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Summary record of the 2355th meeting

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

Extract from the Yearbook of the International Law Commission:-
1994, vol. I

point of view was that it should be left very much to the riparian States to consult and to cooperate. The Chairman of the Drafting Committee, in his introduction (2353rd meeting), had said that the philosophy underpinning the draft was actually the obligation to consult and cooperate. For those reasons, he would have much preferred the article to be omitted.

75. The CHAIRMAN asked whether Mr. de Saram's preference would have been to omit the article *in toto*.

76. Mr. de SARAM said that his concern related to due diligence as against strict liability or the obligation not to cause harm.

77. Mr. SZEKELY, referring to Mr. Villagrán Kramer's observations about the spatial scope of the harm, said he did not think that there need be any cause for concern in that regard. The harm referred to in article 7 was not just harm to the international watercourse. It could be seen from paragraph 1 that the obligation not to cause significant harm related, not just to watercourses, but to other watercourse States.

78. Further to a query by Mr. AL-KHASAWNEH, the CHAIRMAN said that consideration of article 7 would be continued at the next meeting.

The meeting rose at 1 p.m.

2355th MEETING

Thursday, 23 June 1994, at 10.10 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bowett, Mr. Calero Rodrigues, Mr. de Saram, Mr. Fomba, Mr. Güney, Mr. He, Mr. Idris, Mr. Kabatsi, Mr. Kusuma-Atmadja, Mr. Mikulka, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, 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]

CONSIDERATION OF THE DRAFT ARTICLES ON SECOND READING (*continued*)

1. The CHAIRMAN invited the members of the Commission to continue their consideration of the draft articles proposed by the Drafting Committee.

ARTICLE 7 (Obligation not to cause significant harm) (*concluded*)

2. Mr. BOWETT (Chairman of the Drafting Committee) said that Mr. de Saram's remarks (2354th meeting) gave him the impression that his explanations with regard to article 7 had not been very clear. He would thus like to provide further clarification. Everyone agreed that, where a watercourse State envisaged a project for new uses of a watercourse, such a project must first of all be equitable and reasonable, as provided under article 5. However, and that was the point of article 7, paragraph 1, the State that was responsible for the project had to exercise due diligence in its planning, construction and utilization. Article 7, paragraph 2, provided for the situation in which, despite the exercise of due diligence by that State, significant harm had been caused to another watercourse State. In that case, the State in charge of the project must first, as provided in subparagraph (*a*), ascertain whether the project was in fact compatible with equitable and reasonable use of the watercourse and, as provided in subparagraph (*b*), see whether it might be possible to make adjustments to the project which would prevent harm from being caused. That idea of monitoring or supervision reflected current practice. Nevertheless, if significant harm was still being caused after adjustments had been made, the question of the compensation of the injured State must be considered.

3. Mr. AL-KHASAWNEH said that the new wording of article 7 gave rise to some problems, which he would summarize.

4. First, the harm referred to in the article was not just any type of harm, but significant harm, in other words, harm which would be almost impossible to repair. The best solution in such situations was surely prevention and that was why he had preferred and continued to prefer the text adopted on first reading.[2]

5. Secondly, among the reasons given for making major changes in the initial text was the need to take account of the discussions on that matter in the Sixth Committee and in the Commission itself. As he recalled, when Mr. Schwebel had been the Special Rapporteur on the topic, he had sought to subordinate the duty not to cause "appreciable harm", as it had been called then, to the duty of equitable utilization.[3] It was on the basis of the debate that had taken place in the Sixth Committee in the early 1980s that his successor, Mr. Evensen, had changed the wording in such a way that the duty not to cause appreciable harm had become the cornerstone of the draft. When Mr. MacCaffrey had become Special Rapporteur, he had initially sought to return to the wording chosen by Judge Schwebel, but had had to give up that attempt in view of the reactions of the Commission and the Sixth Committee. The draft article submitted on first reading had thus been the result of much reflection and to those who objected to it as a compromise solution, he would reply that the same could be said for all the texts and that completely different conclusions could

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

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

[3] *Yearbook... 1982*, vol. II (Part One), p. 65, document A/CN.4/348.

be drawn from the debates in the Sixth Committee and those in the Commission, and that did not augur well for widespread acceptance of the draft by States.

