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Summary record of the 2334th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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such as the right to a fair trial and the protection of the rights of the accused, without going into detail.

The meeting rose at 1 p.m.

2334th MEETING

Monday, 9 May 1994, at 3.10 p.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

Draft Code of Crimes against the Peace and Security of Mankind (*continued*) (A/CN.4/457, sect. B, A/CN.4/458 and Add.1-8,[1] A/CN.4/460,[2] A/CN.4/L.491 and Rev.1 and 2 and Rev.2/Corr.1 and Add.1-3)

[Agenda item 4]

DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT[3] (*continued*)

1. Mr. HE said it was widely hoped that a new form of international criminal trial mechanism would be established to counter international criminal activities and to prosecute, try and punish the criminals concerned, thereby creating a deterrent and strengthening the cooperation of the international community in that area. Such a mechanism must take into account current international realities, particularly the question of how to supplement and coordinate the existing system of universal jurisdiction so as to guarantee broad acceptance of the court by States. On the whole, the draft statute for an international criminal court was an important step in that direction and he expressed appreciation to the Working Group for its achievement.

2. A number of differences on major legal issues had emerged in both the Commission and the Sixth Committee. Dealing with those problems was an important task for the present session.

3. He took the same view as many members of the Commission that the court should be established by concluding a special international convention. In view of the sensitive issue of national criminal jurisdiction, all States should be able to decide whether or not to accept the statute and the jurisdiction of the court.

4. Yet another important issue to be resolved was the relationship between the court and the United Nations. He shared the opinion that it was difficult to conceive of the United Nations having the competence to establish a permanent criminal court of a universal character. Formal incorporation of the court within the United Nations structure might also imply that States Members of the United Nations would be *ipso facto* parties to the court's statute. A court conceived as a permanent judicial organ of the United Nations lacked flexibility and, in that case, the wording in the second set of square brackets in article 2 (Relationship of the Tribunal to the United Nations) would be more practical. Obviously a close relationship between the United Nations and the court was indeed necessary and such an objective could be achieved through an appropriate arrangement.

5. He understood the reasons for separating the two strands of crimes as listed in articles 22 (List of crimes defined by treaties) and 26 (Special acceptance of jurisdiction by States in cases not covered by article 22) but felt that the concept of "crime under general international law" as stated in article 26, paragraph 2 (*a*), was ambiguous, failed to meet the criterion of precision in international law and gave the court too much discretion. Actually, the crimes referred to in paragraph 2 (*a*) were serious, such as aggression as defined in the draft Code of Crimes against the Peace and Security of Mankind.[4] The draft Code would be considered on second reading at the present session—an important step towards the requisite precision in criminal law. In view of the basic reason for establishing the court, the jurisdiction *ratione materiae* would certainly include the crimes listed in the draft Code, but in accordance with the principle *nullum crimen sine lege* the court in the initial stage should only exercise jurisdiction over crimes as defined in international conventions, leaving aside for the time being the crimes enumerated in the draft Code or the so-called crimes under general international law. Once the draft Code was adopted and entered into force, the court could bring it within the court's jurisdiction *ratione materiae*. The appropriateness of the provision in paragraph 2 (*a*) might well need further consideration. Personally, he was very doubtful about the wisdom of extending jurisdiction to crimes other than those that were of a most serious nature.

6. Bearing in mind the realities of the criminal jurisdiction of States and the need for States to cooperate with the court, it was of great importance for the acceptance of the court's jurisdiction by States to be voluntary. A distinction must be drawn between acceptance of the statute and acceptance of the jurisdiction of the court. Acceptance of the statute should only mean undertaking certain obligations to offer judicial assistance and engage in financial cooperation, whereas acceptance of the

[1] Reproduced in *Yearbook... 1994*, vol. II (Part One).

[2] Ibid.

[3] *Yearbook... 1993*, vol. II (Part Two), p. 100, document A/48/10, annex.

[4] For the text of the draft articles provisionally adopted on first reading, see *Yearbook... 1991*, vol. II (Part Two), pp. 94 *et seq.*

court's jurisdiction depended on the express consent of States. As to the acceptance by States of jurisdiction over the crimes listed in article 22, he was inclined to prefer alternative A of article 23 (Acceptance by States of jurisdiction over crimes listed in article 22).

