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Summary record of the 2033rd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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paragraph 3 (*d*), he suggested that it be divided into two new subparagraphs, which would read:

"(*d*) To be tried in his presence and to defend himself in person or through legal assistance of his own choosing and to be informed of this right if he does not have legal assistance;

"(*e*) To have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it;"

In the present paragraph 3 (*e*), he thought that the words "or have examined" were superfluous.

48. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that the introductory clause referred to the applicable law and the facts. The law referred to in paragraph 1 was the *lex fori*, and the words "by treaty" meant any bilateral or multilateral treaty under which the tribunal had been established. The words "or have examined", in paragraph 3 (*e*), referred to letters rogatory, in other words to cases where witnesses were examined by a court other than the one trying the case.

49. Mr. THIAM (Special Rapporteur) said that the commentary would answer the questions raised by members of the Commission concerning draft article 6.

50. Mr. BEESLEY said that, in his opinion, the proposals made by the Special Rapporteur, Mr. Ogiso, Mr. Yankov and Mr. Sreenivasa Rao were all logical and useful. If the Commission adopted those amendments, however, he was not sure whether the word "minimum" in the introductory clause should be retained or whether it might not be better to use the words "common to all legal systems". He was also not certain whether the accused was entitled to be informed of his rights.

51. Mr. BENNOUNA said that he agreed with the changes suggested by the Special Rapporteur in order to make the text clearer and with the proposals by Mr. Ogiso and Mr. Yankov. He did not, however, see why sacrosanct terms should be used if they were ambiguous. The Commission's role should, rather, be to explain and improve on such terms. It would therefore be preferable, in the introductory clause, to use the words "with regard to the applicable law and the establishment of the facts". In the present paragraph 3 (*f*), he suggested that the words "used in court" be replaced by "during the judicial proceedings".

The meeting rose at 1.05 p.m.

2033rd MEETING

Monday, 13 July 1987, at 3 p.m.

Chairman: Mr. Stephen C. McCAFFREY

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

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

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*concluded*)

ARTICLE 6 (Judicial guarantees)[5] (*concluded*)

1. The CHAIRMAN invited comments on the reformulated text of article 6 proposed by the Special Rapporteur and on the various amendments to the article suggested at the previous meeting. He also invited comments on the text proposed by Mr. Yankov, which had been submitted in writing since the previous meeting and which read:

"Article 6. Judicial guarantees

"Any person charged with a crime against the peace and security of mankind shall be entitled without discrimination to the following minimum guarantees due to all human beings with regard to the law and the facts.

"1. He shall have the right to be presumed innocent until proved guilty;

"2. In the determination of any criminal charge against him, he shall be entitled:

"(*a*) To a fair and public hearing by a competent, independent and impartial tribunal duly established by law or by treaty;

"(*b*) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

"(*c*) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

"(*d*) To be tried without undue delay;

"(*e*) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him in any such case if he does not have sufficient means to pay for it;

"(*f*) To examine, or have examined, the witnesses against him and to obtain the attendance and ex-

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

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

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

[4] *Ibid.*

[5] For the text, see 2031st meeting, para. 2.

amination of witnesses on his behalf under the same conditions as witnesses against him;

"(*g*) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

"(*h*) Not to be compelled to testify against himself or to confess guilt."

2. Mr. THIAM (Special Rapporteur), referring to the amendment submitted by Mr. Ogiso (2032nd meeting, para. 40), said that, in his view, it would be preferable to retain the introductory clause of the article as worded to make it clear that the list of guarantees set forth in the article was not exhaustive. He agreed entirely with Mr. Yankov's proposed wording of paragraph 2 and would also have no objection to the proposal that the words "a fair and public hearing", in the new paragraph 2 (*a*), should be replaced by "a fair and public trial".

3. Mr. OGISO said that he would not insist on his proposal, provided his position was reflected in the summary record.

4. The CHAIRMAN pointed out that the proposal to replace the word "hearing" by "trial" would mean a departure from the language of the International Covenant on Civil and Political Rights on which article 6 was based.

5. Mr. GRAEFRATH said that there was no sense at the current late stage in trying to alter the text of the article. The Drafting Committee had decided after a lengthy discussion to follow the language of the Covenant, which had itself been ratified by more than 86 States after long years of consideration.