6. Thirdly, with regard to the substance of the article, the threshold defined by the word "significant" was a high threshold. The draft as it had emerged on first reading had been the weakest possible interpretation of the maxim *sic utere tuo ut alienum non laedas*; replacing a simple and straightforward prohibition by the obligation to exercise due diligence further weakened the text and had the effect, in his view, of tipping the balance too much in favour of new uses which were based on the vaguely defined concept of equitable utilization. The delicate balance which had to be struck between the interests of upper and lower riparian States, between old and new uses of a watercourse and between the need for development and the equally important need to preserve existing ecosystems would be disturbed if significant harm, as opposed to "minimal" or "intermediate" harm, was allowed to be caused to a watercourse. The example of harm caused to a small group of fishermen cited by the Chairman of the Drafting Committee in his introduction (2353rd meeting, paras. 58 *et seq.*) was unconvincing. What would happen if work intended to benefit the population of a State gave rise to irreversible damage to the entire population or large segments of the population of another State? Should the first State be permitted to undertake such a project?

7. Fourthly, the obligation to exercise due diligence had the disadvantage that the "diligence" exercised by the State which was making new use of a watercourse could be verified only after the event, once the harm had been done. If the harm was "significant", it was highly likely that it would be irreversible. That obligation would have made more sense if it had been required for all levels of harm, including minimal harm. In fact, in interpreting article 7 *a contrario*, it might be said that due diligence was owed only in the case of significant harm. The provision was therefore too permissive and could lead to inequitable results. The problem was compounded by the fact that the injured State would not have ready access to information enabling it to determine whether the State which had caused the harm had fulfilled its obligation of due diligence. In such situations, the burden of proof should fall—and there were some examples of that solution in the nuclear field—on the State which was contemplating the new use because, otherwise, the door would be left open to abuses in the name of development.

8. Fifthly, the new wording of article 7 might have implications for other topics on the Commission's agenda, as Mr. Barboza and Mr. de Saram had pointed out (2354th meeting). The obligation as formulated was an obligation of conduct, but, if significant harm did occur, the responsibility was responsibility *sine delicto*. At the same time, it should be borne in mind that the utilization of watercourses must be seen in the context of environmental interdependence. Like the forces of nature, rivers crossed national borders oblivious to the political sovereignty of States. If the rules of State responsibility continued to govern the effects of natural phenomena, there was no reason why the solution contemplated in article 7 should be an exception to that regime. In that area, a State was always under an obligation of due diligence and it must refrain from any action that might cause significant harm to another State or it would be subject to the rules of State responsibility.

9. Sixthly, article 7, paragraph 2, had the disadvantage of presenting the situation from a bilateral point of view. If a State accepted that a planned use of a watercourse would result in significant harm to it, something that was already undesirable in itself, that did not solve the problem of the pollution or deterioration in water quality that might follow for other States. Bearing in mind that all watercourses flowed into the sea, protecting them was a matter of community interest of concern to all States and such protection could be ensured only by a full-fledged obligation of preservation.

10. Lastly, since the obligation of due diligence was supposedly universally applicable, very few demands were being made on the State contemplating the measure: that State had simply to enter into consultations on the question whether the planned use was equitable, on ad hoc adjustments to the project and, where appropriate, on the question of compensation. However, the article did not specify what would happen if the consultations were inconclusive. It was particularly hypocritical to state that the question of compensation would be considered "where appropriate". Since *restitutio in integrum* was in principle precluded, it seemed that the only remedy available was in fact compensation. If that possibility were further limited by adding the words "where appropriate", the text would become even more unbalanced.