7. Concerning the matter of which State's consent was required for the court to exercise its jurisdiction, as far as the cases in article 22 were concerned the system adopted in article 22 was more or less based on the consent of the State in whose territory the alleged offender was found. The need for such consent in order to ensure the presence of the suspect before the court was self-evident. On the other hand, prosecution and a fair trial of the accused would be impossible without proper investigation, the gathering of evidence and other related matters, which in turn often required very close cooperation with the State in whose territory the crime had been committed. Accordingly, the importance of consent by those two jurisdictions in a given case under article 22 should be emphasized. Article 24 (Jurisdiction of the Court in relation to article 22), paragraph 2, attempted to repair somewhat the inadequacy apparent in paragraph 1, but the whole article did not make the two categories of States a necessity in all circumstances. In addition, the consent of the State of which the accused was a national should not be overlooked in so far as the investigation and the collection of evidence by the court were concerned. That issue would seem to require further clarification.

8. In accordance with the principle *nulla poena sine lege*, the statute should stipulate specific penalties for each crime falling within the court's jurisdiction. However, owing to the lack of a uniformly applicable criminal code, the statute failed to establish specific penalties, and set out that the court, in determining penalties, might have regard to the relevant provisions of the domestic criminal law of the States concerned. That approach could only serve as a temporary solution. In the long run, an arrangement of that kind would probably lead to inconsistencies in the application of penalties by the court, something which was neither compatible with the nature of the court nor in keeping with the fair administration of justice. Thus, it would be difficult to resolve the issue of an applicable criminal code.

9. Considerable differences remained, both in the Commission and in the Sixth Committee, about trial *in absentia*. Article 44 (Rights of the accused), paragraph 1 (*h*), maintained the possibility of holding trials *in absentia*. But it was a principle common to the criminal law of many States that such trials were not allowed. That was also provided for in article 14 of the International Covenant on Civil and Political Rights. The barring of trials *in absentia* was an important judicial guarantee of the rights of the accused. If such trials were allowed, even with limitations, it would make it very difficult for many States to ratify the statute. The provision thus needed further consideration. To create a deterrent for potential criminals, an alternative might be to allow the prosecuting authority to issue a wanted persons circular or to make public disclosure of the decision to prosecute and the preliminary evidence of the suspect's crimes, as was the practice in municipal law in a number of countries. Of course, once the accused was apprehended, the court would start the trial.

10. Article 45 included the principle *non bis in idem* and the commentary contained a reference to the statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.[5] He fully endorsed paragraph 1 of the article, but under paragraphs 2 and 3, the international criminal court would actually serve as a higher court or a court of review for national courts, something that would have a significant impact on the traditional sovereignty of States. In view of the politically sensitive nature of that issue and the fact that the international community consisted of sovereign States, the international criminal court and national courts should be parallel and complementary to each other. Moreover, the backgrounds of the international criminal court and the International Tribunal were essentially different. The court should be established by a statute voluntarily accepted by States, and its legal, binding force should be confined to the contracting parties alone, whereas the International Tribunal, directed at a specific situation, had been set up pursuant to a resolution of the Security Council that contained mandatory measures for maintaining international peace and security and was binding on all the United Nations Member States. Careful consideration should therefore be given to whether it was feasible to make provisions in the statute of the international criminal court analogous to those in the statute of the International Tribunal.

The law of the non-navigational uses of international watercourses (A/CN.4/457, sect. E, A/CN.4/462,[6] A/CN.4/L.492 and Corr.1 and 3 and Add.1, A/CN.4/L.493 and Add.1 and Add.1/Corr.1 and Add.2)

[Agenda item 5]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

11. The CHAIRMAN said that the Commission was undertaking the second reading of the draft articles it had adopted on first reading in 1991.[7] At the forty-fifth session, in 1993, the Commission had, in the light of the Special Rapporteur's first report,[8] considered the first 10 articles of the draft. All 10 articles had been referred to the Drafting Committee, which had adopted the texts of articles 1 to 6 and 8 to 10.[9] They had been introduced in plenary by the Chairman of the Drafting Committee but had not been acted upon by the Commission.[10]

[5] Hereinafter referred to as the "International Tribunal". For the statute, see document S/25704, annex.

