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**A/CN.4/2835**

**Summary record of the 2835th meeting**

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subsequent articles, in particular draft article 4, might, strictly speaking, not be necessary. It did however seem important to emphasize that the older position, according to which armed conflict automatically abrogated treaty-based relations, had been replaced by a more contemporary view according to which the mere outbreak of armed conflict, whether declared war or not, did not *ipso facto* terminate or suspend treaties in force between parties to the conflict. If the Commission so desired, he would not be opposed to the deletion of draft article 3.

73. Draft article 4, on the indicia of susceptibility to termination or suspension of treaties in case of an armed conflict, was a key provision; paragraph 2 (b) in particular highlighted the contextual character of the operation. Modern doctrine in general seemed to highlight the intention of the parties, although French-language commentators often adopted an approach which seemed to be an amalgam between the old and newer positions. According to the doctrine of *caducité*, the effect of war was to terminate treaty relations, though with some important exceptions based upon intention or inferences of intention. The Special Rapporteur felt that it was inherently contradictory to say that armed conflict was qualitatively incompatible with treaty relations and was therefore non-justiciable while at the same time saying that there could be exceptions to that rule, the test being the object and purpose of the treaty. In the final analysis, however, both approaches seemed to highlight the notion of intention, and therefore draft article 4 sought to universalize the test of intention, with regard both to the nature of the treaty itself and to the nature and extent of the armed conflict in question.

74. The remaining draft articles contained more specialized ancillary provisions. Draft article 5 dealt with the effect of express provisions on the operation of treaties and reflected the situation whereby treaties expressly applicable to situations of armed conflict remained operative in case of an armed conflict (para. 1) and the outbreak of an armed conflict did not affect the competence of the parties to the armed conflict to conclude treaties (para. 2). There were in fact well-known examples of the belligerents in an armed conflict concluding agreements between themselves during that armed conflict, and the principles enunciated in draft article 5 were supported by the relevant literature.

75. Draft article 6 dealt with the issue of treaties relating to the occasion for resort to armed conflict. Although some authorities held the opinion that in cases in which an armed conflict was caused by differences as to the meaning or status of a treaty, the treaty could be presumed to be annulled, the more contemporary view was that such a situation did not necessarily mean that the treaty in question would no longer be in force. In fact, the practice of States confirmed that, when a process of peaceful settlement was commenced, the existing treaty obligations which had led to the conflict remained applicable. The *Rann of Kutch Case (India v. Pakistan)* and the awards of the Eritrea–Ethiopia Boundary Commission<sup>8</sup> were examples of situations where the provisions of agreements, the

interpretation of which had given rise to conflict, had been observed in achieving a final settlement.

76. Finally, as a preliminary introduction to draft article 7 on the operation of treaties on the basis of necessary implication from their object and purpose, namely, treaties which would continue in operation during an armed conflict, he noted that paragraph 2 included an indicative list of some such treaties. In compiling that list he had also referred to the memorandum prepared by the Secretariat on the effect of armed conflict on treaties (A/CN.4/550), which had been most helpful. The list was not exhaustive and inclusion of a type of treaty in the list should not be taken as an endorsement on the part of the Special Rapporteur. His basic criterion in compiling the list had been whether the treaties in question were candidates for consideration by the Commission.

### Organization of work of the session (*continued*)

[Agenda item 1]

77. Mr. MANSFIELD (Chairperson of the Drafting Committee) announced that in its final composition the Drafting Committee on the topic of reservations to treaties would consist of Mr. Comissário Afonso, Mr. Daoudi, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kemicha, Mr. Kolodkin, Mr. Matheson, Ms. Xue and the Special Rapporteur, Mr. Pellet.

*The meeting rose at 1.05 p.m.*

## 2835th MEETING

*Tuesday, 10 May 2005, at 10 a.m.*

*Chairperson:* Mr. Djamchid MOMTAZ

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

### Effects of armed conflicts on treaties (*continued*) (A/CN.4/552 and A/CN.4/550 and Corr.1–2)

[Agenda item 8]

FIRST REPORT OF THE SPECIAL RAPporteur (*continued*)

1. The CHAIRPERSON invited the Special Rapporteur to continue with the introduction of his first report on the effects of armed conflicts on treaties (A/CN.4/552).

2. Mr. BROWNLIE (Special Rapporteur) said that draft article 7, which was closely linked to draft articles 3 and 4, set out a legal position that was widely recognized in the

<sup>8</sup> Letter dated 15 April 2002, addressed to the Chair of the Security Council by the Secretary-General (S/2002/423). See also *ILM*, vol. 41, No. 5 (September 2002), p. 1057.

doctrine and reflected in State practice. It listed the 11 categories of treaties whose object and purpose involved the necessary implication that they continued in operation. The list was largely indicative, and the Commission might find that some of the treaties could be omitted. In particular, the inclusion of treaties for the protection of human rights and treaties relating to the protection of the environment might be controversial.

3. With regard to the former, it should be recalled that the topic under consideration did not relate directly to the law of treaties but to certain provisions of general international law dealing with the question of whether the occurrence of an armed conflict in itself prevented the operation of a treaty. The draft articles he had presented did not provide an answer to that question, as they were limited to setting out a principle, that of the intention of the parties. Moreover, he was not entirely convinced by the reasoning followed in the memorandum by the Secretariat (A/CN.4/550), which consisted of drawing an analogy between the non-derogability of the provisions of human rights treaties and *jus cogens* norms, and then linking the criterion of derogability with the effects of armed conflicts. Nevertheless, treaties for the protection of human rights should be included in the list if treaties of friendship, commerce and navigation and bilateral investment treaties were included.