11. Having completed his comments, he said that, out of respect for the Commission's tradition of adopting draft articles by consensus, he would not object to the adoption of article 7, provided that his views were fully reflected in the summary record.

12. Mr. Sreenivasa RAO said that, as a member of the Drafting Committee, he was aware that the obligation not to cause harm was an unclear notion and that its full implications could not be measured until the event had taken place. He would have preferred to delete article 7 and stay with the notion of "equitable and reasonable utilization" introduced in article 5. That doctrine seemed to him to be fair and balanced and to cover fully the duty not to cause harm. In response to the question of the point at which foreseeable harm became "unacceptable", it had proved very difficult to define a threshold and an attempt had been made to refer to custom, which had led to the introduction of the notion of "significant harm". That notion was not a fixed one and had to be assessed according to the circumstances of each case. However, the articles under consideration were going to become a framework convention and were not intended to settle concrete problems. The Commission must move on in its work and submit the draft articles to the Sixth Committee. It was trying, with that in view, to find balanced compromise solutions from which wrong conclusions should not be drawn.

13. Mr. CALERO RODRIGUES said that, as a member of the Drafting Committee, he had accepted the proposed text, which he thought offered a satisfactory compromise solution; however, having heard

Mr. Al-Khasawneh's comments, he too now had some doubts. He wondered whether article 7 did not in fact give States the right to cause harm, provided that they entered into consultation. What would happen if the harm in question was catastrophic? The responsibility of the State would not be at issue. Was there not a need to draft a new article to cover that situation?

14. Mr. GÜNEY said that, like Mr. Sreenivasa Rao, he would have preferred the deletion of article 7 since he was unhappy with the wording, but he had gone along with the opinion of the majority of the members of the Drafting Committee.

15. The CHAIRMAN said that, if he heard no objection, he would take it that the members of the Commission were ready to adopt article 7, on the understanding that the views of Messrs Al-Khasawneh, Sreenivasa Rao, Calero Rodrigues and Güney would be duly reflected in the summary record.

It was so decided.

Article 7 was adopted.

ARTICLES 8 TO 16

Articles 8 to 16 were adopted.

ARTICLE 17 (Consultations and negotiations concerning planned measures)

16. Mr. AL-KHASAWNEH asked why the term "if necessary" had been inserted in paragraph 1. Did it mean that a State could refuse apparently necessary negotiations? In that connection, there was an imbalance between article 17 concerning planned measures and article 4 dealing with watercourse agreements, which might also cover planned measures.

17. Article 4 entitled a State which might be affected by the implementation of a watercourse agreement to the right not only to participate in the negotiations, but also to become a party to the agreement; that constituted an exception to the freedom of choice of the parties to a treaty. In contrast, in article 17, the only obligation was to enter into consultations which might perhaps never result in negotiations. He was surprised that the question of the link between articles 4 and 17 had never been raised in the Drafting Committee. He requested clarification on that apparent inconsistency.

18. Mr. BOWETT (Chairman of the Drafting Committee) said that the term "if necessary" meant that negotiations, which implied more structured discussions than consultations, would not be necessary in all instances and would not automatically follow the consultations.

19. Mr. ROSENSTOCK (Special Rapporteur) said that the difference of meaning between consultations and negotiations was tiny. The assumption of the Drafting Committee was that, in some cases, consultations might be sufficient to satisfy the concern of the State making the communication and to settle the problems at that level. It was intended that the commentary would make it clear that a State did not have the right to refuse to engage in negotiations, but that it was not bound to engage in such negotiations if they were pointless.

20. Mr. VILLAGRÁN KRAMER said that article 4 did not impose on a State the obligation to become a party to an agreement and that, in the Drafting Committee, the links between the various articles had been a constant concern which had resurfaced at every meeting.

Article 17 was adopted.

ARTICLES 18 TO 21

Articles 18 to 21 were adopted.