6. Mr. MAHIOU said that, although he agreed in part with Mr. Graefrath's remarks, he saw no reason why a particular text could not be improved. He did, however, have doubts about the need to amend the text of article 6. The expression "a fair and public hearing" was quite broad and covered committal proceedings as well as the trial itself; if the word "trial" were used, the result might be that the guarantees in question would apply only at the trial stage, not before.

7. Mr. AL-BAHARNA said that, while Mr. Yankov's proposed wording was a great improvement, he would prefer to retain the words "In particular" in the introductory clause. He also considered that it would be better to use the term "trial", which was, in his view, broader than the term "hearing". He found paragraph 2 (*e*) of the text proposed by Mr. Yankov somewhat confusing because of the punctuation and therefore proposed that it be amended to form two subparagraphs, reading:

"(*e*) To be tried in his presence, to defend himself in person or through legal assistance of his own choosing, and to be informed of this right if he does not have legal assistance;

"(*f*) To have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it;"

Paragraph 2 (*f*) to (*h*) would then become paragraph 2 (*g*) to (*i*). He further proposed that the words "or have examined", in paragraph 2 (*f*) of the text proposed by Mr. Yankov, should be deleted.

8. The CHAIRMAN noted that the words "to examine, or have examined" were taken from the Covenant.

9. Mr. BARSEGOV said that there was a discrepancy between the French and English texts of the introductory phrase to the new paragraph 2. In his view, the two texts should be consistent.

10. The CHAIRMAN said that, once again, the difference stemmed from the Covenant.

11. Mr. PAWLAK proposed that the word "person", at the beginning of article 6, should be replaced by "individual", in line with article 3, paragraph 1.

It was so agreed.

12. He also thought that the words "In particular", in the introductory clause of article 6, should be retained.

13. In the new paragraph 2 (*a*), he favoured the word "trial", which was much broader than the word "hearing" and therefore preferable even if it did not appear in the Covenant. In any case, there was no reason why the Commission should not improve on the language of the Covenant.

14. Lastly, he proposed that the title of the article, "Judicial guarantees", should be amended to read "Guarantees for a fair trial".

15. Mr. THIAM (Special Rapporteur) said that the title of the article had been discussed at length in the Drafting Committee, which had decided against any change. He considered that it would be better not to insist on the word "trial", rather than "hearing", but would have no objection to replacing the word "person" by "individual". Subject to that one change, he suggested that the Commission should adopt his reformulated text of article 6 (2032nd meeting, para. 39). Mr. Yankov's proposal had substantive implications and it would perhaps be better not to pursue it.

16. Mr. KOROMA said that the language of the code, as an instrument of criminal legislation, necessarily had to be more narrowly drawn than that of an instrument on human or political rights. The Commission could use the Covenant as a guide, but should not feel bound by it, and there was no reason why it could not improve on the language of the Covenant.

17. In the circumstances, he considered that "trial" rather than "hearing" was the proper word. In addition, he failed to understand the expression "the right to be presumed innocent" in the new paragraph 1, which should, in his view, be amended to provide that an accused should be presumed innocent until proved guilty.

18. Mr. CALERO RODRIGUES said that some of Mr. Al-Baharna's suggestions could have been useful if the Commission had had time to discuss them. He agreed, however, that for the time being the Commission should not try to improve on the language of the Covenant. He therefore proposed that the Commission should accept the text proposed by the Special Rapporteur, which was very similar to Mr. Yankov's text,

with the deletion of the first phrase of paragraph 2, "In the determination of any criminal charge against him".

19. Mr. EIRIKSSON proposed that those words should be transferred to paragraph 2 (*a*) of the new text, in line with the text proposed by the Special Rapporteur.

It was so agreed.

20. Mr. REUTER said that, in his view, the Commission should for the time being adopt the text of article 6 as proposed by the Special Rapporteur. It would, however, have to revert to the article later, first, because it had followed the language of the Covenant without trying to bring the English and French texts into line, and secondly, because a question not only of human rights, but also of the rights of other States was involved, which meant that the list of guarantees was not sufficient. He had in mind, for instance, the position of an extraditing State, which would require certain guarantees regarding the course of the proceedings.

21. Mr. AL-KHASAWNEH said he, too, considered that it was preferable for the time being to adopt the Special Rapporteur's proposal.

22. Mr. HAYES said that he supported the introductory clause of the original text of article 6,[6] as largely retained in the Special Rapporteur's reformulation (2032nd meeting, para. 39), since it was important to have a non-exhaustive list of judicial guarantees. He agreed that the phrase "In the determination of any criminal charge against him" should be transferred to paragraph 2 (*a*) of the new text.

