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**Summary record of the 2879th meeting**

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60. Mr. BAENA SOARES commended the Special Rapporteur and the Working Group for their excellent work on a difficult and little-known topic for which a great quantity of information was required. He was in favour of referring the draft articles to the Drafting Committee, because they provided States with a useful set of non-binding guidelines. However, he wished to stress the importance of bilateral and regional arrangements as the best way of regulating the utilization of transboundary aquifers and aquifer systems. Given the considerable diversity of those resources, there could be no single model for their use and protection. That said, the Commission had not finished with the topic of natural resources because there was still the question of oil, to which, it was to be hoped, it would give the same attention as it had groundwaters.

*The meeting rose at 1.05 p.m.*

## 2879th MEETING

*Friday, 19 May 2006, at 11.10 a.m.*

*Chairperson:* Mr. Guillaume PAMBOU-TCHIVOUNDA

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Operti Badan, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

### **Responsibility of international organizations (continued) (A/CN.4/560, sect. C, A/CN.4/564 and Add.1–2, A/CN.4/568 and Add.1, A/CN.4/L.687 and Add.1 and Corr.1)**

[Agenda item 4]

#### FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. ECONOMIDES said that in his excellent report the Special Rapporteur had, as closely as was possible, skilfully aligned the text on responsibility of international organizations with the draft articles on responsibility of States for internationally wrongful acts.<sup>124</sup> When it came to the section relating to circumstances precluding wrongfulness, however, that alignment became more problematic, even artificial, and at times positively naïve. There were two main reasons for that, as several other speakers, including Mr. Brownlie, Mr. Sreenivasa Rao and the Chairperson, had already pointed out. The first was the essential difference between States and international organizations, which was so marked that like treatment could not be given to two institutions that were profoundly unlike.

2. The second reason was that there was next to no significant practice relating to circumstances precluding wrongfulness in the case of international organizations. Most of the examples given in the report were, in his view, either irrelevant or extremely weak, as he would hope to show. Clearly, in the absence of significant practice, neither codification nor useful progressive development of international law was possible.

3. That being so, the Commission should not blindly follow the text of the draft articles on responsibility of States. On the contrary, three circumstances precluding wrongfulness in the case of States should be deleted from the draft articles on responsibility of international organizations. Those circumstances were—to take them in reverse order—necessity, distress and countermeasures. Necessity did not merit a place in the draft articles, for a number of reasons. First, as the Special Rapporteur recognized, it was the most controversial circumstance precluding wrongfulness as far as States were concerned, and all the more so in the case of international organizations. Secondly, it had often been used arbitrarily in the past for purely selfish reasons. Thirdly, its purpose was to protect a State's essential interests against serious and imminent peril. International organizations, being essentially functional institutions, did not have essential interests in the same way as States. The provision concerning necessity was in any case almost impossible to implement even in the case of States, because the conditions required for its implementation were extremely difficult to meet. It would therefore be foolhardy to seek to apply it to international organizations. The inclusion of such a provision ran the risk of creating more problems than it solved. Moreover, the examples given in paragraph 42 of the report were not pertinent or convincing. Necessity was a passive concept—a means of defence—rather than an active concept or a means of attack. Nor did paragraph 44 correctly describe the state of necessity. Furthermore, operational or military necessity related, as Mr. Momtaz had said, to the law of armed conflicts and not to the state of necessity as a circumstance precluding wrongfulness.

4. The second circumstance that should be excluded was distress. It had never yet arisen in the case of international organizations, and he saw no reason why that state of affairs should change. The irrelevance of distress to the case of international organizations could be explained in the commentary. If, in the future, distress evolved into a circumstance precluding wrongfulness, the door would be left open for the development of customary law.

5. The third circumstance precluding wrongfulness, and undoubtedly the most important, was that of countermeasures. It should be excluded from the draft articles, for the reasons that he had given at an earlier meeting, namely, that countermeasures constituted an archaic and primitive practice that worked to the advantage of the strong, who took justice into their own hands by adopting unilateral measures. International organizations should not be permitted to go down that road. Countermeasures should be excluded in the interests of the progressive development of international law, which was perfectly able to regulate the settlement of any dispute that might arise between international organizations.

<sup>124</sup> See footnote 8 above.

6. As for other circumstances precluding wrongfulness, they should be covered by a single article stating that the provisions of the draft articles on responsibility of States for internationally wrongful acts relating to consent, self-defence and *force majeure* applied also to international organizations, where and to the extent that they could apply. He fully supported draft articles 23 (Compliance with peremptory norms) and 24 (Consequences of invoking a circumstance precluding wrongfulness).

