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Summary record of the 2338th meeting

Topic:
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States, that would be a way to avoid adopting a position on the question that was too clear-cut or rigid, since it would be left to States to decide for themselves.

63. Mr. AL-KHASAWNEH said he shared the Special Rapporteur's opinion that groundwater was an essential source of fresh water for human consumption as well as for industrial and agricultural use. However, a distinction had to be drawn between unrelated confined groundwaters and those referred to in draft article 2, subparagraph (*b*), which were really part of the watercourse itself and whose inclusion was essential, for example, to determine whether the utilization of the watercourse was equitable and whether significant harm had resulted from a given utilization. Extending the scope of the draft to include unrelated confined groundwaters would create confusion in that regard and would not take account of the fact that the draft had been prepared on the basis of the principle that a watercourse was itself an ecosystem and that watercourse States were easily identifiable, thus making it possible to determine whether they were in fact complying with the obligations they had assumed. Such a conclusion might well have adverse effects on the acceptability of the draft by States, particularly at a time when the utilization of transboundary confined groundwaters was a relatively new phenomenon. In his view, it would be preferable to deal with the question in a separate draft which would still be closely linked to the draft under consideration.

64. With regard to the question of the settlement of disputes, he said that it should be borne in mind that, generally speaking, States that agreed to become parties to a convention should also agree that any disputes they might have would be settled through negotiation, conciliation and arbitration and that specific obligations not to cause significant harm and to ensure the equitable utilization of watercourses required the setting up of a sophisticated and effective fact-finding mechanism and a binding dispute settlement procedure. To that end, a much more precise and detailed provision should be envisaged than the minimal one proposed by the Special Rapporteur. It was for the Drafting Committee to finalize a more appropriate and effective text.

The meeting rose at 1.05 p.m.

2338th MEETING

Monday, 16 May 1994, at 3.10 p.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: 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. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, 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. ROSENSTOCK (Special Rapporteur), summing up the debate, said he had yet to hear any convincing arguments for retaining the notion of a common terminus. He had mentioned the example of the Rhine and the Danube because it represented an annual occurrence, not an occasional event, and had arisen, not in some scientific study by a hydrologist, but in a law case, a context most relevant to the Commission's work.

2. A number of examples could be given in support of the idea of deleting the notion of a common terminus. For instance, there was a river in Paraguay that flowed into Argentina and then split into two, with one branch going underground, reappearing as surface water and then returning underground. The other branch remained as surface water and flowed directly to the sea. It was all one system—but where was the common terminus? The Irrawaddy River in Myanmar separated into a number of streams, some of which reached the sea over 300 kilometres away from the point where the others terminated. Where was the common terminus? The Ganges, the Mekong, and to a lesser extent the Nile, ran into a number of streams that reached the sea at great distances from one another, some as many as 250 kilometres away. They were each unitary systems, but did not have a common terminus. The Tonlé Sap Lake in Cambodia was a lake which at certain times of the year flowed by way of the Tonlé Sap River into the Mekong River, while at other times, the Mekong flowed into the Tonlé Sap. Where was the common terminus?

3. One member had said that no one had challenged the idea of the common terminus over the many years of the Commission's work on watercourses. That was not surprising, since the idea of a common terminus had been incorporated only at the forty-third session in 1991. He hoped the Drafting Committee would examine article 2 with a view to considering whether there was a need for any phrase other than "a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole".

4. He had listened in vain for convincing arguments against the inclusion of transboundary unrelated confined groundwaters. Indeed, one harsh attack had left the impression that it was not only unrelated groundwaters,

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

but all groundwaters, that should be excluded from the draft. He had heard nothing to indicate that any of the rules applicable to related confined groundwaters were not applicable to unrelated confined groundwaters.

5. As to whether article 22 on the introduction of alien or new species should apply to aquifers, he had been concerned that micro-organisms might be capable of being introduced. If no species could be introduced, however, then no harm would be caused by the prohibition set out in the article. As far as article 27 was concerned, the case for not extending it to aquifers was somewhat stronger. The fact that excessive withdrawals from an aquifer could alter the pressure, resulting in complete obstruction of the passage of water, had convinced him that it was safer to extend article 27 to encompass aquifers. If members had strong objections, however, he would not insist. It should be borne in mind that inclusion created no rights or obligations, as long as there was no flow of water.