[6] Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

[7] For the text of the draft articles provisionally adopted on first reading, see *Yearbook . . . 1991*, vol. II (Part Two), pp. 66-70.

[8] *Yearbook . . . 1993*, vol. II (Part One), document A/CN.4/451.

[9] For the titles and texts of the draft articles adopted by the Drafting Committee on second reading, see *Yearbook . . . 1993*, vol. I, 2322nd meeting, para. 5.

[10] Ibid., para. 14.

12. In postponing action the Commission had borne in mind, *inter alia*, the request addressed to the Special Rapporteur to undertake a study on the possibility of including unrelated confined groundwater within the scope of the topic and the fact that the articles adopted by the Drafting Committee might therefore have to be reviewed. He invited the Special Rapporteur to introduce his second report (A/CN.4/462).

13. Mr. ROSENSTOCK (Special Rapporteur) said that he had continued the approach of changing as little as possible of the draft that had emerged from the first reading. His first report had already been discussed in plenary and good progress had been made in the Drafting Committee at the forty-fifth session of the Commission under the leadership of Mr. Mikulka.

14. In his second report, he had made only five suggestions that could be regarded as substantive. The first was to delete the phrase "flowing into a common terminus", a concept that had not been present in the drafts submitted by either his predecessor, Mr. McCaffrey, or any of the earlier Special Rapporteurs. That was no accident, but simply a reflection of the fact that deeper knowledge of the topic ruled out inclusion of the concept. It was difficult to sum up the matter more precisely than had the ILA Committee on International Water Resources Law, which had stated, in response to the draft produced on first reading, that the notion that the waters of a watercourse must always flow into a common terminus cannot be justified in light of today's knowledge of the behaviour of water. As noted in paragraph 7 of his second report, at certain times of the year, the waters of the Danube flowed into Lake Constance and into the Rhine, something that had now been recognized for more than half a century.

15. His second suggestion concerned the inclusion of unrelated groundwaters or aquifers. The importance of confined groundwater could not be overestimated. The existing dependence on groundwater in such diverse areas as Scandinavia and North Africa and the increasing demand due to population growth and industrial use made the case for the elaboration of rules beyond debate. The calls for such action from the United Nations Water Conference,[11] the United Nations Interregional Meeting of International River Organizations[12] and from elsewhere underscored the timeliness of the issues. The only question that could be debated was whether the Commission should cover such waters in its current exercise or should it initiate a new exercise to respond to that need. In his view, the Commission should undoubtedly do so in the current exercise. In the first place, it had already concluded that related confined groundwaters were to be included in the articles, and it had drafted them accordingly. He defied anyone to explain why the general terms of a framework agreement dealing with underground aquifers that were directly related to an international watercourse could not or should not be applied to a transboundary aquifer that was not so related. The importance of such aquifers made it reasonable to put the burden of proof on anyone who would deny that the rules for related confined groundwaters applied equally to unrelated confined transboundary aquifers. The two most detailed efforts to elaborate rules for groundwater, in general, were the Seoul Rules[13] and the Bellagio draft treaty on transboundary waters—a model bilateral agreement.[14] There were also bilateral and regional arrangements to which reference was made in the annex to the second report. A detailed study of those instruments revealed no rules applicable to related confined groundwaters that were not applicable to unrelated confined groundwaters and no rules applicable to the latter that were not applicable to the former.

16. To anyone who might contend that the Commission should none the less elaborate a separate instrument for transboundary aquifers, his reply was that it would be a wasteful duplication of time and effort. It took several years to commence an exercise and several more to have the first and second readings, and there was no excuse for creating such a delay, given existing needs. He believed he had amply demonstrated by the drafting changes suggested in his report that it was very simple to add transboundary aquifers to the existing draft. It would not be a responsible approach to fail to do so.