23. He favoured the retention of the language used in the Covenant, since any departure from that language would raise the presumption that the Commission meant something different, and that would not make for an effective provision. Moreover, the relevant provisions of the Covenant were concerned with the exercise of domestic criminal jurisdiction and were therefore relevant to the code.

24. A "hearing", as he understood the word, was wider than a "trial", since it could include pre-trial procedures which involved the determination of a criminal charge but did not actually amount to a trial.

25. Mr. KOROMA said he maintained the view that paragraph 1 of article 6 as reformulated should be brought into line with the French text. He would not insist on that point at the current stage in the work, but none the less thought that there was no harm in rectifying an error: mistakes could slip into a convention and become part of that convention.

26. The CHAIRMAN said that the discrepancy between the French and English texts could be considered at a future date. On that understanding, he suggested that the Commission should provisionally adopt the text of article 6 as amended by the Special Rapporteur (*ibid.*) and as further amended by the proposals of Mr. Pawlak (para. 11 above) and Mr. Eiriksson (para. 19 above).

It was so agreed.

Article 6 was adopted.

[6] See 1992nd meeting, para. 3.

The law of the non-navigational uses of international watercourses (*concluded*)* (A/CN.4/399 and Add.1 and 2,[7] A/CN.4/406 and Add.1 and 2,[8] A/CN.4/L.411)

[Agenda item 6]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*concluded*)

TITLE OF PART II OF THE DRAFT

27. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that the Drafting Committee recommended that part II of the draft should be provisionally entitled "General principles", on the understanding that the title would be reviewed when all the articles of part II had been prepared.

28. The CHAIRMAN said that, if there were no objections, he would take it that the Commission agreed provisionally to adopt the title of part II of the draft on that understanding.

The title of part II of the draft was adopted.

ARTICLE 6 [6 AND 7] (Equitable and reasonable utilization and participation)[9]

29. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that article 6 combined the texts of articles 6 and 7 as submitted by the previous Special Rapporteur and reflected the underlying concepts of article 5 as provisionally adopted in 1980. The latter article, which dealt with the concept of a "shared natural resource", had been criticized on the grounds that it lacked legal precision. It had, however, been recognized that effect could be given to the legal principles underlying that concept without using the expression itself in the body of the article.[10] The Drafting Committee had therefore prepared an article based on the principles of equitable and reasonable utilization and participation in the belief that such an article would more appropriately reflect the principles to be embodied in the draft. The new text did not use the word "share" and it did not refer to the relativity aspect of the uses of a watercourse, a matter which was covered by the provisional working hypothesis and would eventually be covered by the definitional article. Certain members had regretted that the concept of "sharing", which had appeared in earlier texts, had been dropped.

30. Paragraph 1 began with a statement of the basic obligation applicable to all watercourse States, namely that they should in their respective territories utilize a watercourse in an equitable and reasonable manner. That principle had been reflected in the former article 7. The second sentence of the paragraph then explained that that concept meant that a watercourse should be used and developed by watercourse States with a view to attaining optimum utilization thereof and benefits

* Resumed from the 2030th meeting.

[7] Reproduced in *Yearbook . . . 1986*, vol. II (Part One).

[8] Reproduced in *Yearbook . . . 1987*, vol. II (Part One).

[9] For the text, see 2028th meeting, para. 1.

[10] See *Yearbook . . . 1986*, vol. II (Part Two), p. 62, para. 237.

therefrom consistent with adequate protection of the watercourse. Attaining optimum utilization and benefits did not mean achieving "maximum" use or the most technologically efficient use or that the State capable of making the most efficient use of the watercourse should have a superior claim to it. It meant the attainment of the best possible uses and benefits for all with a minimum of harm, in the light of all relevant circumstances and in a manner consistent with the adequate protection of the watercourse in terms, for instance, of flood or pollution control. Some members of the Drafting Committee had stressed that, at some future stage, consideration should be given to the possibility of defining "optimum utilization and benefits" in the article on the use of terms. Equitable utilization did not mean the equal sharing of a watercourse: there might well be cases of "unequal" sharing in the utilization of a watercourse which constituted equitable utilization. That basic concept would be fully explained in the commentary.