4. With regard to treaties relating to the protection of the environment, he said that, as the law in that area was not unified but fragmented, there was no single position on the effects of an armed conflict on that category of treaty. In its advisory opinion of 8 July 1996 on the legality of the threat or use of nuclear weapons, the ICJ had been careful to avoid making a general statement on that point. It could thus be concluded that there was no real *opinio juris* on the subject.

5. Obviously, articles 1 to 7 constituted the essence of the draft he had submitted, while draft articles 8 to 14 simply dealt with the legal consequences resulting therefrom. One issue that was not dealt with was the peaceful settlement of disputes, but in his view that issue should be set aside until the Commission had completed its consideration of the essential points and reflected further on the nature of the study it was conducting on the effects of armed conflicts on treaties. Moreover, shocking as it might seem, he did not think it was essential to include that issue in a standard-setting text. In any case, everyone knew that under the 1969 Vienna Convention it was usual to give States the option to attach a dispute settlement plan to a treaty if they so wished.

6. Draft article 8 was a statement of the obvious in that it dealt with an issue that commonly arose when an armed conflict resulted in the termination or suspension of a treaty, namely, the mode of suspension or termination. The article was not absolutely essential, but it did seem sensible and useful to include it in the draft. The same was true of draft article 9, on the resumption of suspended treaties, the comment on which was fairly succinct. The idea was that States should clarify their positions and remove ambiguities from their post-conflict relations.

7. Draft article 10 was controversial and reflected an entirely different approach from that taken by the Institute of International Law in its resolution II/1985.<sup>1</sup> In his opinion, the draft under consideration did not tackle the question of the legality of any threat or use of force, although that did not mean that the question was completely ignored. It was precisely because the subject was controversial that he had included the relevant provisions of the resolution of the Institute of International Law in the commentary.

8. Draft article 11 was not strictly necessary, but was nonetheless useful in an expository draft, and he had drawn attention in that connection to article 75 of the 1969 Vienna Convention. Draft article 12 was also not strictly necessary, but had a pragmatic purpose. Draft article 13 was a technical consequence of the preceding articles. Given the links between the subject of the report and other well-established aspects of treaty law, it seemed necessary to point out that the draft articles were without prejudice to the termination or suspension of treaties as a consequence of the agreement of the parties, a material breach, supervening impossibility of performance, or a fundamental change in circumstances. Such a reservation was of course a statement of the obvious, but it was still useful. Lastly, draft article 14 was not really necessary either, but reflected the widespread practice of reviving “pre-war” treaties that had been suspended or terminated as a result of an armed conflict.

9. Mr. GAJA commended the Special Rapporteur for the speed with which he had produced his first report on the effects of armed conflicts on treaties and for the clarity of his arguments. The Special Rapporteur had a clear sense of the direction he would like the study to take, and it would be tempting, in the light of such conviction, to allow him a free hand. However, the Commission had a duty to view his approach with a critical eye, a task made particularly difficult by the lack of information on how the solutions proposed by the Special Rapporteur to the problems identified actually related to practice. In fact, the Special Rapporteur did not systematically analyse practice, but was content to make a some references to it, noting in paragraph 43 that “[i]t is probable that much of the practice of States takes the form of observations to the effect that the existence and nature of a general principle is the subject of doctrinal controversy”, and in paragraph 44 that it was generally recognized that municipal decisions were “not of great assistance”. A thorough analysis of practice would make the Special Rapporteur’s work and, ultimately, the Commission’s draft articles more persuasive and would also encourage States to produce examples of possibly divergent practices, which would give the Commission a fuller picture of the situation. It was true that the report was to some extent supplemented by the memorandum on the subject by the Secretariat, but the latter had been prepared separately and was of a preliminary nature. It was certainly useful in that it suggested solutions to some problems and highlighted some examples of practice, but it was no replacement for the analysis to be undertaken by the Special Rapporteur and then by the Commission.

<sup>1</sup> See 2834th meeting, footnote 7.

10. In the examination of practice and the analysis of problems a clear distinction ought to be drawn between the effects of armed conflicts on treaty relations between the parties to a conflict and the effects of armed conflicts, such as civil conflicts, on third States. He drew attention in that connection to the reference in the study by the Secretariat to the suspension by the United States of America of its Peace Corps programmes in cases of armed conflict, either because the United States was directly involved or, more often, because a civil war was taking place (A/CN.4/550, para. 101, footnote 349). However, while practice might differ depending on whether a State was directly involved in the conflict or not, the Special Rapporteur seemed to think that the same principle was applicable in every case. The rules set out in the 1969 Vienna Convention might offer sufficient justification for suspending the operation of a treaty, but that was not the only possible conclusion to be drawn, and the relevant practice should be considered further.