17. A third suggestion related to notice. Article 12 established an obligation on the part of a State that intended to implement or permitted the implementation of planned measures which might have an adverse effect on other watercourse States to provide them with "timely notification", and articles 13 to 16 contained the matrix for the process. The problem with the regime contained in those articles was that it did not provide a notifying State with protection from potential harm caused by the failure of a notified State to respond. Whereas failure to respond should not diminish the responsibility of the notifying State, neither should it increase that responsibility or create an undue burden for the notifying State. New paragraph 2 of article 16 was an attempt to safeguard the notifying State from damage flowing exclusively from the failure of the notified State to respond. The intended protection for the notified State contained in the articles was in no way diminished. The provision contained in his proposed new paragraph had the added advantage of encouraging a response and thus consultation, something which should enhance the prospects for optimal utilization of the resource to the benefit of all concerned. He could think of no reason why the addition should be controversial.

18. As to the fourth suggestion, he still believed that the proper place for paragraph 1 of article 21 was in the article 2 (Use of terms), but that was a matter for the Drafting Committee to examine once it had completed its consideration of all the articles. Whatever the final

[11] See *Report of the United Nations Water Conference, Mar del Plata, 14-25 March 1977* (United Nations publication, Sales No. E.77.II.A.12 and corrigendum).

[12] See Proceedings of the United Nations Interregional Meeting of International River Organizations, held at Dakar, Senegal, from 5 to 14 May 1981 (United Nations, *Experiences in the Development and Management of International River and Lake Basins*, Natural Resources/Water Series No. 10 (Sales No. E.82.II.A.17), part one).

[13] Rules on international groundwaters, adopted by ILA in 1986; see ILA, *Report of the Sixty-second Conference, Seoul, 1986* (London, 1987).

[14] R. D. Hayton and A. E. Utton, "Transboundary groundwaters: The Bellagio Draft Treaty", *Natural Resources Journal* (Albuquerque, N.M.), vol. 29, No. 3 (1989), p. 663.

decision in that respect, paragraph 3 should be strengthened by adding the word "energy" to cover the thermal consequences of certain activities. By way of example he would refer to a scheme devised by Consolidated Edison to pump water from the Hudson River in New York State to the top of the abutting palisade during off-peak periods of use and then to generate power during peak periods by allowing the water to fall back into the Hudson River. Although there had been no loss of water from the river, and no substance had been added to the water, the ecology of the stream had been adversely affected because the water returned to the river had been significantly warmer. The question whether the resultant damage had been offset by the benefits of producing more electricity was one of equitable and reasonable use. There was no doubt, however, that the thermal consequences of the activity should be treated in the same way as "substances" for the purposes of article 21, paragraph 3.

19. His fifth point concerned dispute settlement. The Commission could not, in his view, propose articles which depended on cooperation between States without making provision for resolving differences that would inevitably ensue. He frankly regretted that the Commission had not accepted the proposals for joint management arrangements put forward by his predecessors. Such arrangements lay at the heart of, for example, the Bellagio draft treaty[15] and had proved indispensable in solving most of the water-related problems that had arisen between the United States of America and Canada and between the United States and Mexico. He appreciated that, inasmuch as not all regions enjoyed the fraternal relations that existed between the three North American States, or between Italy and Switzerland, which maintained a joint control commission, the Commission was not prepared to accept the imposition of detailed arrangements over and above what was provided for in the existing draft in general and in articles 6 and 8 in particular. The lack of detail was unfortunate, however, and underlined the need for provisions on dispute settlement. His own preference was for the proposal by the previous Special Rapporteur, Mr. McCaffrey, contained in his sixth report, under which arbitration or judicial settlement would be made binding and would not be dependent on the agreement of the parties.[16] He also drew some inspiration from the Inter-State Water Disputes Act, 1956 whereby the Government of India was empowered to establish a tribunal if a negotiated settlement among the States in its federal system proved impossible.[17]

20. Since the draft articles proposed by the previous Special Rapporteur, Mr. McCaffrey, along with the annexes thereto, were already before the Commission, and since his own proposed amendment with regard to arbitration was simple to grasp, he had merely put forward a skeleton proposal on dispute settlement. He trusted that the discussion in plenary would indicate where the centre of gravity lay as between the proposal of the previous Special Rapporteur and his own, so that the Drafting Committee could then take the appropriate action. In that connection, consideration should be given to the extent to which appropriate conflict resolution mechanisms could help to point the way out of the difficulty over the possible clash between draft articles 5 and 7. Where State A claimed that it was covered by the criterion of equitable and reasonable utilization, consistent with optimal utilization, and State B objected on the ground of potential or actual significant harm, it might perhaps be useful to provide that State A must offer to submit the dispute to a tribunal for a final and binding decision.