31. With regard to the terms used in paragraph 1, the expression "in an equitable and reasonable manner" would, of course, have to be interpreted on a case-by-case basis and the factors that were relevant in that regard were set forth in the new article 7. The words "adequate protection" covered not only measures of conservation, but also measures of "control" in the sense of measures to control floods, pollution or erosion. Although those words referred primarily to measures taken by individual States, they did not exclude co-operative measures or activities undertaken by States jointly.

32. Paragraph 2 provided for the consequences of equitable utilization, namely the equitable and reasonable participation by watercourse States in the use, development and protection of a watercourse. Equitable utilization by each State would necessarily lead to equitable participation by all the States concerned. An important element in that new paragraph was that equitable participation included both the right to equitable utilization, as provided in paragraph 1, and the duty to co-operate in the protection and development of the watercourse. The latter duty was linked to the future article on the general obligation to co-operate which was to be prepared on the basis of draft article 10 as submitted by the Special Rapporteur.[11] Article 6 therefore no longer spoke only of an entitlement, but also of a duty, which did not imply the creation of a collective management scheme but was, rather, linked to the general duty to co-operate. Since the future article 10 would contain references to such general principles as good faith, the Drafting Committee had not deemed it necessary to include them in paragraph 2 of article 6.

33. Doubts had been expressed in the Drafting Committee about some of the terms used in article 6, particularly the word "benefits" in the second sentence of paragraph 1 and the word "includes" in the second sentence of paragraph 2, which, it had been suggested, should be replaced by "shall be based on". It had also been noted that the use in some languages of similar words, such as "use" and "utilize" in English, would have to be reconsidered.

34. Lastly, the title of article 6 was new and reflected the new content of the provision.

35. Mr. KOROMA said that he accepted the principle of equitable and reasonable utilization, but had serious doubts about extending that principle in such a way as to impose an obligation on States to participate in the use, development and protection of an international watercourse. He therefore proposed that the words "and participation" should be deleted from the title of the article and that the words "shall participate", in the first sentence of paragraph 2, should be replaced by "may participate" or "may decide to participate".

36. Mr. ROUCOUNAS recalled that, at the Commission's thirty-eighth session, it had been agreed that the draft articles should reflect the idea of a "shared natural resource" without actually using that expression.[12] Article 6 as drafted, however, did not seem to reflect the idea that the waters of a watercourse were, by their very nature, shared among the States concerned.

37. Mr. AL-KHASAWNEH said he thought that the first sentence of paragraph 2 should be couched in less mandatory terms as he was not certain that the duty for which it provided really existed. He also had doubts about the second sentence of paragraph 2, which was lacking in legal precision. Did the word "includes", for instance, mean that there were rights other than the right to use the international watercourse system? In any event, the corollary of that right was not the duty to co-operate in the protection and development of a watercourse system, but rather the duty not to cause injury to other States.

38. The CHAIRMAN, speaking as Special Rapporteur, said that article 6 had been the subject of a detailed discussion in the Drafting Committee, which had taken the view that the concept of equitable participation would convey the notion that States had a duty to co-operate and, in so doing, to achieve and maintain equitable utilization within the meaning of paragraph 1 of the article. The Drafting Committee, as he understood the position, had regarded the second sentence of paragraph 2 not as stating two corollaries, but rather as referring to two aspects of the specific duty of equitable participation. Determining the precise contours of that duty might, of course, have to await the further development of the draft.

39. Mr. AL-KHASAWNEH said that, as it now stood, the second sentence of paragraph 2 none the less gave the impression that the right and the duty referred to were corollaries—and he did not think that that had been the intention of the Drafting Committee. He would, however, not stand in the way of the adoption of article 6.

40. Mr. KOROMA said he was still not convinced that there was a rule of law which required watercourse States to participate in the use, development and protection of a watercourse system.

41. Mr. ARANGIO-RUIZ said that, in his view, the mandatory term "shall" applied not so much to participation in the use, development and protection of an

[11] See 2001st meeting, para. 33.

[12] See footnote 10 above.

international watercourse as to the requirement that such participation should be equitable and reasonable. The effect of the word "may", if it were to replace "shall", as suggested by Mr. Koroma, would be virtually to destroy the intent of the article, which was to ensure that the States which made use of a watercourse did so in an equitable and reasonable manner. It should also be borne in mind that, even if a State made no use whatsoever of a watercourse that flowed through its territory, that watercourse inevitably affected the territory of that State. Those considerations might dispel some of Mr. Koroma's doubts.

