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Summary record of the 2214th meeting

Topic:
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Extract from the Yearbook of the International Law Commission:-
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mally associated with surface water, and confined groundwater, which was not related to surface water, and gave examples of instruments that dealt with the two categories. After commenting on the rules governing international groundwater adopted by ILA at its Seoul Conference in 1986, he concluded that the views of ILA would support the inclusion of groundwater in the Commission's draft articles, whether or not it was related to surface water. He himself did not see how the scope of the draft articles could be extended to include confined groundwater (aquifers). First, it was difficult to understand how the term "watercourse" could encompass the category of groundwater. Secondly, and above all, the provisions of the draft articles, as they now stood, did not take into consideration problems specific to confined groundwater and would therefore not be applicable to such water. Consequently, the Commission must restrict the scope of the draft articles to free groundwater that was associated with surface water and merely draw the attention of the international community to the need for an instrument on confined groundwater.

70. He agreed with the Special Rapporteur that it was necessary, in order to avoid all problems of application, to define not only the term "international watercourse", but also the term "watercourse".

71. The "system" concept defended by the Special Rapporteur was acceptable, provided that it was clearly defined. However, instead of speaking of "watercourse system", as was the case in alternative A of the draft article, it would be preferable to say, as in alternative B that "a watercourse is a system". Such wording would allow the system concept to be included in the draft articles without changing the general title.

72. On the other hand, he was opposed to the reference in both alternatives of the draft article to "hydrographic components, including rivers, lakes, groundwater and canals, constituting by virtue of their physical relationship a unitary whole". In a sense, that was inconsistent with the principle of the unity of the system, which was essential and must be stressed. Moreover, the existence of a physical relationship between the hydrographic components, to use the Special Rapporteur's wording, was not sufficient to form a unitary whole. The flow of some of the waters of the Danube into the drainage basin of the Rhine, which was at the origin of the famous *Donauversinkung* case,¹³ was an example of a physical relationship between two rivers, but that did not mean that the Rhine and the Danube were a single watercourse. That was an important point to which it would be necessary to return.

The meeting rose at 1.20 p.m.

¹³ *Streitsache des Landes Württemberg und des Landes Preussen gegen das Land Baden, betreffend die Donauversinkung*, German Staatsgerichtshof, 18 June 1927, *Entscheidungen des Reichsgerichts in Zivilsachen* (Berlin), vol. 116, appendix, pp. 18 *et seq.*

2214th MEETING

Friday, 24 May 1991, at 10.05 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Illueca, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

Draft Code of Crimes against the Peace and Security of Mankind¹ (continued) (A/CN.4/435 and Add.1,² A/CN.4/L.456, sect. B, A/CN.4/L.459 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.3)

[Agenda item 4]

NINTH REPORT OF THE SPECIAL RAPPORTEUR
(concluded)

ARTICLE Z and

JURISDICTION OF AN INTERNATIONAL CRIMINAL COURT³
(concluded)

1. Mr. THIAM (Special Rapporteur) said that, before the Commission proceeded to take a decision on draft article Z, he wished to round off the statement he had made at the previous meeting with a few additional remarks. In particular, he wished to reassure those members who had expressed reservations about the abolition of the death penalty, as well as those who favoured specific penalties for each crime, or a more flexible system of punishment that established a maximum and a minimum penalty, that their comments had been duly noted.

2. As to the court's competence to hear appeals, he was firmly opposed to any form of hierarchical scale on which the court would occupy a higher position than national jurisdictions. The only hypothetical cases in which the international court might act as a court of appeal would be those where a crime under the Code had been defined as an ordinary crime instead of as a crime against the peace and security of mankind and, possibly, where the victim State or the State of which the victim was a national had obvious reason to think that the penalty was disproportionate to the heinous nature of the offence. Provision for such hypothetical cases might rea-

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...1991*, vol. II (Part One).

³ For texts of draft article Z and of possible draft provisions on jurisdiction of the court and criminal proceedings, see 2207th meeting, para. 3.

sonably be made where a State tried its own nationals for crimes committed abroad, but cases of that kind were rare and might be avoided altogether if, as Mr. Graefrath had suggested (2208th meeting), a system of cooperation was established between the States affected by the offence.