21. Some drafting points were not discussed in his second report. They included the introduction of the terms "sustainable development" and "rational and optimal" in article 25 without any clarifying reference to the basic criteria in article 5, of the kind set forth in paragraph 1 of article 6. The Drafting Committee might wish to resolve any possible confusion that could arise either by adding the words "subject to article 5" in paragraph 2 of article 26 or by incorporating the words "sustainable development" and "optimal utilization" in new subparagraphs to paragraph 1 of article 6, or again, though it was perhaps less desirable, by way of the commentary to article 5 and/or article 26.

22. The Drafting Committee should be asked to consider, when putting the final touches to the draft, whether the word "extent", in article 3, paragraph 2, and article 4, paragraph 2, could be seen as unintentionally suggesting that serious localized harm might not be covered. It might likewise wish to re-examine the words "applies to" in article 4 with a view to clarifying whether they meant "affects significantly" or alternatively, "governs" or "regulates", in which case was it anything but a statement of the *pacta tertius* norm? Subject to the Drafting Committee's guidance, that point could perhaps be dealt with in the commentary.

23. He trusted that his statement would provide the basis for a fruitful discussion in plenary and thus enable the Drafting Committee to complete its work on the topic at the current session. In his view, the Commission should, if necessary, subordinate its other work, other than that on the international criminal court, to that goal.

24. Mr. THIAM noted that the Special Rapporteur, in referring to the expression "flowing into a common terminus", had cited just one example, that of the Danube which flowed both into the Rhine River and into Lake Constance. He asked whether the Special Rapporteur could give any other examples.

25. Mr. ROSENSTOCK (Special Rapporteur) said that, at that stage, the example of the Danube was the only one he could quote in specific terms. All the contemporary writing on the subject indicated that the constant flow of water through the ground was such that the expression "common terminus" was wrong and misleading. He would be interested to know why the term should be included in the draft.

26. Mr. CALERO RODRIGUES pointed out that an explanation for the inclusion of the expression "common terminus" was to be found in paragraph (7) of the commentary to article 2 (Use of terms), which stated: "This requirement was included in order to introduce a

[15] Ibid.

[16] *Yearbook... 1990*, vol. II (Part One), document A/CN.4/427 and Add.1, pp. 66-79.

[17] *The Gazette of India, Extraordinary* (New Delhi), No. 44 (28 August 1956), part II, sect. I, pp. 717-721.

certain limitation upon the geographic scope of the articles. Thus, for example, the fact that two different drainage basins were connected by a canal would not make them part of a single 'watercourse' for the purpose of the present articles."[18] As he understood it, the expression complemented the idea of a physical relationship between watercourses which could form a unitary whole. The most characteristic feature was the fact that they flowed in the same direction to a common terminus.

27. Mr. YANKOV congratulated the Special Rapporteur on his invaluable introduction to his second report and on a concise and lucid report which adequately reflected the observations and suggestions made by the Commission at its forty-fifth session and by the Sixth Committee of the General Assembly. The proposals made in the report were particularly relevant for a second reading.

28. The study which appeared in the Special Rapporteur's second report (A/CN.4/462, annex) made an important contribution to the elucidation of the scientific and legal aspects of the concept of unrelated confined groundwaters as an independent water system or "independent" reservoirs which "do not interact significantly with existing surface water" (ibid., para. 3). It also provided sufficient scientific evidence for the statement that: "A number of transboundary groundwaters are not related to surface water, and do not flow into a common terminus ..." (ibid.). The brief but pertinent reference to topical issues relating to pollution of groundwater and to State practice concerning transboundary groundwater deserved special consideration.