42. Mr. GRAEFRATH said that he shared Mr. Koroma's concern. "Participation" referred not to a shared watercourse system, but to the use a State made of the waters within its territory and its co-operation with other watercourse States under specific agreements.

43. Mr. CALERO RODRIGUES said that, in purely theoretical terms, he agreed with Mr. Koroma that paragraph 2 should not be interpreted as imposing on a State a strict obligation to participate in the use of a watercourse. However, he read article 6 not as Mr. Koroma did, but rather as Mr. Arangio-Ruiz did. He understood paragraph 2 to mean that, where each State along a given watercourse used the waters of that watercourse in its own territory, there was participation in the uses, and such participation should be equitable and reasonable. What was stated in the article was only a general principle of co-operation that would have to be developed later in the draft.

44. Mr. BARSEGOV said that he, too, shared Mr. Koroma's concern on a matter which involved the sovereign competence of States. As he saw it, the Commission's task was to draw up a set of recommendations to assist States in concluding agreements on specific uses of watercourses.

45. Mr. BEESLEY said that he could accept the text of article 6 as worded on the understanding that it was interpreted to mean that watercourse States participating in the use, development and protection of a watercourse system should do so in an equitable and reasonable manner and not as imposing any obligation on watercourse States.

46. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 6 [6 and 7] as proposed by the Drafting Committee.

Article 6 [6 and 7] was adopted.

47. Mr. EIRIKSSON said that he had two proposals which he was making following the adoption of article 6 to ensure that they did not give rise to any debate. The first was that the word "respective", in the first sentence of paragraph 1, and the word "both", in the second sentence of paragraph 2, should be deleted and the second was that the second sentence of paragraph 1 should be couched in the active, not the passive, voice.

48. Mr. ARANGIO-RUIZ said that he could not agree to the deletion of the word "respective", which clarified the meaning of the provision.

ARTICLE 7 [8] (Factors relevant to equitable and reasonable utilization)[13]

49. Mr. RAZAFINDRALAMBO (Chairman of the Drafting Committee) said that article 7 was based on article 8 as submitted by the previous Special Rapporteur in 1984. As indicated in its title, article 7 was concerned with factors relevant to the equitable and reasonable utilization of international watercourses and thus provided States with guidance as to the meaning and application of article 6. The introductory clause of paragraph 1 provided that the utilization of a watercourse in an equitable and reasonable manner within the meaning of article 6 required that account be taken of all relevant factors and circumstances, including those listed in paragraph 1 (*a*) to (*f*). In its new version, that clause did not include the words "In determining whether the use . . . is exercised in a reasonable and equitable manner", which had appeared in the previous Special Rapporteur's draft. The Drafting Committee had decided, in order to achieve a more widely acceptable text, to delete any reference to "determining", which, in the view of some members, implied third-party determination.

50. Article 7 as it now stood recognized that, in the first instance, it was for States to make the necessary assessments in weighing the various factors. The cross-reference to article 6 made it clear that watercourse States were the primary actors in equitable and reasonable utilization and participation. The article did not, of course, preclude the possibility that technical commissions, joint bodies or third parties might be involved in such assessments under any arrangements or agreements accepted by the States concerned.

51. The word *implique*, in the French text of paragraph 1, was meant to convey the idea of the need to ensure that the relevant factors were taken into account. Article 7 did not, of course, deal with the question of the weight to be accorded, in the first instance by States, to the various factors or with the extent to which individual factors were to be taken into account in any given situation.

52. With regard to the list of factors and circumstances, the Drafting Committee had agreed with the conclusion by the Special Rapporteur indicated in the Commission's report on its thirty-eighth session, namely that the Commission should strive for a flexible solution and confine the factors to a limited indicative list of more general criteria.[14] The Drafting Committee had accordingly decided not to adopt the detailed list proposed by the previous Special Rapporteur. The list contained in article 7, paragraph 1 (*a*) to (*f*), was therefore only of a general nature and was not intended to be exhaustive or to establish any order of priority. Each factor had to be viewed in relation to the particular watercourse concerned.

53. Subparagraph (*a*) concerned physical or natural factors and included the factor of "contribution", which was referred to in the 1984 text. Subparagraph (*b*), which was new, combined several elements of the

[13] For the text, see 2028th meeting, para. 1.