ARTICLE 22 (Introduction of alien or new species)

21. Mr. de SARAM, comparing the phrase "shall take all measures necessary" with the corresponding phrases in articles 26 ("shall ... employ their best efforts") and 27 ("shall ... take all appropriate measures"), said that the variation of terminology ought to be explained in the commentary.

22. Mr. ROSENSTOCK (Special Rapporteur) said that the members of the Drafting Committee had thought that each of the phrases suited the specific situation dealt with in the corresponding article.

Article 22 was adopted.

ARTICLES 23 to 26

Articles 23 to 26 were adopted.

TITLE OF PART FOUR

The title of part four was adopted.

ARTICLES 27 to 31

Articles 27 to 31 were adopted.

ARTICLE 32 (Non-discrimination)

23. Mr. TOMUSCHAT proposed that, to make the text clearer and underline that the access to judicial or other procedures did not depend on the existence of significant harm, a comma should be placed after the word "procedures" in the article.

24. Mr. Sreenivasa RAO reiterated his reservations about the article, which had no place in a framework convention concerned mainly with cooperation between States. The problem of the possible recourse available in law to individuals in a State other than the one of which they were nationals was far too complex to be dealt with in such a concise, even misleading, manner. That being the case, he noted that the article provided access to judicial or other procedures for foreigners on an equal footing with the nationals of a State and not on a preferential basis.

Article 32 was adopted.

ARTICLE 33 (Settlement of disputes)

25. Mr. ARANGIO-RUIZ said that the language of the last lines of subparagraph (*c*), which read:

> "... any of them may, subject to the agreement of the States concerned, submit the dispute to a permanent or ad hoc tribunal or to the International Court of Justice"

was not consistent with what was currently found in arbitration clauses. Moreover, its meaning was obscure in that the phrase "any of them may ... submit" suggested the idea of a unilateral application, whereas the phrase "subject to the agreement of the States concerned" suggested referral by way of a compromise.

26. Mr. BOWETT (Chairman of the Drafting Committee) said that the point raised was important and requested the Special Rapporteur to explain what he understood by the phrase "subject to the agreement of the States concerned". Either it referred to a watercourse agreement as envisaged in article 4, which might itself provide, for example, for referral to the court by way of a compromise, or it referred to a particular agreement among the States concerned in the context of a given dispute.

27. Mr. ROSENSTOCK (Special Rapporteur) said that he had intended the phrase to cover several possible cases: a special or ad hoc agreement, an agreement within the framework of a watercourse agreement, the case in which the States concerned were parties to an agreement for the peaceful settlement of disputes covering, *inter alia*, that type of problem, or the case in which the States concerned had individually accepted the jurisdiction of ICJ. He could explain that intention in the commentary.

28. Mr. TOMUSCHAT said that the presentation would be improved if the semicolons at the end of each subparagraph were replaced by full stops. Subparagraph (*b*) contained an ambiguity due to the repetition of the phrase "the States concerned". The reference in both cases was to the same States and it would be clearer to replace the second mention of "the States concerned" by "them".

29. In subparagraph (*c*) the phrase "any of them may ... submit the dispute" wrongly suggested the idea of a unilateral application. Only the notion of "agreement" should be retained in the subparagraph.

30. Mr. ARANGIO-RUIZ said that the main concern, when examining a provision like subparagraph (*c*), which contained an arbitration clause, was not to lose sight of the fundamental difference between arbitration, on the one hand, and judicial settlement, on the other.

31. Arbitration was essentially consensual by nature, since the arbitral body could be created only by agreement and with the specific object of submitting a particular dispute to it.

32. On the other hand, a case could be brought, under certain conditions, before ICJ by unilateral application, as the Court was a permanent body. Subparagraph (*c*) could therefore be reworded to provide that each of the States concerned could propose that the dispute should be referred by agreement to arbitration and that, in the absence of agreement, any party could bring a case before ICJ by unilateral application.