29. The chief merit of the second report lay in the integrated approach the Special Rapporteur had consistently applied to several interrelated phenomena, an approach that resulted in a comprehensive concept of watercourses, their uses and conservation. The Special Rapporteur first considered surface and underground waters, and that approach was reflected throughout the whole set of draft articles and particularly in articles 1 and 2. He then applied the same integrated approach to the relationship between protection of watercourses and their management. That method was in keeping with emerging environmental law, in which the environment and sustainable development were integrated—a law that was reflected in recent international instruments and had led to the United Nations Conference on Environment and Development, Agenda 21[19] and the Rio Declaration on Environment and Development[20] with respect to fresh water. He had noted in particular that principle 4 of the Rio Declaration on Environment and Development stated: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."[21]

30. The Special Rapporteur had also suggested a number of general principles and specific rules for the uses of international watercourses and transboundary aquifers and of their waters, and for their conservation and management. Following the methodology of his predecessor, the Special Rapporteur had gone further into the application of the integrated approach to international watercourses and confined groundwater.

31. In the introduction to the second report, the Special Rapporteur suggested that efforts should be concentrated on three issues: the inclusion of unrelated confined groundwaters within the scope of the topic; the inclusion in the draft of provisions on dispute settlement; and consideration of certain proposals concerning various draft articles.

32. So far as the scope of the draft was concerned, the Special Rapporteur had come to the conclusion that unrelated confined groundwaters should be considered from the standpoint of their close relationship with the surface water system, although, in many instances, groundwater was not related to surface water and did not flow into a common terminus. The reference to waters that flowed into a common terminus would not therefore be justified on scientific and legal grounds, and the proposed terms "transboundary aquifer" or "aquifer" would suffice. At the Commission's previous session he had been among those who had expressed doubts whether, by simply amending the initial draft articles and without adding the word "groundwaters",[22] a viable result could be achieved. The Special Rapporteur had, however, now convinced him that that approach could work. He agreed with the Special Rapporteur that the rules on surface and groundwaters should therefore be harmonized and embodied in one legal instrument—a framework convention or model rules.

33. The importance of arrangements for the settlement of disputes was self-evident. It was hard to conceive of a legal regime governing the uses of international watercourses and transboundary aquifers that did not provide for such arrangements and for the relevant fact-finding machinery. He was in favour of the more concise set of rules put forward by the Special Rapporteur in a proposed new provision, article 33 (Settlement of disputes), having regard to the fact that the draft articles would most probably be embodied in a framework convention or in model rules. However, a reference to ICJ should be added at the end of paragraph 2 (*c*) of the article. There was no valid reason for overlooking ICJ's role of adjudication. The word "applicable" before the word "agreement", in the first line of paragraph 2, could be deleted as it was a statement of the obvious; moreover, the use of dispute settlement machinery that might be embodied in an agreement not necessarily confined to international watercourses should not be excluded.

34. He saw no need to provide a definition in article 2, subparagraph (*b*) *bis* of "transboundary confined groundwaters", as that term was not used elsewhere in the text. In keeping with the integrated approach, the words "and management" should be inserted after the word "protection" in the final sentence of article 5,

[18] *Yearbook... 1991*, vol. II (Part Two), p. 70.

[19] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (A/CONF.151/26/Rev.1 (Vol. I, Vol.I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1)) (United Nations publication, Sales No. E.93.I.8 and corrigenda), Vol. I: *Resolutions adopted by the Conference*, resolution 1, annex II.

[20] Ibid., annex I.

[21] Ibid., p. 4.

[22] *Yearbook... 1993*, vol. I, 2312th meeting, para. 36.

paragraph 1, in order to ensure concordance with article 1, paragraph 1. The same thing should be done in article 8. In the title of article 7 and in the first sentence of article 12, the word "appreciable" should be replaced by "significant", to maintain consistency with the other articles.

35. In his view, the scope of article 22 was confined to two forms of interference with the ecological balance of the watercourse or aquifer resulting in significant harm to other watercourse States. The use of certain new technologies might have the same effect, however. On the advice of qualified experts, article 196 of the United Nations Convention on the Law of the Sea had been made to refer explicitly to the use of technology "which may cause significant and harmful changes". He therefore suggested that, in article 22, the phrase "prevent the introduction of species" should be replaced by the following phrase: "prevent, reduce and control pollution resulting from the use of technologies under their jurisdiction or control, or the intentional or accidental introduction of species". The words "resulting in" should then be replaced by "which may cause".

