First, to align the text with article 4, paragraph 2, reference had been made to the "entire" watercourse, rather than to the watercourse "as a whole". Secondly, in order to give effect to the obligation set forth in the new version of article 4, paragraph 3, the words "as well as to participate in any relevant consultations" had been added.

48. Paragraph 2 also referred to "consultations", in line with the new version of article 4, paragraph 3. In addition, paragraph 2 had been amended in the light of the debate held at earlier sessions on the right of a watercourse State, under the conditions set forth in that paragraph, to become a party to the agreement referred to therein. If those conditions had been fulfilled, there appeared to be no reason why a watercourse State should not, in the circumstances envisaged, be entitled to become a party to the agreement in question. The commentary would nevertheless explain that the best way of solving the problem would be to proceed on a case-by-case basis. Thus the State concerned might, through a protocol, become a party to the elements of the agreement that affected it or it might become a full party to the agreement: the solution would depend entirely on the nature of the agreement, the elements of the agreement affecting the State in question and the nature of the consequences that might ensue for it. Lastly, the paragraph no longer contained a cross-reference to the preceding article, as had been the case in article 4 of 1980, for that had given rise to confusion and had created a possibility of misinterpretation, as the previous Special Rapporteur had pointed out in his second report.⁵

49. Mr. EIRIKSSON, noting that the words "any relevant consultations" at the end of paragraph 1 were too vague, suggested that they should be replaced by "any consultations relating to such an agreement".

50. At the end of paragraph 2, he suggested that the penultimate phrase should be replaced by the words "to the extent that its use is affected by it".

51. Mr. AL-KHASAWNEH said that he wished to place on record his reservations with regard to draft article 5. The entitlement it gave any watercourse State to become a party to any watercourse agreement was not adequately supported by doctrine and was not in conformity with political reality.

52. Mr. YANKOV said that the wording proposed by Mr. Eiriksson for paragraph 1 would improve the text.

⁴ For the text, *ibid.*

⁵ *Yearbook . . . 1984*, vol. II (Part One), p. 109, document A/CN.4/381, para. 42.

53. Mr. AL-QAYSI, supported by Mr. BEESLEY, said that draft article 5 complemented article 4. If the wording proposed by Mr. Eiriksson for article 5, paragraph 1, were adopted, the wording of article 4, paragraph 3, would also have to be amended. He urged the Commission to adopt article 5 in the form proposed by the Drafting Committee.

54. Mr. McCAFFREY (Special Rapporteur) also urged the Commission to adopt article 5 as proposed by the Drafting Committee.

55. Mr. EIRIKSSON said that his intention had not been to change article 4, paragraph 3. He had simply hoped that his amendments would remedy the inconsistencies between article 4 and article 5.

56. Mr. KOROMA said that he would like his view that article 5 was not in accordance with political reality to be placed on record. He hoped that that provision would be reviewed at a later stage.

57. Mr. REUTER said that he had no objection to the adoption of article 5, but wished to place on record his reservations concerning the incompatibility between paragraphs 1 and 2, and concerning the legal effects of paragraph 1. Those were matters of substance that would have to be discussed more thoroughly at a later stage.

58. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt article 5 as proposed by the Drafting Committee.

Article 5 was adopted.

59. The CHAIRMAN said that the meeting would rise to enable the Planning Group of the Enlarged Bureau to meet.

The meeting rose at 11.35 a.m.

2031st MEETING

Friday, 10 July 1987, at 10 a.m.

Chairman: Mr. Stephen C. McCAFFREY

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Bennouna, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Jacovides, Mr. Koroma, Mr. Mahiou, Mr. Ogiso, Mr. Pawlak, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Reuter, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat, Mr. Yankov.

Tribute to the memory of Mr. Senjin Tsuruoka, former member of the Commission

1. The CHAIRMAN announced with deep regret the death of Mr. Senjin Tsuruoka, a former member of the

Commission, who had made an important and lasting contribution to its work.

At the invitation of the Chairman, the Commission observed one minute's silence in tribute to the memory of Mr. Senjin Tsuruoka.

Draft Code of Offences against the Peace and Security of Mankind¹ (continued)* (A/CN.4/398,² A/CN.4/404,³ A/CN.4/407 and Add.1 and 2,⁴ A/CN.4/L.412)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE

TITLES OF CHAPTER I AND PARTS I AND II OF THE DRAFT *and* ARTICLES 1, 2, 3, 5 AND 6

2. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the titles of chapter I and parts I and II of the draft code and draft articles 1, 2, 3, 5 and 6 as adopted by the Committee (A/CN.4/L.412), which read:

CHAPTER I

INTRODUCTION

PART I. DEFINITION AND CHARACTERIZATION

Article 1. Definition

The crimes [under international law] defined in this Code constitute crimes against the peace and security of mankind.

Article 2. Characterization

The characterization of an act or omission as a crime against the peace and security of mankind is independent of internal law. The fact that an act or omission is or is not punishable under internal law does not affect this characterization.

PART II. GENERAL PRINCIPLES

Article 3. Responsibility and punishment

1. Any individual who commits a crime against the peace and security of mankind is responsible for such crime, irrespective of any motives invoked by the accused that are not covered by the definition of the offence, and is liable to punishment therefor.

2. Prosecution of an individual for a crime against the peace and security of mankind does not relieve a State of any responsibility under international law for an act or omission attributable to it.

...

Article 5. Non-applicability of statutory limitations

No statutory limitation shall apply to crimes against the peace and security of mankind.

* Resumed from the 2001st meeting.

¹ The draft code adopted by the Commission at its sixth session, in 1954 (*Yearbook . . . 1954*, vol. II, pp. 151-152, document A/2693, para. 54), is reproduced in *Yearbook . . . 1985*, vol. II (Part Two), p. 8, para. 18.

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

³ Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

⁴ *Ibid.*