6. He had no difficulty whatsoever with the suggestion that the Commission should indicate it was not foreclosing the option of doing better work in the future by doing intensive and good work now. He was sure the Drafting Committee would be able to put that suggestion into an appropriate formulation. While he believed the detailed approach in his second report was clearer and preferable, he was prepared to consider with an open mind the proposals by Mr. Calero Rodrigues (2334th meeting), Mr. Bowett (2336th meeting) and Mr. Eiriksson (2337th meeting) involving, *inter alia*, the drafting of a separate article.

7. The simplest way to solve the clash between articles 5 and 7 was still to delete article 7. In view of the contents of article 21, such a course would not produce a system which permitted or condoned pollution. Actually, it would create a system which gave equitable and reasonable use its proper place as a guiding principle in an instrument which must be responsive to the growing needs of countries, facilitate economic development and avoid according de facto primacy for existing uses in a way that would block optimal utilization for all concerned. In his first report,[2] he had suggested a compromise formula that would permit the retention of article 7 in a less counterproductive form. He had reiterated the suggestion in his second report.

8. Mr. Bowett (2335th meeting) and Mr. Crawford (2336th meeting) had proposed yet another approach, namely retaining the concept of due diligence, permitting some uses that caused significant harm, but ascribing to the State causing harm an obligation to provide compensation. The advisability of that approach depended on whether the notion could be comprehensibly and concisely drafted. He was prepared to attempt such an endeavour or to look at any other proposal for article 7. On the whole, however, he believed his formulation of article 7 would not be inconsistent with achieving the goals pursued by Mr. Bowett and Mr. Crawford if and when the articles on international liability for injurious consequences arising out of acts not prohibited by international law were adopted.

9. The comment by one member that article 5 put an obligation on States to achieve optimal utilization, and to do so without regard for the consequences, appeared to be a misreading of the article. It ignored the phrases "with a view to" and "consistent with the adequate protection of the watercourse", as well as the commentary.[3] However, if other members believed article 5 was open to the interpretation suggested by the comment, then the Drafting Committee should take another look at it.

10. He would reconsider article 21 in response to the comments made and in the light of the broader question of whether thermal pollution was adequately covered. It was gratifying that his addition to article 16 had received a generally favourable response. To those who had expressed concern, he wished to point out that what he proposed was not estoppel: quite the contrary. If there were estoppel *vis-à-vis* the notified State, there would be no need for his addition. Mr. Szekely's suggestion concerning article 13 (2337th meeting) could be helpful in every respect.

11. He was pleased at the very wide support for including a provision on the peaceful settlement of disputes. Draft article 33 was put forward merely to give the Commission a full range of choices between a relatively detailed and rigorous position and a bare minimum. There was plenty of room to strengthen the proposed article, with his wholehearted support, starting with the addition of a suitable reference to ICJ. He was favourably inclined towards the suggestion by Mr. Arangio-Ruiz (ibid.) on the deletion of paragraph 1 and would also welcome any specific suggestions on how to strengthen paragraph 2.

12. Finally, with regard to the use of the term "significant", he assured Mr. Szekely that he was fully prepared to maintain the commitment made at the forty-fifth session of the Commission.

13. The CHAIRMAN said the Commission had concluded its general debate on the present topic. He suggested that, in accordance with the usual practice, the Commission should refer the draft articles proposed by the Special Rapporteur in chapter IV of his second report to the Drafting Committee. The Committee would consider them in the light of the debate and weigh up the advantages and disadvantages of the various approaches to unrelated confined groundwaters, bearing in mind that during the discussion in plenary, some members of the Commission had supported inclusion of the concept as proposed by the Special Rapporteur, others had opposed it, and still others had made compromise proposals.

14. Mr. GÜNEY said the debate revealed that the articles were not ready to be referred to the Drafting Committee, which was not empowered to decide on matters relating to substance. Clearly, there were still important issues to be resolved. Specifically, most members of the Commission were opposed to including the notion of unrelated confined groundwaters.

15. Mr. THIAM said he fully endorsed Mr. Güney's comments. The Commission was now into the second

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

[3] For the commentary to article 5, initially adopted as article 6, see *Yearbook . . . 1987*, vol. II (Part Two), pp. 31-36.

reading of the draft articles. At such an advanced stage in the work, it was not for the Drafting Committee to resolve outstanding issues. If any questions or contradictions remained in the draft articles, a solution should be sought through a vote in plenary.