3. In the matter of the court's review competence, a close reading of his report would show that the case envisaged therein—that of the court's being empowered to review or rescind certain decisions of national courts—was only a hypothetical one. He was fully aware that review of a decision fell, in principle, within the competence of the court which had handed down that decision, and only if new facts emerged. That being so, it was difficult to understand Mr. Razafindralambo's vehement attitude (2211th meeting) towards something he (the Special Rapporteur) was not proposing. Lastly, with regard to the question of the relationship between the international court and the Security Council, he referred members to the statement he had made on that subject at the 2061st meeting.⁴

4. As a general comment, he noted the international community's growing interest in the subject of the Code and of a possible international criminal jurisdiction, and in that connection expressed his appreciation to the Foundation for the Establishment of an International Criminal Court for organizing a most interesting seminar on the subject at Talloires, France, from 18 to 20 May 1991.

5. He proposed that draft article Z should be referred to the Drafting Committee in the light, more particularly, of the specific proposals made by members of the Commission, including himself, in the course of the discussion.

6. The CHAIRMAN said that, if he heard no objection, he would take it that the Commission agreed to that proposal.

It was so agreed.

7. The CHAIRMAN said that the Commission had thus concluded its consideration of the ninth report of the Special Rapporteur on the draft Code of Crimes against the Peace and Security of Mankind.

The law of the non-navigational uses of international watercourses (continued) (A/CN.4/436,⁵ A/CN.4/L.456, sect. D, A/CN.4/L.458 and Corr.1 and Add.1, ILC(XLIII)/Conf. Room Doc.2)

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR
(continued)

PART I OF THE DRAFT ARTICLES

ARTICLE [1] [2] (Use of terms)⁶ (continued)

8. Mr. McCAFFREY (Special Rapporteur), continuing the presentation of his seventh report begun at the previ-

ous meeting, drew attention to the alternative versions, A and B, of the article on the use of terms he had proposed. He said that the Commission would note that, while the definitions employed were the same in both versions, the terms defined were slightly different, alternative A including the expression "system" and alternative B confining itself to the expression "watercourse". As already stated, his own preference was for alternative A.

9. As to the structure of Part I of the draft articles, he had recommended that the Commission should consider reversing the order of articles 1 and 2. Such a structure would reflect an approach followed in a number of conventions, based on Commission drafts, that he had listed in the report. There was ample precedent for beginning the draft with an article on scope, and the Commission could make such a relatively simple change at the present session, without waiting for the second reading. He also drew attention to the recommendation in the comments to the draft article to the effect that the definition of a "watercourse State" (or "system State") should be transferred from its present position in article 3⁷ to the article on the use of terms because the definition was closely related to that of an "international watercourse" or "international watercourse system", included in the article under discussion.

10. Adoption of the concept of the international watercourse system, as the basis of the draft, was essential if the articles were to have any lasting impact. Merely to speak of a watercourse without defining that expression as being inclusive of all the terrestrial components of the hydrologic system would be not only to ignore physical realities but, what was far more serious, also to leave out of account some of the worst problems which already existed today and would increasingly plague humanity in the future.

11. One of the most important components of a watercourse system was groundwater; he hoped members would forgive him for having included in the report two diagrams which were intended to illustrate the way in which various components of a watercourse system and those of an international watercourse system related to each other. The sheer quantity of groundwater alone would seem to justify its inclusion in the scope of the draft. It would be seen that groundwater constituted an astonishing 97 per cent of fresh water on Earth, excluding polar icecaps and glaciers, a figure which contrasted dramatically with that for fresh water contained in lakes and rivers, amounting together to less than 2 per cent. Without attempting to review in detail the material set out in the report, he would none the less draw attention to the passage on the *Donauversinkung* case,⁸ which strikingly illustrated the interrelationship between surface water and groundwater. A question members might wish to address, assuming that groundwater was included in the definition of a "watercourse", was whether the draft articles should apply both to groundwater related to surface water (free groundwater) and groundwater unrelated to surface water (confined

⁴ *Yearbook*...1988, vol. I, pp. 118 *et seq.*, 2061st meeting, paras. 54-70.

⁵ Reproduced in *Yearbook*...1991, vol. II (Part One).

⁶ For text, see 2213th meeting, para. 66.

⁷ For the text and commentary, see *Yearbook*...1987, vol. II (Part Two), p. 26.

⁸ See 2213th meeting, footnote 13.

groundwater), or whether they should apply to free groundwater alone. Although he believed that the rules embodied in the draft articles, and especially the fundamental rules of no appreciable harm, equitable utilization and notification of planned measures, would apply equally in the case of unrelated, or confined, groundwater, he had an open mind on that question.