7. He would end with three specific comments. First, the commentary to draft article 17 should specify that consent was not valid if it ran counter to a *jus cogens* rule of international law. Secondly, since Article 51 of the Charter of the United Nations concerning self-defence did not apply to international organizations, draft article 18 should refer not to the Charter but to general international law, as had been suggested by several speakers. Lastly, he did not consider that the word “intervention” in the second sentence of paragraph 48 of the report was the appropriate term.

8. Mr. KATEKA said that self-defence, countermeasures and necessity, all of them controversial topics, should be omitted from the list of circumstances precluding wrongfulness in relation to international organizations. He was particularly concerned by the inclusion of self-defence: it was not possible, as some had suggested, to differentiate between an international organization and its member States in that context. For example, the Chairperson had referred at the previous meeting to an occasion when Nigeria, acting on behalf of ECOWAS, had intervened in Liberia. A similar situation had arisen when the forces of NATO had bombed positions in the Federal Republic of Yugoslavia (Serbia and Montenegro) in 1999. On the other hand, the ECOWAS intervention in Sierra Leone in February 1998 had been criticized as illegal by the United Kingdom, because it had not been authorized by the Security Council under Article 53 of the Charter of the United Nations. That would suggest that no regional problem could be addressed without prior authorization. Article 2 (f) of the Southern African Development Community (SADC) Protocol on Politics, Defense and Security Cooperation adopted in 2001 by the 14 States of SADC stated that the organ established by the Protocol would “consider enforcement action in accordance with international law and as a matter of last resort where peaceful means have failed”. The SADC countries, represented principally by one of the major countries of the region, had intervened under that provision to restore the Government of Lesotho, which had been overthrown in a coup. In another case, the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), together with the Government of that country, had been engaged in pursuing insurgents in the eastern Congo, who had been a destabilizing element. He wondered how either of those two actions would be characterized under the terms of the draft articles.

9. It was very difficult to decide which particular actions could be described as self-defence. The term should not, for example, be used in connection with forces trying to enforce peace. If action was taken with the concurrence of the host Government and with United Nations assistance, no problem arose, but the sensitivity of the issue was

pointed up by the fact that the Commission had avoided the daunting task of defining self-defence in the draft articles on responsibility of States for internationally wrongful acts. Moreover, although the Commission had considered the question of conditions in relation to countermeasures, it had avoided doing so in relation to self-defence. It was therefore on dangerous ground, especially if reference was made to Article 51 of the Charter of the United Nations, or even simply to customary international law. The fact that some speakers had referred to factors that the Special Rapporteur deemed irrelevant showed the complexity of the whole question of self-defence, which should be excluded from the draft articles.

10. Mr. GAJA (Special Rapporteur) said that several speakers had emphasized that international organizations could not be likened to States. The prevailing view, however, was that the differences were generally not relevant when it came to circumstances precluding wrongfulness. That largely explained the inclusion in the draft articles of several texts similar to those adopted in the draft articles on responsibility of States. As some speakers had noted, the latter draft articles were not perfect and it might be that some matters could be dealt with more appropriately in a different way. Mr. Brownlie, for example, considered that distress should be viewed as a part of necessity and that the question of compensation should be dealt with in a more positive manner. While sharing certain opinions expressed in that regard, he had decided, in his fourth report, to maintain consistency with the Commission’s previous work on State responsibility. Some speakers, such as Mr. Yamada and Mr. Kolodkin, had urged the Commission not to introduce changes that could also affect States. That suggestion was a timely reminder that the draft articles on responsibility of States were delicate plants that might suffer from any inconsistency with the Commission’s current work. Until such time as the General Assembly had reached a decision on the draft articles on responsibility of States,<sup>125</sup> it was preferable not to make changes, such as the identification of additional circumstances precluding wrongfulness that would apply also to States.

11. Draft article 17, concerning consent, had received general approval. He wished to point out that the example given in paragraph 12 of the report, concerning verification of the electoral process, had been chosen because consent was not part of a formal agreement between the supervising organization and the State in which it operated. The same applied to the Aceh Monitoring Mission in Indonesia, mentioned in paragraph 13, or at least to its initial deployment, which had come about because the Government of Indonesia had invited several States and the European Union to send a monitoring mission.