33. Mr. YANKOV said that that point, which had been fully discussed in the Drafting Committee, raised a problem that was one not of drafting, but of conceptual approach. The basic idea of the draft was that, in the context of a framework agreement which laid down general guidelines only, there must always be an agreement between the parties.

34. Mr. ROSENSTOCK (Special Rapporteur) said he recognized that drafting changes could doubtless be made to subparagraph (*c*). A problem of substance would, however, arise if the effect of the changes in its wording was to provide that any State party to the draft treaty would be deemed to have accepted the jurisdiction of ICJ. It should also be noted that the concept of the compulsory jurisdiction of ICJ had not been supported in the Drafting Committee.

35. Mr. ARANGIO-RUIZ said that the question of the compulsory jurisdiction of ICJ would in any event arise only in the highly unlikely case that the parties did not succeed either in settling the dispute through conciliation or in establishing an arbitral tribunal. The question of substance was, however, a matter for the Special Rapporteur. His main concern was with the wording of the last part of subparagraph (*c*), which seemed to him to be odd and virtually unacceptable coming from international lawyers. The words "any of them may, subject to the agreement of the States concerned, submit the dispute" in effect established a unilateral right, as it were, to refer the case to a court and, moreover, presupposed the prior existence of an ad hoc court, and that was a contradiction in terms.

36. Mr. AL-KHASAWNEH said that he agreed with Mr. Arangio-Ruiz on the substantive question of the compulsory jurisdiction of ICJ.

37. Mr. BOWETT (Chairman of the Drafting Committee) said that, as far as substance was concerned, the only compulsory provisions related to fact-finding—mediation and conciliation being optional. He did not see how provision for the compulsory jurisdiction of ICJ could be included in the paragraph. Mr. Arangio-Ruiz was, however, right about the wording of subparagraph (*c*) and it would be better to say simply "if ... the States concerned have been unable to settle the dispute, they may by agreement submit ...".

38. After a discussion in which Mr. BOWETT, Mr. TOMUSCHAT, Mr. ARANGIO-RUIZ, Mr. ROSENSTOCK (Special Rapporteur) and Mr. YANKOV took part, the CHAIRMAN suggested that the Commission should resume consideration of article 33, as amended in the following manner: in subparagraph (*b*), the words "if agreed upon by the States concerned" should be replaced by the words "if agreed upon by them" and, in subparagraph (*c*), the words "any of them ... or to the International Court of Justice" should be replaced by the words "they may by agreement submit the dispute to arbitration or judicial settlement".

39. Mr. ARANGIO-RUIZ said he could not resist the temptation of proposing that the wording of subparagraph (*c*) should be made even more clearly redundant by stating that "the States may or may not by agreement ...". Letting jokes aside, he saw no point in stating, in a Convention, that the contracting States were free to agree, or not to agree, to resort to arbitration. Of course they were anyway.

40. Mr. AL-KHASAWNEH said he wished once again to stress that, in his view, some form or other of compulsory third-party settlement was essential in the draft articles. In general, those States which agreed to become parties to a treaty should agree that their conduct with respect to the interpretation and application of that treaty could be the subject of a third-party procedure for the settlement of disputes. In the more specific context of the topic under consideration, substantive obligations, namely, the obligation of equitable utilization and the obligation to exercise due diligence in order not to cause significant harm, were by nature elastic and subject to many different interpretations and therefore involved an inherent risk of dispute.

41. He also noted a difference of approach, in that little account was taken of political realism in article 4, which derogated from the general principle of the freedom of choice of the parties to a treaty, as compared to the place which that self-same political realism was accorded in article 33 and for the sake of which the idea of third-party compulsory settlement had been rejected. The Commission should, if only out of professional conscientiousness, foster the development of international law and the establishment of the rule of law in the international community and should not yield unduly before the political realism that the delegations in the Sixth Committee would no doubt propound, as it was their task to do.