12. With regard to the concept of the “relative international character” of a watercourse, a notion which originated in the provisional working hypothesis accepted by the Commission as the basis for its work,⁹ he knew of no precedent for it in scientific and technical works, State practice or legal studies, reports or recommendations. The concept, as discussed in his report, might at first glance have superficial appeal, but it was, at best, incompatible with the idea, also contained in the provisional working hypothesis, that a watercourse constituted a unitary whole, and at worst, it was a dangerous element that could negate entire sections of the draft articles. In any event, as indicated in the report, there would no longer seem to be any need for the concept—if indeed such a need had ever existed—since none of the fundamental obligations under the draft articles would apply unless there was an actual or possible effect upon another watercourse State or the regime of the watercourse. As the Special Rapporteur on the topic, he therefore urged very strongly that the notion of relative internationality should be abandoned.

13. Lastly, he clarified that the last paragraph of the section of the report in which he discussed the Bellagio Draft, had been included in error and should be deleted; a corrigendum to that effect would be issued in due course. The report also listed a number of other terms for possible inclusion in the draft article on the use of terms. It was essentially a matter of polishing the final text that could be dealt with in the Drafting Committee rather than in plenary.

14. Mr. AL-BAHARNA congratulated the Special Rapporteur on his report, which considered two basic issues, first, the definition of international watercourses and, secondly, the use of the “system” or related concepts in international agreements.

15. Regarding the first issue, he shared the general view of the Special Rapporteur that the term “international watercourse” should be defined in a way that made plain the implications of the draft articles adopted thus far. As pointed out in the report, the rules of the draft, by their very nature, would require watercourse States to consider the possible impact on other watercourse States of activities that might not be in the immediate vicinity of a border. Consequently, the term should be so defined as to bring within its ambit the rights and obligations of watercourse States under the draft articles.

16. In that connection, the Special Rapporteur presented the views of geographers, hydrologists and other experts. It was stated that surface water and groundwater should not, in the view of water resource specialists, be treated separately for legal and planning purposes. More important, a number of meetings held under the auspices

of the United Nations had recognized that water resource planning should take into account groundwater resources and their interaction with surface waters. It was also noted that States were increasingly including groundwater within the scope of their agreements concerning international watercourses, a trend that had recently received further impetus by the adoption in 1986 of the Seoul Rules by ILA.

17. The issue of the use of the “system” approach in the draft articles was one of the most difficult facing the Commission. The geographical advantages of the “system” approach over the “territorial” approach were not fully clear, and the legal implications of those different approaches had not been satisfactorily explained, despite the Special Rapporteur’s instructive treatment of the subject. The report drew upon all relevant sources in international law. Interestingly, the treaties and agreements cited covered Africa, Asia and Europe, with States that belonged to different political and economic systems. Evidently, the “system” approach had steadily gained ground in State practice. He was inclined, tentatively at any rate, to support the idea of using it in the draft. However, it might be useful if the Special Rapporteur were to clarify what the principal legal differences were between the “system” and the “territorial” approaches, in order to see in what ways, if any, the “system” approach promoted better realization of the principle of equitable and reasonable utilization and participation (art. 6) and also the obligation not to cause appreciable harm (art. 8), and finally, whether the “system” approach was more likely to create differences and disputes between watercourse States than the “territorial” approach. Clarification of those points would help the Commission choose between the two alternatives.

18. The Special Rapporteur stated that the Commission had decided to continue its work on the basis of the provisional working hypothesis accepted by the Commission at its thirty-second session, in 1980. Notwithstanding the third paragraph of that hypothesis, the Special Rapporteur suggested in the report that the notion of relative internationality should be dropped, because its inclusion could, he argued, eviscerate entire sections of the draft articles. That was a rather questionable assumption, and he was therefore inclined to adopt the working hypothesis in its entirety, rather than piecemeal.

19. As to the proposed article on the use of terms, except for the addition of the word “system” after “watercourse”, he saw little difference between alternatives A and B and would support either version, depending upon which one received stronger backing in the Commission. Assuming that alternative A received wider support, paragraph (a) thereof, which stated that “A watercourse system is a system of waters . . .” should be redrafted so as to remove the second reference to “system”. Perhaps it could simply be reformulated to read “A watercourse system refers to waters composed of hydrographic components . . .”. Similarly, paragraph (b) of alternative A could be recast as: “An international watercourse system refers to watercourses, parts of which are situated in different States”. Paragraph (c) would be best without the square brackets, and he had no objection to moving article 3, which defined “watercourse States”, to the article, numbered 1 or 2, that would deal with the use of terms.

⁹ Ibid., footnote 12.

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

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

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

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

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

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

The meeting rose at 11.10 a.m.

2215th MEETING

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

Chairman: Mr. John Alan BEESLEY

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Díaz González, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucouas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

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

[Agenda item 5]

SEVENTH REPORT OF THE SPECIAL RAPPORTEUR
(*continued*)

PART I OF THE DRAFT ARTICLES

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

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

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

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

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

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