11. With regard to the key idea on which the Special Rapporteur's report was based, namely, that armed conflicts *per se* did not affect the operation of a treaty unless that was the intention of the parties, he noted that several instances of practice to which both the report and the Secretariat memorandum referred appeared to suggest the opposite—that armed conflicts did lead to the automatic suspension of various categories of treaty relations, in full or in part. While he was willing to concede that on grounds of principle there was an argument against such automatic effects of conflicts, he was not persuaded that the available evidence of practice could be ignored in order to posit an idea that, while undoubtedly original and interesting, did not provide a sound basis for discussion. Moreover, the criterion of intention, as contemplated in draft articles 4, 6 and 9, was rather elusive. Although the 1969 Vienna Convention did refer to intention in a number of its articles, it did not say how a State's intention was to be ascertained. Contrary to the proposed draft articles 4 and 9, articles 31 and 32 of the 1969 Vienna Convention dealt with the interpretation of treaties, not with the determination of intention, so they were not really helpful for the purposes of the Commission's study. Moreover, it would have to be determined whether the intention referred to was the actual intention or the presumed intention of a State; if the latter, perhaps different wording was necessary. If it was a question of the interpretation of a treaty, it would be sufficient to include a proviso to the effect that the general criterion would be applied only if the treaty did not provide otherwise. Draft article 7 as it stood should be reconsidered, and an attempt should be made to draw a more broadly applicable principle from it.

12. Commenting on specific draft articles as proposed by the Special Rapporteur, he said that draft article 1 should not limit the scope of the articles to treaties between States, but should also cover those involving international organizations, and should refer to the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations. The definition in draft article 2 (b) of an armed conflict as armed operations which by their nature or extent were likely to affect the operation of treaties was somewhat circular, as the reply to the question of whether or not a treaty would be affected by a conflict was

given in the following article. The wording of that provision should perhaps be reconsidered. He agreed with the Special Rapporteur's suggestion in paragraph 28 that the phrase "*ipso facto*" in draft article 3 should be replaced by the word "necessarily". Lastly, he proposed that in draft article 5, paragraph 2, and perhaps also in draft article 14, the word "competence" should be replaced by the word "capacity", to reflect the terminology of the 1986 Vienna Convention. In conclusion, he expressed the hope that the Special Rapporteur would develop more fully the ideas that he would like the Commission to eventually endorse.

**Shared natural resources (*continued*) (A/CN.4/549 and Add.1, sect. B, A/CN.4/551 and Add.1 and Corr.1, A/CN.4/555 and Add.1)**

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

13. Mr. SEPÚLVEDA said that the wealth of documentation that the Special Rapporteur had compiled and reviewed showed that it was possible to formulate draft articles on transboundary groundwaters even if State practice in that area was minimal. There were also a great many multilateral, regional and bilateral agreements that set out principles that could form the basis of the study of the topic.

14. The first point deserving of attention was the nature and scope of the draft articles. The Commission might consider drafting a convention on the law of transboundary aquifer systems, but by its very nature such an instrument would be universal in character. The subject at hand did not lend itself to such treatment, however, since not all States possessed transboundary aquifer systems. Consequently there did not seem to be much point in elaborating a protocol to the 1997 Watercourses Convention. A framework convention setting out principles to facilitate the conclusion of bilateral or regional agreements would be more appropriate.

15. A second point related to the political powers and legal entitlements of States over the transboundary aquifer systems located in their territory. It had been said that such hydrological resources were the property of the State concerned, which exercised exclusive sovereignty over them in accordance with General Assembly resolution 1803 (XVII). Yet to recognize sovereign, absolute and unlimited entitlements in respect of every aquifer State would be to void the draft articles, which were aimed at conferring rights and imposing duties on the States concerned, since such entitlements would not facilitate the equitable sharing of resources among all aquifer States and went against the idea that States should utilize the aquifer in a sustainable and reasonable manner.

16. He assumed that the idea of "sovereign rights" of States over the natural resources located within their jurisdiction, referred to in paragraph 19 of the report, had not appeared by chance but reproduced similar wording used in the United Nations Convention on the Law of the Sea to define the powers of a coastal State over its exclusive economic zone, which were not absolute property rights but had to accommodate certain rights of third States. It

thus seemed reasonable to consider simultaneously that aquifer States exercised sovereign rights over the transboundary aquifer or aquifer system located in their territory and that the international community must impose certain duties on them to ensure that they used those groundwaters responsibly. However, he did not see why reference was made to “territorial integrity” in article 8, on the general obligation to cooperate, and he requested clarification on that point, which was not explained in the commentary.

17. In the context of the obligation not to cause harm, it was necessary not only to discuss the question of compensation, as indicated in article 7, paragraph 3, but also to determine whether the significant harm resulted from a wrongful act, in which case the responsibility of the State concerned was incurred. On the other hand, if the damage was caused by acts not prohibited by international law, then it was the State’s liability that came into play. Reparation for harm was part and parcel of the obligation not to cause harm. The draft articles should in fact contain provisions outlining the nature, origin and target of the harm.

18. Water quality should be included among the factors relevant to equitable and reasonable utilization in draft article 6. The concept had been taken into account in various legal instruments, including the Agreement on Great Lakes Water Quality, signed by Canada and the United States of America in 1978,<sup>2</sup> and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, concluded at Helsinki in 1992, which defined transboundary impact. That idea could be interpolated into article 1, subparagraph (b) of the draft, which stated that the convention applied to other activities that had or were likely to have an impact upon aquifers and aquifer systems. That was why one of the criteria for equitable and reasonable utilization should be preservation of the quality of groundwaters.

19. Lastly, he thought it might be useful to include in the draft articles a provision similar to article 33 of the 1997 Watercourses Convention, which contemplated a mechanism for the settlement of disputes concerning the interpretation or application of the Convention.