36. He agreed with the Special Rapporteur that article 29, on international watercourses and installations in time of armed conflict, should be retained. The provisions set out therein were of practical importance in international and internal armed conflicts as was to be seen from recent events in the world. Lastly, he recalled the view he had already expressed that institutional arrangements at the regional and local levels were of great importance.

37. The second report constituted a reliable basis for the work of the Drafting Committee. It was at the present time necessary to give the Committee adequate time to complete its work on the draft on second reading. The commentaries to the articles adopted in 1991[23] could provide useful material for the commentaries to be adopted on second reading.

38. Mr. IDRIS said it was gratifying to note that the Sixth Committee and the General Assembly had welcomed the progress made by the Commission on the topic and the adoption of articles 1 to 6 and 8 to 10 by the Drafting Committee.[24] It was to be hoped that the momentum would be maintained at the present session, with a view to completing the work as soon as possible.

39. The Special Rapporteur was to be congratulated on the simplicity and clarity of the second report, which was short but full of substance. The study annexed to the report, on unrelated confined groundwaters, was very useful. It had been instrumental in guiding the Special Rapporteur to his conclusion that it would be useful to incorporate unrelated confined groundwaters in the work on international watercourses. How to incorporate them was the question that remained to be answered.

40. The Special Rapporteur's idea of deleting the phrase "flowing into a common terminus" from article 2, in order to expand the scope of the topic, was a revolutionary one. As the ILA Committee on International Water Resources Law had pointed out, the term "flowing into a common terminus" seemed to reflect a concern that a national watercourse artificially connected to an international watercourse system might be considered to have become part of that system. Thus, the concept of "flowing into a common terminus", which might be dubious from the scientific point of view, had taken on specific significance in legal reasoning, and had acquired a solid conceptual basis. Deletion of the phrase at the present stage could undermine the general acceptability of the draft articles and it should, accordingly, be retained.

41. Another approach to the formidable challenge of including unrelated confined groundwaters in the definition of an international watercourse might be, as the Special Rapporteur also suggested, to add a reference to groundwater in such articles as might require one. If that method was adopted, the Commission would have to examine closely the legal content of each article and look at the overall structure of the draft. It should be noted that, though the report argued for the inclusion of such references to unrelated confined groundwaters, the modified articles proposed in the draft referred only to transboundary groundwaters. In his view, it might be less problematic to include transboundary groundwaters in the present scope of the draft articles, but a decision on the matter had to be taken by the Commission in plenary before the draft articles could be referred to the Drafting Committee.

42. Article 16 (Absence of reply to notification) must be read jointly with article 13 (Period for reply to notification) and article 15 (Reply to notification), paragraph 2. As he understood it, article 16 stated that if, within six months, the notifying State received no communication from the notified State, the notifying State could proceed with implementation of the planned measures. If that interpretation was correct, there was a built-in protection mechanism for the rights of the notifying State. He appreciated the concern that had prompted the Special Rapporteur to suggest a new paragraph 2, but believed it could be better met by stipulating that the notified State was under an obligation to reply to notification. In his view it was not a question of incentives to the notified State or of sanctions to be applied, as the Special Rapporteur had suggested.

43. Dispute settlement was a complex issue, but he fully agreed with the Special Rapporteur that at least a minimum provision was required in the draft. Otherwise, the draft articles would lack credibility. With the diminishing supplies of water throughout the world, there would certainly be disputes over watercourses and the draft articles must envisage a mechanism for settling such disputes. Proposed article 33 formed a sound basis for discussion, pending drafting changes. The Special Rapporteur was proposing a simple mechanism for the settlement of disputes by peaceful means, through consultations and negotiations and, if necessary, binding arbitration by either an ad hoc or a permanent tribunal.

44. He was not convinced that the introduction of the reference to "energy" in article 21, paragraph 3, was appropriate or advisable and requested further clarification

[23] *Yearbook... 1991*, vol. II (Part Two), pp. 70 *et seq.*

[24] See footnote 9 above.

from the Special Rapporteur of the reason behind the proposal.