12. The report attempted to give as full a picture as possible of the available practice, which was admittedly

<sup>125</sup> In resolution 56/83 of 12 December 2001, the General Assembly took note of the draft articles and decided to include in the provisional agenda of its fifty-ninth session an item entitled “Responsibility of the States for internationally wrongful acts”. In resolution 59/35 of 2 December 2004, the General Assembly commended the articles to the attention of Governments and decided to include in the provisional agenda of its sixty-second session in 2007 an item entitled “Responsibility of States for internationally wrongful acts”.

scanty. Some instances of practice were not immediately relevant but were useful to the extent that they showed a widespread acceptance of categories such as self-defence, necessity and *force majeure*. For example, the use of the term “self-defence” with regard to United Nations peacekeeping forces showed that the United Nations considered itself entitled to invoke self-defence; indeed, United Nations organs had often given the term a wider meaning than it had in Article 51 of the Charter of the United Nations. There had been no intention on his part to build a rule exclusively on United Nations practice, nor to pronounce on when peacekeeping forces should be regarded as entitled to use force. Draft article 18 had been drafted on the basis of an analogy between States, on the one hand, and those organizations that deployed armed forces or administered territories, on the other. It could be assumed that, in a given case, deployment of forces was lawful, perhaps on the basis of an authorization by the Security Council. The question before the Commission, however, was whether an international organization lawfully deploying peacekeeping forces could respond to an armed attack, invoking self-defence, in the same way as could a State. Clearly, only a few organizations would be in a position to invoke self-defence. Self-evident though the point might be, reference could be made in the text or in the commentary to the fact that self-defence could not be invoked by organizations that did not deploy armed forces or administer territories, such as those dealing with health matters or postal services.

13. As in the case of States, the conditions under which an international organization could resort to self-defence were somewhat controversial. Since the prevailing view was that the current study was not the appropriate place to analyse such controversial issues, the Commission should follow the same approach that it had taken in the draft articles on responsibility of States, article 21 of which referred merely to “conformity with the Charter of the United Nations”.<sup>126</sup> A reference to the same effect in article 18 of the draft articles on responsibility of international organizations was certainly not based on an assumption that the Charter expressly governed self-defence on the part of international organizations. Although the reference to international law that some had suggested would probably have a similar result, such a reference might lend itself to the interpretation that an international organization could invoke self-defence also in certain circumstances not permitted under the Charter. That was not to say that such an interpretation would necessarily be correct. The Drafting Committee might perhaps consider making a reference to “the principles of international law as enshrined in the Charter”.

14. The question of countermeasures presented certain difficulties. The prevailing view seemed to be that the question of countermeasures would have to be examined when the Commission came to consider the implementation of the responsibility of international organizations. It also seemed to be widely accepted that international organizations did indeed take countermeasures and should be entitled to do so in certain circumstances. That would justify a reference to countermeasures in the chapter concerning circumstances precluding

wrongfulness. If, as Mr. Kolodkin, Mr. Economides and Mr. Kateka had suggested, draft article 19 was not referred to the Drafting Committee, the impression would be created that the Commission was of the view that international organizations were never entitled to take countermeasures.

15. However, in his view, an article entitled “countermeasures” was needed in that chapter. One solution would be to include an article with that title, but to leave the provision itself blank, pending an examination of countermeasures at a later stage. If the Commission were subsequently to conclude that countermeasures were never permissible, that blank article could be deleted. Another possibility would be to insert a text along the lines suggested in alternative B in paragraph 25 of the report. Opinions in the Commission seemed to be evenly divided between those two alternatives. The Drafting Committee could, however, steer a middle course by incorporating a text along the lines of alternative B, but leaving it in brackets. That would be preferable to including a blank provision, an approach that might puzzle many readers.

16. The statement in paragraph 31 that the financial distress of an international organization might constitute an instance of *force majeure* had given rise to some criticism. In that paragraph, he had merely quoted at length the view expressed by INTERPOL to the effect that financial distress was invocable, but he had not endorsed that position. He believed it was important for the Commission to have before it all the opinions expressed by international organizations. Financial distress could be regarded as relevant only if the conditions listed in draft article 20 were met, namely, the occurrence of an irresistible force or of an unforeseen event, beyond the control of the organization. While those conditions might appear too lenient, they mirrored those set forth in article 23 of the draft articles on responsibility of States for internationally wrongful acts<sup>127</sup> and hence should be retained for the sake of consistency.