16. Mr. PAMBOU-TCHIVOUNDA said he supported the arguments advanced by Mr. Güney and Mr. Thiam. The Commission should resolve the remaining substantive issues in order to enable the Drafting Committee to play its proper role.

17. Mr. ROSENSTOCK (Special Rapporteur) said the diverging views expressed in plenary were not so far apart that the Drafting Committee would be unable to find grounds for broad agreement. He still believed the articles should be sent to the Drafting Committee. Holding a vote in plenary would set a very dangerous precedent.

18. Mr. CALERO RODRIGUES said it was true that the Commission rarely put the issues before it to the vote. Usually, the debate in plenary provided ample guidance for the Drafting Committee, which made changes in accordance with the views expressed. There was all the more reason to follow that approach in the present instance, for the text was not new and had already been adopted on first reading: it was simply a matter of making small adjustments. The discussion had clearly demonstrated that there was no support for the Special Rapporteur's proposals on including the concept of unrelated confined groundwaters, but a number of compromise proposals had been made. He had no objection to the articles being sent to the Drafting Committee, on the understanding that the Committee could adopt a compromise proposal.

19. Mr. MAHIOU said that, if the point at issue was merely a drafting matter, he would have no objection to its being referred to the Drafting Committee. The question of references to aquifers and confined groundwaters was a substantive one, however. It might be advisable to establish a small working group to look into the compromise proposals with a view to finalizing a text for submission to the Drafting Committee.

20. Mr. PAMBOU-TCHIVOUNDA said he was opposed to the idea of establishing a working group. The general trend of the Commission's thinking was already clear. A working group would not advance the discussion any further.

21. Mr. THIAM, replying to a query from the CHAIRMAN, recalled that on one occasion a vote had been taken on a text being discussed during the second reading of the draft articles on succession of States in respect of State property, archives and debts.[4]

22. Mr. IDRIS said the problem under discussion required further thought. Personally, he was not ready to decide either way and, if a vote were taken, he would be obliged regretfully to refrain from participating. He proposed that the Chairman should be requested to undertake consultations in order to ascertain the Commission's feelings.

23. Mr. SZEKELY said he agreed the time was not ripe for radical measures. The Commission should ask the Drafting Committee to explore the possibilities offered by the compromise proposals which the Special Rapporteur had received in an open-minded spirit.

24. Mr. EIRIKSSON said he, too, thought it would be undesirable to take a vote at the present stage. On many occasions in the past, the Commission had referred matters to the Drafting Committee when no final decision had been taken on them, with a request for the views expressed in the debate to be taken into account. There was no reason why the same procedure should not be followed now.

25. Mr. MAHIOU reiterated his proposal for the establishment of a working group. The vote referred to by Mr. Thiam had been taken after extensive discussion on second reading. Problems of substance could not be resolved simply by a vote. The working group would consider all aspects of the matter in depth and report back to the Commission before the end of the session.

26. Mr. GÜNEY, noting Mr. Calero Rodrigues' observation to the effect that the debate had shown a majority of Commission members were against including unrelated confined groundwaters in the draft, said that, in the circumstances, a vote at the present stage was likely to prove to the Special Rapporteur's disadvantage. The difference of opinion on how best to proceed showed that the question as a whole was not ripe for decision. He continued to be opposed to referring the matter to the Drafting Committee, but was prepared to discuss it further in any suitable framework that the Commission might choose.

27. Mr. THIAM said his previous position should not be taken to mean that he was in favour of voting at the present stage. Like Mr. Güney, he was still opposed to referring the matter to the Drafting Committee. The establishment of a small but representative working group would be the best solution.

28. Mr. VILLAGRÁN KRAMER said that the Commission was under no obligation to complete the second reading of the draft articles at the present session. The inclusion of groundwaters was not the only new proposal in the Special Rapporteur's second report. Other changes in articles 11 to 32 were recommended and required in-depth consideration. Referral of the matter to the Drafting Committee or setting up a working group would inevitably involve the same persons. It would be preferable for the Chairman to sound out informally the views of all members.

29. Mr. MIKULKA said that he was strongly opposed to a vote. At the previous session, the Commission had requested the Special Rapporteur to undertake a study on the question of unrelated confined groundwaters in order to determine the feasibility of incorporating them in the topic. If, at the present session, it simply voted the question out, it would make itself look ridiculous in the eyes of the Sixth Committee.