45. Although the Special Rapporteur had spoken of articles 5 and 7, in his introduction to the report, the report itself was silent about them. Those two articles were central to the draft, and the delicate balance struck between them must be maintained. They set out serious obligations and they stood in need of further discussion before they were referred to the Drafting Committee. Mr. Yankov had just reminded the Commission that a decision had yet to be taken on whether the term "significant" or "appreciable" was to be used.

46. Mr. ROSENSTOCK (Special Rapporteur), said that the term "energy" he was proposing for inclusion in article 21, paragraph 3, referred to thermal energy, which was well known to have pernicious effects on watercourses. As to articles 5 and 7, he thought that they had been discussed thoroughly, indeed exhaustively, in the Drafting Committee at the previous session, and that it was not necessary to go into them again.

The meeting rose at 4.35 p.m.

2335th MEETING

Tuesday, 10 May 1994, at 11 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Baharna, Mr. Al-Khasawneh, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, Mr. Eiriksson, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Vargas Carreño, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/457, sect. E, A/CN.4/462,[1] A/CN.4/L.492 and Corr.1 and 3 and Add.1, A/CN.4/L.493 and Add.1 and Add.1/Corr.1 and Add.2)

[Agenda item 5]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. BOWETT said that he found the Special Rapporteur's conclusion that the draft articles should be extended to cover unrelated confined groundwaters quite compelling. It followed that the requirement of a "common terminus" should be dropped because it certainly did not work in the case of confined groundwater. The two points which concerned him, however, were the impasse in which the Drafting Committee found itself over articles 5 and 7 and the question of the settlement of disputes. With regard to the first point, the Commission appeared to have made two propositions which were *a priori* irreconcilable. Under article 5, States must utilize watercourses in an equitable and reasonable manner; and, if they did so, they could not be held liable for harm caused to others even if such harm was significant. Under article 7, States had an obligation not to cause significant harm, which implied that a utilization which caused such harm must be inequitable and unreasonable. That contradiction was perhaps not so insoluble as it might seem if it were recognized that, in certain situations, and even without liability, an obligation to compensate could arise. A provision could therefore be incorporated in article 6 stipulating that any use which involved an imminent threat to human health and safety could not be equitable and reasonable and article 7 could then be broken down into a series of propositions that would allow for greater flexibility. First, it would provide that States had an obligation to use due diligence not to cause significant harm, and a breach of that obligation would give rise to international responsibility. Secondly, if, despite the use by the State of due diligence, significant harm was caused, then, on the one hand, the other riparian States affected by such harm could require immediate consultation with a view to an agreed ad hoc adjustment of the use of the watercourse and, on the other, compensation might be agreed for harm caused or likely to result despite the ad hoc adjustment agreed. That was the concept of compensation even where there was no liability which lay behind the "polluter pays" principle.

2. The second point of concern to him related to article 33, which dealt with the settlement of disputes. Paragraph 2 (*c*) of the article provided that, where neither fact-finding nor conciliation had resolved the dispute, any of the parties could submit the dispute to binding arbitration by any permanent or ad hoc tribunal that had been accepted by all the parties to the dispute. There would be no difficulty with that wording if the dispute was referred to ICJ, but, in the case of arbitration, there had to be a *compromis d'arbitrage*, in other words, an agreement defining the issue to be litigated. That was the problem the Commission had faced in connection with the Model Rules on Arbitral Procedure, proposed by the Commission in 1958,[2] when it had decided that, in the absence of an agreement by the parties defining the matter in dispute, the arbitral tribunal could itself undertake such a definition on the basis of the written pleadings of the parties. That system had not received the support of States which had regarded it as a dangerous intrusion into their freedom of action. Another attempt should therefore be made to resolve that particular difficulty with arbitration, perhaps by adding a clause to article 33 to supplement the initial agreement to arbitrate by a clear commitment by the parties to the new convention that it should be read as an agreement to refer all disputes arising from the interpretation or application of the new convention to the

[1] Reproduced in *Yearbook . . . 1994*, vol. II (Part One).

[2] *Yearbook . . . 1958*, vol. II, document A/3859, p. 83, para. 22.