[14] *Yearbook . . . 1986*, vol. II (Part Two), p. 63, para. 239.

former text. Subparagraph (*c*) related to the possibility of conflicting uses. Subparagraph (*d*), which was also new, spelt out a factor implicitly covered by subparagraphs (*b*) and (*c*). It should be noted, however, that "existing uses" were but one factor to be taken into account, and again no priority was assigned among any of the factors. Subparagraph (*e*) combined various elements of the former text. The expression "economy of use" referred to the avoidance of unnecessary waste and the cost of measures taken for that purpose was also highlighted. Subparagraph (*f*) provided for the availability of alternatives to a planned or existing use, but only where such alternatives were of a "corresponding value". "Corresponding" referred to equivalence in the broadest sense, meaning equally convenient, economical and, on the whole, of the same value, "value" being interpreted in a broader sense that a simple "cost" figure to include elements of convenience and practicability as well. Indeed, "cost-effectiveness" was the element implicitly stressed. Moreover, the alternatives envisaged related not only to alternative uses of the watercourse, but also to alternative means of achieving the desired objective, even without utilizing the watercourse.

54. The new paragraph 2 was linked to the application of article 6, as well as to that of article 7, and it no longer referred to "determining", for the reasons already stated in connection with paragraph 1 (para. 49 above). In addition, the requirement now involved an obligation to enter into consultations, rather than negotiations, in a spirit of co-operation. It had been considered that a reference to negotiation might be interpreted to imply the commencement of a procedure for the settlement of a dispute, when in fact, very often, a dispute as such did not exist. States might simply wish to exchange information or commence discussions. Paragraph 2 therefore aimed at dispute avoidance rather than dispute settlement and, at the present stage, the shaping and encouragement of co-operation was the objective being sought.

55. The phrase "when the need arises" was meant to serve as a "triggering" mechanism which was based on objective criteria and would bring paragraph 2 into play. It was not intended to mark the start of a formal dispute-settlement procedure to be invoked at the request of one State. In practical terms, if States applied the provisions of the draft articles in good faith and in a spirit of co-operation, a request by one State for consultations should not be ignored by the other States concerned.

56. The second sentence of paragraph 2 as proposed by the previous Special Rapporteur, which referred to the procedures for peaceful settlement to be provided for in the later parts of the draft, had been deleted. As the content of those provisions had not yet been discussed by the Commission, it had been considered premature to mention them at the present stage.

57. The title of article 7 had been adjusted in the light of the new wording.

58. Mr. BENNOUNA said that the text of article 7 was entirely satisfactory to him. He would, however, suggest that the word "or", in the first part of paragraph 2, should be replaced by "and" or by "and/or" to make it clear that articles 6 and 7 could be applied together.

59. Mr. MAHIOU, referring to the French text, suggested that the word *les* should be added at the beginning of paragraph 1 (*a*) to bring that subparagraph into line with the other subparagraphs.

60. The CHAIRMAN, speaking as Special Rapporteur, said that, in the English text at any rate, the absence of the definite article was a matter of euphony, not of substance, and did not mean that any particular factor carried less weight.

61. Mr. AL-BAHARNA said that he could accept article 7 as drafted. Without wishing to reopen the debate on article 6, however, he considered that, for the sake of consistency, the words "conservation and" should be added before "adequate protection" in the second sentence of paragraph 1 of article 6, in order to bring that provision into line with the wording of paragraph 1 (*e*) of article 7.

62. Mr. OGISO said that he, too, read article 7 in conjunction with article 6. He noted in that connection that article 6 consisted of two elements: equitable and reasonable utilization, as dealt with in paragraph 1, and equitable and reasonable participation, as dealt with in paragraph 2. The factors referred to in article 7, paragraph 1 (*e*), were particularly important with regard to participation. To make the relationship between the two articles clearer, he therefore proposed that the words "and participation" be added at the end of the title of article 7 and also after the word "utilization" in paragraph 1 of the article. He would not insist on his proposal if the Commission was reluctant to consider it at the present stage.

63. The CHAIRMAN, speaking as Special Rapporteur, said that personally he would have no objection to Mr. Ogiso's proposal. The response to the same proposal in the Drafting Committee had, however, been that article 7 did in fact cover participation inasmuch as participation was involved in equitable utilization, as was apparent from article 6, paragraph 2. The only element not covered in article 7 was thus co-operation, which would be dealt with in a separate article.