20. Mr. COMISSÁRIO AFONSO said that he agreed with the Special Rapporteur on the need for an explicit reference to General Assembly resolution 1803 (XVII) on permanent sovereignty over natural resources; like other members of the Commission, however, he believed that the reference should be incorporated in the body of the draft. It was obvious that territorial sovereignty was exercised over underground resources, including aquifers, and insofar as the draft convention dealt with transboundary groundwaters, the exercise of such sovereign rights must be understood to go hand in hand with the obligation to cooperate.

21. He had no objection to draft article 1 in its present form but wondered whether the relationship between the draft convention and the 1997 Watercourses Convention

could be made clearer by highlighting their differences and complementarities. The Commission could go further in certain areas or even travel a different road. It could, for example, bring the natural interrelationship that already existed between surface waters and groundwaters into the legal sphere in a more global and integrated manner. Mr. Galicki had rightly drawn the Commission’s attention to the conflict that might arise between the 1997 Watercourses Convention and the draft under consideration. In addition, the Special Rapporteur had noted that the term “impact” should be construed as a broader concept than “harm”. It would be useful to specify in the draft or the commentary the actual scope of the concept, which was more precisely defined in such legal instruments as the 2002 Tripartite Interim Agreement between the Republic of Mozambique, the Republic of South Africa and the Kingdom of Swaziland for co-operation on the protection and sustainable utilization of the water resources of the Incomati and Maputo watercourses and the 1998 Agreement on cooperation for the protection and sustainable use of the waters of the Spanish–Portuguese hydrographic basins.<sup>3</sup>

22. With regard to draft article 2, he said that the explanation offered in paragraph 8 of the report appeared to imply that the term “water-bearing” in subparagraph (a) of the draft article was not necessary. The definition of an aquifer in the Bellagio Draft Treaty was shorter and more concise.<sup>4</sup> In addition, he wondered how the “negligible” or “non-negligible” amount of water recharge mentioned in subparagraphs (e) and (f) was to be measured.

23. In article 3, States were encouraged to enter into bilateral and regional arrangements, but for those members who wanted the Commission to adopt a legally binding instrument, the language of the article was too weak. It could doubtless be improved in order to commit States, where necessary, to negotiate and conclude such arrangements.

24. Article 4 dealt with the relation to other conventions and international agreements, and he agreed that the draft should also mention the relation to the applicable principles and rules of customary or general international law, as Mr. Brownlie and Mr. Niehaus had proposed. In fact, the draft would be stronger if it contained a body of fundamental principles to guide States in their activities and relations in the areas covered by the draft convention. While some of the principles were already in the text, others, including the precautionary principle and the “polluter pays” principle, for example, were not.

25. He welcomed the Special Rapporteur’s decision to include in draft article 5 the principles of equitable utilization and reasonable utilization, which in his view made that article one of the most important in the text. It emphasized the need to strike a balance between the sovereign right of a State over its natural resources and the interests not only of other States but also of present and future generations. It was in that provision, and not in the preamble or draft article 8, that the question of sovereignty should be dealt with, and it should be made clear that the two

<sup>2</sup> Signed at Ottawa on 22 November 1978 (*United States Treaties and Other International Agreements, 1978–1979*, vol. 30, part 2, Washington D.C., United States Government Printing Office, 1980, p. 1383).

<sup>3</sup> United Nations, *Treaty Series*, vol. 2099, No. 36496, p. 275.

<sup>4</sup> Hayton and Utton, *loc. cit.*

above-mentioned principles must take precedence over the sovereign equality and territorial integrity of States.

26. With regard to draft article 7, on the obligation not to cause harm, he agreed with the idea of retaining the threshold of “significant harm” already established in article 7, paragraph 1, of the 1997 Watercourses Convention and in many other international instruments. At the same time, it was hard to see what legal consequences could be derived from draft article 7, paragraph 3, which stipulated that, in the event of significant harm, “States [...] shall [...] take all appropriate measures [...] to discuss the question of compensation”. It was unfortunate that the draft contained no rules for the settlement of disputes. Two States that shared an aquifer, one of which was open to discussions while the other was not, would find the draft article unhelpful. He was firmly convinced that on that particular point the Commission should take a different course from that of the 1997 Watercourses Convention.

27. Lastly, he supported the idea of setting up a working group to consider the draft in greater detail before referring it to the Drafting Committee.

28. Mr. RODRÍGUEZ CEDEÑO commended the Special Rapporteur for the significant work he had done on a topic that was both legally and technically complex. He wished to start by making four general comments. First, the topic was difficult and not very well known. Aquifers and aquifer systems were extremely diverse in form and size, as well as in the volume and quality of their waters. Second, State practice was not extensive, and close attention should be paid to various ongoing bilateral or regional negotiations aimed at regulating the use of aquifer systems. Third, the main purpose of the draft articles was to encourage and help States that shared an aquifer system to manage that resource in the best possible manner. The bilateral and regional, rather than global, perspective adopted in the draft was thus the best suited to its purpose. Fourth, the Special Rapporteur had obviously produced the draft with a view to having the final result be a convention, but the Commission would have to decide whether it would be an independent convention, a framework agreement or a protocol to the 1997 Watercourses Convention. In his view, the most appropriate form would be an independent framework convention, but the matter should be considered by the working group that was to be established, an initiative that he fully supported. In any event, the draft should retain ties not only to the 1997 Watercourses Convention, which must be its main source of inspiration, but also to existing bilateral and regional agreements and related instruments. Obviously, the views of States on the subject would be a decisive factor.