42. Mr. VILLAGRÁN KRAMER said that the wording of article 33 as amended did not introduce any new idea or criterion that might be of guidance to States. The Commission had simply marked out a huge area of *laissez-faire, laissez-passer*. In subparagraph (*c*), for instance, it would be better to say "They must by agreement", and not "They may by agreement". The Commission did not share that view, of course, but Mr. Al-Khasawneh had been right to urge the Commission to ensure that the draft which was placed before the General Assembly invited it to forge ahead and to establish a clearer and more distinct obligation to settle disputes by the means provided for in the Charter of the United Nations.

43. Mr. KUSUMA-ATMADJA said that the first version of article 33 at least had the merit of providing for the possibility of referring disputes to ICJ and such referral would in any event always be on a voluntary basis. None the less, the new wording was certainly acceptable to more of the Commission's members.

44. Mr. Sreenivasa RAO said that he welcomed the clarification introduced in the draft article and would have no difficulty in participating in a consensus in favour of the new text. He would, however, have preferred to place the emphasis on the basic principles and on the free choice of dispute settlement procedures. In particular, the fact-finding commission of several members, provided for in article 33, might prove to be costly and even prejudicial to speedy and peaceful dispute settlement if one or more of its members disagreed with its findings, something that would be contrary to the desired objective. On the other hand, if the choice of a fact-finding commission was freely made by the parties, it could be extremely useful.

45. In drawing up a framework convention, the Commission did not have to go into the details of the dispute settlement procedures which were normally dealt with in other instruments. The Commission should abide by State practice and encourage those States which had not concluded an agreement on a particular watercourse to do so, which presupposed that it would provide them with a reasonable draft that could be finalized when the time came. The problem with regard to the utilization of watercourses was one of lack of agreement, but, when there was an agreement, it always embodied dispute settlement provisions.

46. The CHAIRMAN suggested that the Commission should adopt article 33 as amended on the understanding that all the views expressed would be duly reflected in the summary record of the meeting.

Article 33, as amended, was adopted.

Draft resolution proposed by the Drafting Committee (*continued*)*

47. The CHAIRMAN invited the Commission to continue its consideration of the draft resolution on unrelated confined groundwater proposed by the Drafting Committee (A/CN.4/L.492/Add.1).

48. Mr. TOMUSCHAT said that, as the question had not been examined in sufficient depth, he wished to reserve his position.

49. Mr. ROSENSTOCK (Special Rapporteur) explained that, at the request of the Commission, he had submitted a study at the current session on the question of the feasibility of including confined groundwaters in the draft articles.[4] The discussion to which that study had given rise showed that there were three broad trends of opinion: that the draft articles as a whole should be expressly extended to cover confined groundwaters; that confined groundwaters should not be included within the scope of the draft articles; and that a provision should be incorporated in the draft articles providing that the principles embodied in them would apply *mutatis mutandis* to confined groundwaters. The Drafting Committee had been invited to reconcile those views and, after careful reflection, had agreed on the resolution now before the Commission.

50. Mr. AL-KHASAWNEH said that he agreed with Mr. Tomuschat's view.

51. Mr. SZEKELY said he thought that the text under consideration, which was explicit and well-balanced,

* Resumed from the 2353rd meeting.

[4] This study was not issued as an official document of the Commission.

was the best compromise it had been possible to find on an extremely delicate matter.

52. Mr. Sreenivasa RAO said that the draft resolution was acceptable, although he would have preferred the question of confined groundwater to have been the subject of a more detailed study.

53. Mr. THIAM, drawing attention to the fact that he was one of those who had wanted the question of confined groundwater to be the subject of a separate study, noted with satisfaction that the draft resolution did not rule out that possibility at a subsequent stage.

54. On the assumption that the words "principles contained", in paragraph 1, in fact referred to the general principles referred to in article 5 (Equitable and reasonable utilization and participation), he wondered whether it would not be desirable explicitly to state that that was the case. With that proviso, he supported the draft resolution.