64. Mr. AL-KHASAWNEH proposed that, in paragraph 2 of article 7, the words "paragraph 1 of" should be inserted before "the present article".

It was so agreed.

65. He questioned the value of paragraph 1 of article 7, which was very ambitious and seemed to say that every case should be decided on an *ad hoc* basis and on its own merits. That would make the position of those responsible for taking a decision in such matters very difficult indeed, particularly since the paragraph laid down an imperative rule rather than a guideline.

66. The CHAIRMAN, speaking as Special Rapporteur, said that the Drafting Committee had endeavoured to comply with the Commission's wish to provide States with some guidance in the form of a non-exhaustive list of factors applicable to the utilization of an international watercourse.

67. Mr. BEESLEY said that, in his view, the list of factors would be more complete and accurate if it contained the word "biological" at some point. He could, however, accept the article as drafted, since the list was only indicative and the Commission would presumably revert to it.

68. The CHAIRMAN said that, if there were no further comments, he would take it that the Commission agreed provisionally to adopt article 7 [8] as proposed by the Drafting Committee, with the amendment proposed by Mr. Al-Khasawneh (para. 64 above).

It was so agreed.

Article 7 [8] was adopted.

69. Mr. EIRIKSSON said that, had time allowed, he would have liked to introduce a number of amendments. For instance, he noted that the word "circumstances", in the introductory clause of paragraph 1, did not appear in the title of the article and he wondered whether it was really necessary. He would have preferred to delete the word "concerned", in paragraphs 1 (*b*) and 2. He did not like the use of both the singular and the plural in paragraph 1 (*c*) ("use or uses") or the use of the word "particular" in paragraph 1 (*f*). He would like to have an explanation of the expression "economy of use" in paragraph 1 (*e*) and, in that context, would have preferred to speak merely of "protection and development". In his view, the word "corresponding", in paragraph 1 (*f*), should be replaced by a term such as "comparable". He would also have liked to amend paragraph 2 to read:

> "Watercourse States shall, at the request of any watercourse State, enter into consultations with respect to the application of article 6 or paragraph 1 of the present article."

70. Lastly, he thought it should be explained in a footnote that the numbers between square brackets were the original numbers of the articles, to avoid giving the impression that the Drafting Committee had been in doubt.

71. The CHAIRMAN thanked the Chairman of the Drafting Committee for his report and expressed appreciation for the patience and skill with which he had discharged his task.

The meeting rose at 6.05 p.m.

2034th MEETING

Tuesday, 14 July 1987, at 10.05 a.m.

Chairman: Mr. Stephen C. McCAFFREY

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

Draft report of the Commission on the work of its thirty-ninth session

1. The CHAIRMAN invited the Commission to consider its draft report, chapter by chapter, starting with chapter I.

CHAPTER I. ***Organization of the session*** (A/CN.4/L.413)

Paragraph 1

Paragraph 1 was adopted.

Paragraph 2

2. Mr. PAWLAK (Rapporteur) proposed that the words "and sets out the five articles on the topic, with commentaries thereto, provisionally adopted by the Commission at the present session" should be added at the end of the second sentence and that the words "and sets out the six articles on the topic, with commentaries thereto, provisionally adopted by the Commission at the present session" should be added at the end of the third sentence.

3. Mr. BARSEGOV said that the Commission had not yet seen the commentaries referred to in those amendments.

4. The CHAIRMAN said that the commentaries would appear in documents to be submitted to the Commission shortly and would form part of the relevant chapters of the draft report.

5. Mr. BARSEGOV said that he could not agree to the approval of commentaries he had not yet seen. Moreover, because of the lack of time, those commentaries were likely to be approved in great haste.

6. Mr. PAWLAK (Rapporteur) explained that the amendments he had proposed were intended to show that commentaries would be attached to the articles which the Commission had provisionally adopted on two of the topics on its agenda. The content of those commentaries would, of course, be considered by the Commission at a later stage.

7. Mr. MAHIOU, noting that past reports had contained wording such as that proposed by the Rapporteur only when a set of draft articles had been adopted on first reading, proposed that the amendments should be left in abeyance until the Commission had approved the commentaries to which they referred.

8. The CHAIRMAN suggested that the Commission should adopt paragraph 2 on the understanding that it would consider the amendments proposed by the Rapporteur when it approved the commentaries to which they referred.

Paragraph 2 was adopted on that understanding.

Paragraphs 3 to 8

Paragraphs 3 to 8 were adopted.