30. Mr. YANKOV supported by Mr. Sreenivasa RAO and Mr. HE, proposed that the discussion on the pro-

[4] See *Yearbook ... 1981*, vol. I, 1692nd meeting.

cedure to be adopted should be suspended in order to enable the Chairman to conduct informal consultations with a view to arriving at a satisfactory solution.

31. The CHAIRMAN said that it appeared that further discussion in plenary was pointless and several members were reluctant to vote at the present stage. The choice was between meeting in a working group or holding informal consultations. He was in favour of the latter. He was prepared to organize the informal consultations and would ask the Special Rapporteur, the Chairman of the Drafting Committee, Mr. Calero Rodrigues, Mr. Güney and Mr. Thiam to participate. The consultations would of course be open-ended and everyone was welcome to join in them.

32. Mr. GÜNEY said that he agreed with the procedure proposed by the Chairman. By "open-ended" he understood that no time-limit should be fixed.

33. Mr. EIRIKSSON said that it would even be possible to place everything else before the Drafting Committee and leave the unresolved question pending. The Committee could carry on with the work for the second reading. He saw no reason to be pressed for time.

34. Mr. MAHIOU agreed with Mr. Eiriksson. He had already suggested that all the articles should be referred to the Drafting Committee, leaving the unresolved question aside. That would not interfere with the work of the Committee.

35. Mr. ROSENSTOCK (Special Rapporteur) said that the matter should be decided one way or the other, without delay. He had no particular preference and did not wish to interfere with the search for a compromise. He had never done so with regard to any topic. It was important not to prejudice the work of the Commission on other important topics by prolonging the one currently under discussion, and he did not think that much progress was possible in the Drafting Committee until the issue was resolved.

36. The CHAIRMAN said that guidance could be given to the Drafting Committee the next day on the basis of the interim results of the informal consultations. If he heard no objection, he would take it that the members of the Commission agreed to proceed in that fashion.

It was so agreed.

State responsibility (A/CN.4/453 and Add.1-3,[5] A/CN.4/457, sect. D, A/CN.4/461 and Add.1-3,[6] A/CN.4/L.501)

[Agenda item 3]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR

37. The CHAIRMAN recalled that chapter II of the fifth report on the topic of State responsibility had been introduced at the previous session,[7] and said that the Commission would now consider the legal consequences of "crimes". The relevant documentation included: (*a*) chapter II of the Special Rapporteur's fifth report (A/CN.4/453 and Add.1-3); (*b*) the introduction by the Special Rapporteur of chapter II of his fifth report;[8] and (*c*) chapter II of the sixth report (A/CN.4/461 and Add.1-3).

38. Mr. ARANGIO-RUIZ (Special Rapporteur) said he was somewhat surprised that a number of members had said earlier that they were looking forward to his introduction, as he had already introduced his fifth report the previous year. Actually, the best course would be to refer back to chapter II, section A, of his fifth report and chapter II of his sixth report, as well as to the summary record of the 2315th meeting.[9]

39. Chapter II of the sixth report contained in logical order the issues dealt with in the fifth report, on which it would be desirable for members to comment and to provide him with the guidance needed for his further work on a difficult subject.

40. As could be seen, almost all the paragraphs in chapter II of the sixth report referred back to chapter II of the fifth report. His colleagues no doubt realized that the outline set forth in chapter II of the sixth report only contained the barest essentials. In other words, many details were not mentioned because they had appeared in the appropriate parts of the fifth report. It would be useful if members could, where possible, follow the outline. He very much looked forward to hearing his colleagues' comments.

41. Mr. THIAM said that he had read the Special Rapporteur's sixth report with great interest. He had been struck by a parallel drawn in the report between wrongful acts characterized as crimes under article 19 of part one[10] of the draft and other crimes, for example, crimes against the peace and security of mankind, the subject-matter of the topic for which he was Special Rapporteur. He had the impression that a term had been borrowed from another field and was being employed with a different meaning. The international responsibility of States had but little to do with the criminal responsibility of individuals.

42. The subject of law in criminal proceedings could only be individuals. At the beginning of the discussions of his own topic, the Commission had considered at length whether it should address the criminal responsibility of States, and several members had been in favour of that approach. However, the Commission had concluded that it could not embark on such a course, for the simple reason that individuals could not be treated like States. It was impossible to apply a criminal procedure to one relating to international responsibility.