29. Turning to more specific points, he said that the preamble should be drafted later, but that it must contain a specific reference to General Assembly resolution 1803 (XVII), the content of which should be reflected in a clear and comprehensive manner. Draft article 2, on use of terms, was in his view acceptable, although he had some reservations about the definitions of recharging and non-recharging aquifer. Draft article 3, on bilateral and regional arrangements, should be considered in conjunction with draft article 8, on the general obligation to cooperate. The obligations of conduct in question should

be stated more clearly and more precisely. For example, the weakness of the term “encouraged”, which appeared in paragraph 1 of article 3 and paragraph 2 of article 8, had been pointed out. The Drafting Committee should therefore review the wording of the articles without elaborating a binding or unduly rigid rule. Since the legal obligations of States would not be modified by the draft, it would be preferable to speak not of “arrangements” but of “agreements”, as in articles 3 and 4 of the 1997 Watercourses Convention. Draft article 7, on the obligation not to cause harm, was acceptable. The obligation it placed on States, namely to discuss the question of compensation, was quite important. Turning to draft articles 8 and 9, he said that the obligation to cooperate was one of the foundations of the draft. It was a clear rule, binding upon States, even though the manner of cooperation could be flexible, as was evident from draft article 8, paragraph 2. The influence of article 8 of the 1997 Watercourses Convention was entirely appropriate there. The same could be said of the obligation to exchange data and information regularly, wording that was modelled on article 9 of the Convention. Lastly, draft article 18, on scientific and technical assistance to developing States, was of fundamental importance, since aquifers were a vital resource for the international community. The word “States” should simply be replaced by “countries”.

30. Mr. ECONOMIDES noted that the issue of aquifers had more to do with the progressive development of international law than its codification. The Commission was attempting to deal with the topic by analogy, following the model provided by the provisions of the 1997 Watercourses Convention; he wondered, however, if that was in fact the appropriate model. The law of international watercourses was dominated by the striking contrast between the interests of the upstream and downstream countries, the former generally able to pollute a watercourse or modify its flow, the latter usually the victims. It was not at all obvious that the same difference existed in relation to aquifers, in particular those that were not linked to surface waters. Another difference was the high degree of vulnerability of aquifers relative to rivers, which necessitated the establishment of a regime affording greater protection. Moreover, aquifer waters, while not “international”, were nevertheless “transboundary” waters, and that made them subject to international law, so that they had an international character after all. Lastly, with regard to the final form of the draft, he said it would be wise to adopt the approach taken by Mr. Sreenivasa Rao the previous year with regard to the draft articles on international liability in the case of loss from transboundary harm arising out of hazardous activities,<sup>5</sup> which was simply to develop draft principles for first reading, with the option of developing those principles into a set of binding rules at second reading if States greeted them favourably.

31. Turning to the draft articles themselves, he said that he supported the Special Rapporteur’s suggestion that the preamble be drafted at a later date. Draft article 1, subparagraph (b), posed a problem, as he wondered what

<sup>5</sup> “Second report on the legal regime for the allocation of loss in case of transboundary harm arising out of hazardous activities” in *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/540. See also the draft principles and commentaries thereto, adopted on first reading by the Commission, *ibid.*, vol. II (Part Two), chap. VII, sect. C, paras. 175–176.

apparently negative “other activities” were contemplated there; the commentary did not provide sufficient explanation. The definition of the term “aquifer” in draft article 2 was not clear enough. It should contain two elements: first, any geological formation, provided that it was permeable and, second, the water contained therein, provided that it could be exploited for a useful purpose. Draft article 3 should be greatly simplified. Only the first six lines would be retained and the paragraph would end after “particular project, programme or use”; the rest of the paragraph, which would be too difficult to apply, would be included in the commentary. He also felt that a much stronger term than “encouraged” should be used. Draft article 4 should be placed at the end of the text, and the bilateral and regional arrangements referred to in draft article 3 should be more clearly excluded from paragraph 2. Turning to draft article 5, he said the notion of “equitable” could be dangerous if not precisely defined, at least in the commentary. In draft article 7 the adjective “significant” should be deleted for reasons already mentioned relating to the vulnerability of aquifers. Paragraph 2 of draft article 8, on joint mechanisms or commissions, should be greatly strengthened and, once again, the term “encouraged” was too weak. Mr. Chee’s suggestion that aquifer States should provide for appropriate dispute settlement mechanisms should be retained. He strongly supported draft article 10 on monitoring and, like other Commission members, sought further explanation of the principle of prevention contemplated in draft article 14. He well understood Mr. Pambou-Tchivounda’s concern with regard to draft article 18: the provisions on scientific and technical assistance to developing States should be drafted in a more realistic manner.

32. Lastly, with regard to next steps, he saw no need for haste; the draft should be considered as a whole, article by article, in a working group before it was submitted to the Drafting Committee.

33. Mr. DAOUDI said that the Special Rapporteur’s third report called for a number of general comments. First, while he did not wish to question the Commission’s decision to deal, as a first step, only with aquifers under the topic of shared natural resources, the draft convention as submitted would seem to indicate that every natural resource or category of resources would require a separate instrument. If that was the case, not only would it be inconsistent with the Commission’s mandate as stated, but it immediately posed the problem of how to align the current draft with any future drafts dealing with shared natural resources.

34. Second, State practice relating to the use and management of shared aquifers was not yet at a stage where it would be possible to identify standards that would be acceptable to all States concerned. It seemed, then, that the Commission was taking the opposite approach to the one it had taken in codifying the law of watercourses by seeking to establish an international regime without the benefit of any conventional regimes that reflected State practice. That might explain why the Special Rapporteur had based his text to such an extent on the 1997 Watercourses Convention and, in draft article 3, paragraph 3, had taken the unusual step of suggesting that bilateral and

regional arrangements should take precedence over the draft convention.