55. Mr. BARBOZA said that, while sharing the doubts which had been expressed by some members of the Commission and which chiefly reflected a lack of experience, he found the draft resolution useful, since it now provided for the protection of confined groundwater, to which the principles contained in the draft articles would be applied as necessary in a specific legal framework.

56. Mr. KUSUMA-ATMADJA said that he could accept the text submitted because the regime agreed for surface water and related groundwater was not explicitly extended to confined groundwater, about which little was known, and because its principles were supposed to be applicable to confined groundwater only "where appropriate". Sharing to some extent the views expressed by Mr. Tomuschat and Mr. Al-Khasawneh, he sought assurances that the draft resolution did not rule out the possibility of conducting a more detailed study of confined groundwater, which, given its importance, might merit particular attention or even a particular regime at a later stage. In that regard, he considered that the measures envisaged in the draft resolution were only interim measures.

57. The CHAIRMAN said it was his understanding that the text under consideration did not rule out the possibility of conducting a more detailed study on the question of confined groundwater. It simply reflected the current level of knowledge of the members of the Commission on the question, which led them to think that the agreed principles might be applicable to confined groundwater.

58. Mr. VILLAGRÁN KRAMER noted that the proposed draft resolution offered a useful frame of reference to States for the management of confined transboundary groundwater, to which the obligations, inter alia, not to pollute, not to cause harm, and to exercise due diligence in joint and equitable utilization could be applied.

59. He supported Mr. Thiam's proposal that paragraph 1 should specify that the "principles contained" were the general principles contained in article 5 of the draft articles. He hoped that the Special Rapporteur would be able to redraft the text of that paragraph to that effect without affecting its substance.

60. Mr. YANKOV said he recognized that, with the possible exception of the Special Rapporteur, the members of the Commission were not very well versed in the question of confined groundwater, but it was not fair to say that little attention had been devoted to it: it was the subject of three long paragraphs in the topical summary of the discussion held in the Sixth Committee of the General Assembly during its forty-eighth session (A/CN.4/457, paras. 394-396) and of an annex containing a wealth of miscellaneous information, appended to the second report of the Special Rapporteur (A/CN.4/462).

61. That being said, he would have preferred to have the applicable general principles listed in paragraph 1 of the draft resolution, particularly since there was no reference to the principle of equitable and reasonable utilization and participation; to the principles of cooperation and regular exchange of data and information—which did not seem to be useful; or to the principle of protection and conservation. However, in a spirit of compromise, he endorsed the current wording of that paragraph.

62. In response to those who had drawn attention to the unusual nature of the text under consideration, he pointed out that it consisted of recommendations and that, as such, it should be included in the report of the Commission on its work at the current session.

63. Lastly, he proposed that the draft resolution should be adopted by consensus.

64. Mr. ROBINSON said that he wondered whether the words "principles contained", which appeared in paragraph 1, referred only to the general principles contained in part two—in which case that should be specifically stated—or to the whole of the draft articles—in which case the draft resolution was acceptable. Paragraph 1 might be more acceptable if it simply reflected the idea that States could envisage applying to confined transboundary groundwater the principles listed in the draft articles.

65. Mr. TOMUSCHAT, referring to the question of the lack of clarity in the text, which Mr. Robinson's question, for example, had just highlighted, said that the words "may be applied" in paragraph 1 could be interpreted as meaning "are applicable" rather than "may or may not be applicable". It would thus be better to say that States could envisage applying those principles to confined transboundary groundwater.

66. Secondly, the question arose whether the words "principles contained" in paragraph 1 referred only to the principles contained in part two or also to part three (Planned measures), which could also be regarded as containing a principle in the sense that watercourse States wishing to undertake major works must notify other watercourse States likely to suffer adverse effects as a result.

67. Thirdly, it was important to bear in mind the major and essential difference between renewable and non-renewable confined groundwater, which should not be

treated in the same way, since the latter might require a special regime.