[5] *Yearbook . . . 1993*, vol. II (Part One).

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

[7] Chapter II of the fifth report was not discussed at the forty-fifth session of the Commission for lack of time; see *Yearbook . . . 1993*, vol. II (Part Two), document A/48/10, para. 205.

[8] See *Yearbook . . . 1993*, vol. I, 2315th meeting, paras. 1-61.

[9] Ibid.

[10] For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook . . . 1980*, vol. II (Part Two), pp. 30 *et seq.*

For example, a State could not be summoned to appear in court and certainly could not be served an arrest warrant. With regard to penalties, it was impossible to impose a prison sentence upon a State.

43. As to the consequences of responsibility, the differences between his own topic and that of the Special Rapporteur were enormous. The responsibility of States was primarily reflected in the reparation which was proportional to the damage caused. In his own topic that was impossible. Although a crime might well cause damage, the main point of criminal proceedings was not to repair that damage, but to decide upon a punishment, something that was very different.

44. If an individual acting as a head of State or Government or simply as a civil servant committed a crime, clearly he was personally and directly responsible for that act, but the responsibility of his State was also involved, and there might be some confusion between the two forms of responsibility. From the conceptual point of view, however, the two ideas were completely different.

45. While he thanked the Special Rapporteur for his enriching discussion of the subject, he did not think that it would ever be possible to mix the two topics.

46. Mr. ARANGIO-RUIZ (Special Rapporteur) said that he had no intention of mixing the topic of State responsibility with that of the draft Code of Crimes against the Peace and Security of Mankind or of confusing the criminal responsibility of individuals with the criminal liability of States under article 19,[11] however interrelated the breaches in question could obviously be. He entirely agreed with Mr. Thiam that it was inconceivable to put a State in prison. Indeed, if the Commission was to look for special consequences for crimes, it would need to go beyond the very strict limits of State responsibility for the offences envisaged so far.

47. Mr. THIAM said that he had one simple question: Could a term other than "crime" be found for that type of responsibility?

48. Mr. ROSENSTOCK said he fully agreed with the thrust of Mr. Thiam's question.

The meeting rose at 4.15 p.m.

[11] Ibid.

2339th MEETING

Tuesday, 17 May 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Eiriksson, Mr. Elaraby, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mahiou, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, Mr. Villagrán Kramer, Mr. Yamada, Mr. Yankov.

State responsibility (*continued*) (A/CN.4/453 and Add.1-3,[1] A/CN.4/457, sect. D, A/CN.4/461 and Add.1-3,[2] A/CN.4/L.501)

[Agenda item 3]

FIFTH AND SIXTH REPORTS OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. BENNOUNA said that, in chapter II of his sixth report on State responsibility (A/CN.4/461 and Add.1-3), the Special Rapporteur had asked whether the crimes could be defined, and all the following questions would depend upon the reply. For that reason, he suggested that the debate should be organized in two parts: the first would be devoted to the question of defining the crimes set forth in article 19 of part one of the draft[3] and the second to the consequences stemming from the definition agreed. In his view, that approach was important given that the Commission must express an opinion on the fate of article 19.

2. Mr. ARANGIO-RUIZ (Special Rapporteur) said he took the view that the members of the Commission should be allowed to decide what questions they raised during their statements. He was well aware that certain members would like to focus first on the question of consequences. It was therefore inappropriate to specify what form the debate must take.

3. Mr. MAHIOU said that Mr. Bennouna's comments were very much to the point, but, noting that article 19 of part one had already been adopted on first reading, he did not think that it was necessary to reply to the question in chapter II, section A of the sixth report of the Special Rapporteur before moving on to the following questions. In his opinion, the Commission might have a better idea of those crimes after the debate on the consequences of internationally wrongful acts characterized as crimes under article 19.

4. Mr. BENNOUNA said that he would not insist on his suggestion, but he did want to formulate a reservation about Mr. Mahiou's comment. In his opinion, the Commission could not wait until the second reading of article 19 to reply to the Special Rapporteur's question on the definition of crimes. It could not work in the abstract, but must clearly state its opinion on that point at the outset.

[1] *Yearbook... 1993*, vol. II (Part One).

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

[3] For the texts of articles 1 to 35 of part one, provisionally adopted on first reading at the thirty-second session, see *Yearbook... 1980*, vol. II (Part Two), pp. 30 *et seq.*