35. Third, the exclusive sovereignty of a riparian State, which in the current context meant an aquifer State, over water resources shared among several States, had always been contested because any such claim of sovereignty would be tantamount to denying the rights of the other States to the equitable and reasonable utilization of those resources. The notion of sovereignty was not in fact mentioned in the 1997 Watercourses Convention. In any case, it was essential to exclude from the draft any reference to the General Assembly resolution 1803 (XVII) on permanent sovereignty over natural resources.

36. Fourth, the distinction drawn in draft article 5 between recharging and non-recharging aquifers, while conjunctural, remained fundamental. Nevertheless, since aquifer waters were not inexhaustible, other criteria besides equitable and reasonable utilization must be considered, in particular the surface area of the territory, population density and level of development.

37. Fifth, the obligation not to cause significant harm was essential, but given that aquifer waters did not recharge or did so only slightly and were therefore susceptible to pollution, it would be more appropriate to refer to harm without being restrictive and to develop the issue of compensation further, as suggested by Mr. Brownlie and others.

38. For all those reasons, it would be preferable to submit the draft to a working group which could consider it in the light of all the points raised during the discussion.

39. Ms. ESCARAMEIA said that draft articles 12 and 13 should also deal with third States, namely States where recharge or discharge zones were located, and create rights and obligations for any State that could affect or be affected by aquifers. The Special Rapporteur said that it would be difficult to place any obligation on States that did not benefit from aquifers. That was a contractualistic, synallagmatic view and would be tantamount to not placing any obligations on third States not to pollute, even though some of them, such as discharge States, could benefit greatly from an aquifer that was not situated in their territory.

40. Turning to draft article 14 on prevention, reduction and control of pollution, she said that she would not repeat her concerns about the use of the adjective “significant” to qualify harm; however, she regretted that the particular vulnerability of groundwaters to pollution was not reflected in the draft article. States were simply “encouraged to take a precautionary approach”, which meant absolutely nothing. The precautionary principle should be included in the draft articles, since the effects of certain activities were little known, difficult to detect and often long-lasting. It was therefore encouraging to note that Mr. Pellet had stated that if there was an instrument where that principle ought to be enshrined, it was undoubtedly the draft articles on transboundary groundwaters. The Special Rapporteur claimed that the precautionary principle had not yet developed as a rule of general international law without, however, explaining why. Yet, that principle

had been enshrined in numerous instruments, both binding and non-binding, in particular in Principle 15 of the Rio Declaration.<sup>6</sup>

41. Turning to draft article 16, she said that the expression “as far as practicable”, which was very weak, should be deleted and replaced with “as far as possible”. Draft article 17, on planned activities, should be more specific. The 1997 Watercourses Convention, for example, devoted nine articles to such activities; the provision should therefore be developed further. She agreed with the inclusion of draft article 19, on emergency situations, and suggested that a draft article providing for the establishment of a dispute settlement mechanism should be included with a view to protecting the weakest negotiators and maintaining a balance among negotiating States.

42. The final form of the draft articles should be a binding convention rather than a protocol to the 1997 Watercourses Convention, which dealt with very different issues and had still not entered into force.

43. Mr. MANSFIELD, commenting on part III of the draft convention, asked how draft article 12 would apply, if at all, to non-recharging aquifers. Turning to draft article 13 and paragraph 33 of the report, he acknowledged that it would certainly be desirable to seek the cooperation of third States to prevent pollution from entering the recharge or discharge zones of an aquifer system where those zones were located in the territory of the third State; he wondered whether it was really the case that they had no legal obligations in that regard. As Mr. Brownlie had pointed out, in a situation where third States knew or ought to have known that their territory was being used to cause harm to adjoining aquifer States, general international law would apply. The working group might need to consider whether it would be desirable to spell that out or at least refer to it in draft article 13. Since aquifers were much more vulnerable to pollution than watercourses and prevention was therefore imperative, the order of the articles might need to be reconsidered. The relevance of the precautionary principle likewise needed to be further highlighted.

44. Draft article 15 as it stood might inhibit sensible management because it gave the impression that if three or four States shared an aquifer, then each must establish a management plan. Only if one of them requested consultation would they be required to enter into consultations that might lead to a joint management mechanism. That was surely not a situation to be encouraged. It would be preferable to propose that aquifer States should enter into consultations with a view to agreeing on a management plan and perhaps a management mechanism. It could then be stipulated that in the absence of agreement on a joint management plan the aquifer States should establish and publish their own management plans, but it should also be made clear that those plans should comply with the principles reflected in the draft convention and take into account the interests of the other aquifer States, as provided for in draft article 17.

<sup>6</sup> Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992 (United Nations publication, Sales No.: E.93.I.8 and corrigenda), vol. I: Resolutions Adopted by the Conference, Resolution 1, annex I.

45. Draft articles 16 and 17 would both benefit from further examination by the working group. In the light of international law and practice it would seem unthinkable and certainly unacceptable that an aquifer State could have grounds for believing that a planned activity in its territory might have adverse effects on a transboundary aquifer and yet not carry out a proper environmental impact assessment. In that regard draft article 17, paragraph 1, seemed deficient to the extent that it might imply that the information to be supplied to the other aquifer States about an activity that might adversely affect them needed to include an environmental impact assessment only if one had been conducted.