17. Although known practice did not offer examples of the invocation of distress by an international organization, the possibility that it could be invoked was far from remote, in view of the number of people who might be regarded as having been entrusted to the care of a given organization. The paradigm in the drafting of the provision on distress in the draft articles on responsibility of States had been that of a ship’s captain who, during a storm, entered a foreign port without consent.<sup>128</sup> The reference to “persons entrusted to the author’s care” in article 24 of the draft articles on responsibility of States was designed to deal with that type of situation. A similar relationship might exist between an international organization, or an organ of an organization, and some of the people who were entrusted to it. The introduction of more specific wording—such as a reference to “a special relationship” between the organization and the persons in danger—might operate against the vital interests of some of the people concerned, who might not be deemed to be sufficiently closely related to the organization.

<sup>127</sup> *Ibid.*, p. 27.

<sup>128</sup> *Ibid.*; see the commentary to article 24, pp. 78–80, paras. 2–6.

<sup>126</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 74–75.

18. In view of the fact that several States in the Sixth Committee and a number of international organizations had been in favour of including necessity in the draft articles, he had drawn up an article on that subject covering the eventuality of a grave and imminent peril to an essential interest. As the Commission had not been entirely comfortable with the provision on necessity in the draft articles on responsibility of States, he believed that the Commission had good reason not to reiterate the rule accepted with regard to States, but to make it clear that the essential interest in question had to be one that the organization had a function to protect. That proposal had met with substantial approval, notwithstanding the criticism voiced by Ms. Escarameia, who was in favour of extending the possible range of situations in which international organizations could rely on necessity so as to include, for example, those where the very existence of the United Nations might be imperilled. That dramatic eventuality would, however, be indirectly covered by the reference to the essential interests that the organization had a function to protect, because some of the interests currently protected by the United Nations would be jeopardized if the Organization ceased to exist. On the other hand, Mr. Matheson had proposed limiting the reference to those functions of organizations that were similar to those of States. While that would generally be the case, it was possible to envisage cases in which necessity could be invoked in order to safeguard an essential interest which an organization had a function to protect, but which constituted a function that States were not in a position to exercise, such as the supervisory functions entrusted to the ILO.

19. He had never said or written that international organizations were not bound by peremptory norms. Paragraph 48 of his report, which had given rise to some difficulties, had been based on the premise that a treaty between States allowing military intervention in one State by another State at the latter's discretion would contravene a peremptory norm. Although some members had expressed scepticism, he submitted that it was a tenable position. It was the one taken by Cyprus before the Security Council in 1964. Cyprus had held that if the Treaty of Guarantee were interpreted in that manner, it would contravene a peremptory norm. That had been one of the first occasions on which peremptory norms had been invoked with regard to the use of force. It could be contended that the Member States had given the United Nations a general power of intervention which clearly did not conflict with a peremptory norm.

20. The question which would have to be answered if the Commission were to consider the issue of the manner in which peremptory norms concerning the use of force applied with regard to international organizations was whether States could grant a regional organization a general power to intervene militarily in that territory at the organization's discretion without contravening a peremptory norm. A problem would arise if a general power to intervene were to be given to the international organization without the specific consent of the State in which the intervention was to take place. Some of the examples given by Mr. Fomba and some of the questions raised by Mr. Kateka would be worth discussing if that

issue were to be examined, but he personally was opposed to doing so, or even to mentioning it in the commentary. A "without prejudice" clause along the lines of the one adopted in the draft articles on responsibility of States would be sufficient.

21. Accordingly, he proposed that draft articles 17 to 24 should be referred to the Drafting Committee.

22. The CHAIRPERSON, endorsing the Special Rapporteur's proposal, urged the Commission to show forbearance if the Drafting Committee found that it was unable to complete its task at the current session. If he heard no objection, he would take it that the Commission wished to refer draft articles 17 to 24, contained in the Special Rapporteur's fourth report, to the Drafting Committee.

*It was so decided.*

**Shared natural resources (continued)**  
(A/CN.4/560, sect. A, A/CN.4/L.683, A/CN.4/L.688)

[Agenda item 5]

REPORT OF THE WORKING GROUP (continued)

23. Mr. OPERTTI BADAN said that his observations would focus on what he believed were crucial aspects of the Commission's further examination of the topic. First, it was vital to avoid any outright departure from the earlier course of the Commission's deliberations. It should be remembered that, in 2003, the Special Rapporteur had envisaged that his first report<sup>129</sup> on outlines would be followed by a second report on confined groundwaters in 2004,<sup>130</sup> a third report on oil and gas, and a fourth report on comprehensive review in 2006. While he personally was a realist and knew from his own political experience that it was sometimes impossible to adhere to plans, he nevertheless wished to remind the Commission of its commitments. Given that at the fifty-seventh session, the Special Rapporteur had acknowledged the many similarities between groundwaters, oil and gas, he was concerned at the Special Rapporteur's remark to the effect that he did not know whether the Commission would proceed to deal with gas and oil.<sup>131</sup>