68. Lastly, he wondered what purpose the resolution might serve. There were a number of general principles of international law applicable in the matter, as established, for example, in the *Lake Lanoux*[5] and *Corfu Channel*[6] cases, which had a bearing on the issue under consideration. The ambiguity of paragraph 1 did not make it possible to answer the question whether the Commission wished to go beyond the regime embodied in those principles.

69. The CHAIRMAN pointed out that the wording of the draft resolution allowed for some flexibility, thanks to expressions such as "to be guided" and "where appropriate" in paragraph 2.

70. Mr. ROSENSTOCK (Special Rapporteur) said he thought that the text did indeed allow some flexibility and that it was not wise to limit the applicable principles to those listed in article 5 of the draft articles. In that regard, the Drafting Committee had discussed the following principles and practices: entering into agreements with other States in which the confined transboundary groundwater was located; respect for the entitlement of all other States in which the water was located to participate in the negotiation of and become a party to any agreement which might affect the use or enjoyment of the water; utilization of the water in an equitable and reasonable manner; respect for the rights of all States in which part of the water was located to participate in its use in a reasonable manner in accordance with the general obligation to cooperate; exercise of due diligence with regard to utilization of the water so as not to cause significant harm to other States in which part of the water was located; cooperation with other States in whose territory the water was located to obtain optimal utilization and adequate protection thereof and consultation concerning management of the water; exchange of data and information on a regular basis and in response to requests; protection and preservation of the ecosystem of the water; prevention, reduction and control of pollution of the water; and protection and preservation of the natural environment. No members of the Drafting Committee had raised objections to any of those principles and practices; nor could they logically have done so.

71. After debating whether that list was exhaustive or whether there were other principles and practices, the Drafting Committee had decided that it would be better to confine itself to a general reference. It had identified no principle applicable solely to unrelated confined groundwater and it had not considered that some of the above-mentioned principles were not applicable thereto. Lastly, it had found nothing to support the view that a distinction must be made, in respect of the application of such general principles, between non-renewable and renewable confined groundwater.

72. Given the generally flexible character of the text under consideration and the nature of the principles contained in the draft articles and of the above-mentioned principles, it would be strange and disturbing if the Commission did not go at least as far as the Drafting Committee was requesting it to go. Personally, he, like other members of the Commission, would have liked to go further.

The meeting rose at 1.05 p.m.

2356th MEETING

Friday, 24 June 1994, at 10.05 a.m.

Chairman: Mr. Vladlen VERESHCHETIN

Present: Mr. Al-Khasawneh, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Bennouna, Mr. Bowett, Mr. Calero Rodrigues, Mr. Crawford, Mr. de Saram, 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. Robinson, Mr. Rosenstock, Mr. Szekely, Mr. Thiam, Mr. Tomuschat, 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]

DRAFT RESOLUTION PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

1. Mr. PAMBOU-TCHIVOUNDA said that, in the last preambular paragraph of the draft resolution adopted by the Drafting Committee (A/CN.4/L.492/Add.1), the Commission recognized the need for continuing efforts to elaborate rules pertaining to confined transboundary groundwater. Important issues were involved. Was it enough simply to "recognize" that need? Was the Commission expecting some action on the part of the General Assembly? In what context, and to what extent, were such efforts to be continued? The paragraph was by no means negligible, nor was it merely an afterthought. Its contents should therefore also be reflected in the operative part.

2. Mr. GÜNEY said that the draft resolution was the only text on which the Drafting Committee had been unable to reach consensus in the course of the second

[5] United Nations, *Reports of International Arbitral Awards*, vol. XII (Sales No. 63.V.3), p. 281; partial translations in *International Law Reports, 1957* (London), vol. 24 (1961), p. 101; and *Yearbook . . . 1974*, vol. II (Part Two), pp. 194 *et seq.*, document A/5409, paras. 1055-1068.

[6] Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 4.

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