46. In the last sentence of paragraph 37 the Special Rapporteur had made the point that nothing prevented planned activities from being carried out without the consent of the affected States, but that in such a situation liability might arise. There was surely a case for making it clear that while an aquifer State might not have to obtain the consent of the other aquifer States for its planned activities, general international law precluded it from carrying out activities in its territory which it knew or ought to have known would cause harm to other aquifer States.

47. Mr. ADDO said that the topic that the Special Rapporteur had considered in his third report was of particular importance, as the solution to the world’s water crisis might well lie hidden below the Earth’s surface. Aquifers, which could extend for thousands of miles, contained enough water to satisfy all of humanity’s needs for many decades. Like watercourses, they could be shared by several States, yet little was known about transboundary aquifers. The Special Rapporteur’s draft articles thus filled a vacuum. As Governments were often reluctant to admit that other countries shared the aquifers they relied on for drinking water and irrigation, transboundary aquifers were a potential source of conflict, especially in arid regions, where fierce competition for water resources might well intensify in the future because of population growth and climate change. Noting that the draft articles did not contain any provision on dispute settlement or conflict resolution, he asked the Special Rapporteur whether he intended to include such a provision in the text or whether he did not consider that aspect important. He himself did not think that any reference to the permanent sovereignty of States over their natural resources was appropriate: if transboundary aquifers were supposed to be a shared natural resource, then no aquifer State could claim to have permanent sovereignty over them.

48. Mr. KATEKA noted that the draft articles were based mainly on the 1997 Watercourses Convention. As a number of members had pointed out, that instrument continued to be controversial, in particular with regard to the role of previous agreements and certain aspects of equitable and reasonable utilization. The Commission should be careful not to replicate those controversial provisions in the current draft.

49. It had been observed that there was not much State practice in the area of transboundary aquifers. He thus appreciated the compilation of bilateral and regional agreements on the subject which the Special Rapporteur had included in his third report.

50. The Special Rapporteur had not wanted to prejudge the final form the draft articles would take. He personally supported the adoption of a binding instrument. If that was to be the case, however, the instrument would need to include dispute settlement provisions.

51. The concept of the permanent sovereignty of States over their natural resources should be incorporated in the main body of the text and not be relegated to the preamble.

52. On certain issues, the Special Rapporteur had been too cautious. For example, in article 3, paragraph 1, he referred to bilateral and regional "arrangements", as opposed to "agreements". Yet the compilation of instruments contained binding bilateral and regional agreements, some of which had already entered into force.

53. Article 3, paragraph 3, on bilateral and regional arrangements taking priority as *lex specialis*, and article 4, paragraph 1, which gave precedence to the draft articles over the 1997 Watercourses Convention, should be examined closely by a working group. There was also a need to look at article 2, subparagraphs (e) and (f), on the terms "non-negligible" and "negligible", more carefully. The same applied to "significant harm" in article 7. The threshold for groundwaters should be lower, owing to their more sensitive nature.

54. In paragraph 33 of the report, the Special Rapporteur remarked that the draft articles in part III "should not be construed as environmental protection provisions" and that the objective was not to protect and preserve aquifers for their own sake, but to do so to allow humankind to utilize the precious water resources contained therein. That view implied an encroachment on the sovereign rights of aquifer States. In the same paragraph, while noting that scientists strongly favoured the application of the precautionary principle, the Special Rapporteur argued that that principle had not yet developed as a rule of general international law. If that was true, progressive development of international law might well be called for. In fact, the precautionary principle was already included in many international instruments, which he enumerated, and thus could certainly be incorporated in the draft articles.

55. In conclusion, he expressed the hope that the Commission would be able to complete a first reading of the draft articles on transboundary groundwaters by the end of the quinquennium and said that a working group should be set up to focus on them.

56. Mr. MATHESON said that he had already argued that the threshold of significant harm must be kept. For the same reasons, the words "an impact" in article 1 (b) should be changed to "a significant impact". That would avoid the impression that important agricultural and industrial activities having only a negligible impact on aquifers would nevertheless be subject to the restrictions set out in the articles.

57. With regard to article 3, he did not agree with those members who believed that instead of being "encouraged" to enter into bilateral and regional arrangements, States should be "required" to do so, because in certain situations it might not be necessary or feasible to negotiate an

arrangement. That would be the case, for example, if there were no plans to exploit the aquifer or if an armed conflict broke out between aquifer States. The most the Commission should do, then, was to encourage States to conclude such arrangements. It was also not entirely clear whether article 3, paragraph 3, would apply to arrangements that had already been concluded by States for the utilization and protection of transboundary aquifers. In his view, those arrangements should not be renegotiated because they had been entered into in good faith based on the particular circumstances of the aquifer in question. The matter could be clarified by adding that the articles did not affect aquifers that were already the subject of arrangements among the aquifer States concerned. It would also be useful to confirm, either in the text or in the commentary, that if arrangements among aquifer States had not yet been concluded, any aquifer State could still use the aquifer in question and conduct other activities in its territory that might affect it, provided that it did so in a manner consistent with the principles set out in part II of the draft articles.

58. Turning to article 12, he said that the proposed language on the protection of ecosystems might be too categorical, given the state of knowledge on aquifers and their effects on ecosystems. It would be preferable to require States to endeavour to take all appropriate measures to meet the objectives set out in article 12, rather than imposing an absolute obligation to achieve them.

59. With regard to article 14, he agreed with the Special Rapporteur's conclusion that the precautionary principle had not yet developed as a rule of international law. The proposed language was a sensible way of indicating that States should make every effort to anticipate possible pollution risks and to act in a timely way to deal with them.

60. While he agreed that States should be encouraged to provide various forms of assistance to developing States for the protection and management of their aquifer systems, the current language of article 18 on that question appeared to impose an obligation on all States that they might not be in a position to meet. The text should therefore be revised.

61. Lastly, on article 21, he said that no State should be required to provide information vital to its national defence or security. In his view, that provision should apply also to industrial secrets and intellectual property, as in article 14 of the draft articles on prevention of transboundary harm from hazardous activities.<sup>7</sup>

62. He concluded by endorsing the proposal to establish a working group to discuss all those matters at greater length.

63. The CHAIRPERSON said that the wide-ranging discussion on the report of the Special Rapporteur, in which most members of the Commission had taken part, testified to the importance attached to the topic of shared natural resources. He drew the Commission's attention to the report of the High-level Panel of Eminent Persons

<sup>7</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, chap. V, sect. E, p. 148, para. 98.

on Threats, Challenges and Change, of which Mr. Baena Soares had been a member, entitled “A more secure world: our shared responsibility”; chapter IV of the report addressed the subject of conflict between and within States.<sup>8</sup> It established a link between armed conflicts and the question of shared natural resources, and it referred in paragraph 93 to the role of the International Law Commission in developing rules for the use of transboundary resources such as water, oil and gas.

*The meeting rose at 1 p.m.*

## 2836th MEETING

*Wednesday, 11 May 2005 at 10.15 a.m.*

*Chairperson: Mr. Djamchid MOMTAZ*

*Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.*

### **Shared natural resources (continued) (A/CN.4/549 and Add.1, sect. B, A/CN.4/551 and Corr.1 and Add.1, A/CN.4/555 and Add.1)**

[Agenda item 4]

#### THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on his third report on shared natural resources: transboundary groundwaters (A/CN.4/551 and Corr.1 and Add.1).

2. Mr. YAMADA (Special Rapporteur) expressed his sincere gratitude to all those members who had offered valuable comments on his third report, comments which he had carefully noted and would take into account in his future work. Given the number of members who had taken the floor, it would be difficult to cover all the points raised in his summary, and he begged the Commission's indulgence if he failed to do so.

3. Some members had wondered whether the sub-topic of transboundary groundwaters was ripe for codification. He felt, however, that in recommending the topic of shared natural resources to the General Assembly in 2000 on the basis of the syllabus prepared by Mr. Rosenstock, which had focused exclusively on groundwaters and such other single geological structures as oil and gas,<sup>1</sup> the Commission had taken the position that the topic was in fact ready for codification. It was true that he himself had initially felt

there was a scarcity of State practice and existing norms on groundwaters, and he expressed regret that his repeated statements to that effect in his successive reports might have contributed to creating an erroneous impression that there was not sufficient evidence for codification.

4. Groundwaters represented 97 per cent of the fresh-water resources available on the planet. Global estimated dependency on groundwaters, which had already been more than 50 per cent for drinking water, 40 per cent for industry and 20 per cent for irrigation at the time of preparation of his first report,<sup>2</sup> had greatly increased and many areas of the world were currently faced with problems of over-exploitation and pollution of aquifers. Groundwater experts and administrators were making every effort to cope with that situation; however, most such cooperative efforts in Africa, the Americas and Europe had taken place since the year 2000. Furthermore, most of the books, articles and instruments relevant to groundwaters had been written since 1998. Although the titles did not necessarily mention groundwaters, the instruments in *Shared Natural Resources: Compilation of international legal instruments on groundwater resources*, distributed by the Secretariat, all contained specific references to groundwaters, and those formulated after 1998 focused principally on groundwaters. There were therefore numerous examples of State practice, arrangements and agreements which had emerged in recent years on the basis of which the Commission could pursue its work.

5. Mr. Brownlie had referred to the lectures given by Professor Richard Baxter on “Treaties and Custom” at the Hague Academy of International Law in 1970, in which Baxter had affirmed that antiquity was not necessarily a relevant criterion in determining the existence of a rule of customary international law,<sup>3</sup> citing the ICJ decision in the *North Sea Continental Shelf* case, according to which the passage of only a short period of time did not stand in the way of the creation of a new rule of customary law. Professor Baxter had concluded that a treaty which purported to be wholly declaratory of customary international law was an extremely rare phenomenon and none of the so-called “codification treaties” drawn up under the auspices of the Commission was of that character.<sup>4</sup>

6. It was therefore perfectly appropriate for the Commission to proceed towards the progressive development and codification of the law on groundwaters, in accordance with its mandate from the General Assembly. Groundwaters would be one of the major topics of discussion at the Fourth World Water Forum, to take place in Mexico in 2006. Groundwater experts and administrators had high expectations of the Commission, which must keep up with the rapid pace of developments and respond to current needs, or see its usefulness and credibility called into question.

7. The issue of the relationship of general international law to the draft instrument had also been raised; he agreed with Mr. Kolodkin that it was a rule of international law that general international law would have parallel application

<sup>2</sup> *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/533 and Add.1.

<sup>3</sup> Baxter, *loc. cit.* (2832nd meeting, footnote 2), pp. 41–47.

<sup>4</sup> *Ibid.*, p. 42.

<sup>8</sup> A/59/565 and Corr.1.

<sup>1</sup> See *Yearbook ... 2000*, vol. II (Part Two), annex, p. 135.