24. Secondly, it had to be recognized that, regardless of the form that the draft text would ultimately take, it was naturally influenced by the 1997 Watercourses Convention. However, although there was an undeniable link *ratione materiae*, it could be seen from closer scrutiny of the 1997 Watercourses Convention that its object was quite different from that of the draft articles on transboundary aquifers. Consequently, it seemed somewhat strange to contemplate the possibility of turning those draft articles into an additional protocol to an instrument with a different

<sup>129</sup> *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/533 and Add.1.

<sup>130</sup> The second report on confined groundwaters is reproduced in *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/539 and Add.1; the third report on transboundary groundwaters is reproduced in *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/551 and Add.1.

<sup>131</sup> *Yearbook ... 2005*, vol. I, 2836th meeting, p. 34, para. 12.

object, one which, moreover, had still not entered into force almost 10 years after its conclusion.

25. Thirdly, it was essential to decide what normative status the text should have. That was an issue not of form but of substance, because the question of the binding or non-binding status of the provisions was a central aspect of their content. In that connection, he wished to make a suggestion. Part II of the text, entitled “General principles”, was uncontroversial. One way of striking a balance between international and regional situations might be for aquifer States—which alone were entitled to regulate and control their own commitments—to take those general principles into account as a basis for developing their own regional or bilateral arrangements, without having to adopt the draft text in its entirety as a set of binding provisions.

26. Fourthly, it was necessary to consider the relationship between the draft articles and other instruments. More specific norms were required than the majority of those contained in the 1997 Watercourses Convention. He therefore endorsed Ms. Escarameia’s view that there would be no point in drawing up a new instrument which merely repeated what had already been established in that Convention. Accordingly, he urged the Commission to draft a set of articles tailored to the very different object of regulating the management of aquifers.

27. With regard to regional arrangements, he was concerned about the issue of precedence. Would it be based on temporal or on hierarchical considerations, or governed by the rules concerning *lex specialis*? What would be the relationship between the new convention—if it was decided that that was the form the draft articles were to take—and regional arrangements between aquifer States? His concern was prompted by the fact that old draft article 3, which had since become new draft article 19, had contained two additional paragraphs dealing with precisely that situation, based on sources cited in great detail by the Special Rapporteur. One of the principles had been that nothing in the convention affected the sovereign right of States to exploit, develop and manage their natural resources. That was tantamount to a twofold restatement of the principle of sovereignty and the principle that the convention would not be imposed on countries that had concluded special arrangements. He agreed with Mr. Kolodkin, who, at the meeting of the Commission held on 6 May 2005, had said that the term “arrangements” could include political or administrative arrangements, which were dissimilar in nature to the traditional sources of international law.<sup>132</sup> Mr. Galicki had expressed similar concerns about the use of that expression in his statement at the same meeting.<sup>133</sup> Over and above the use of that term, which seemed to have been adopted provisionally in order to pave the way for future discussion of the matter, it was necessary to take into account the sensitive issues of precedence and coordination, which were of central importance.

28. Consideration must also be given to the role played by third States with regard to aquifers. He supposed that

it was the same role as that played by third States with regard to gas and oil, namely that of purchasing, importing and utilizing those resources. In the microclimate of the Drafting Committee and the Commission, it was sometimes forgotten that their work was addressed to the international community of States and to Governments. The extreme sensitivity of those matters made it imperative for the Commission to return to the sources of its work on the topic, in particular the mandate given to it by the General Assembly, treaty law and the general principles of international law. As Mr. Candioti had rightly indicated at the 2834th meeting, the Commission must concentrate on the obligations of each of the aquifer States.<sup>134</sup> He therefore welcomed the Commission’s intention to focus on the rights and obligations of those States.

29. Another point related to the international community. At the Commission’s 2834th meeting, Mr. Candioti had also warned against the internationalization or universalization of aquifers.<sup>135</sup> He wished to draw attention once again to that point, which was of central importance.

30. His next point was that any bilateral or regional agreements must be consistent with the general principles set out in the future instrument, whether it took the form of a convention or some other form. Those principles encompassed a commitment to equitable and reasonable utilization, in other words protection, of natural resources, a commitment that should be extended to all sources of energy, including gas and oil. By 2027, all non-renewable energy sources were likely to be depleted. Accordingly, it was up to society to ensure that they were used in a rational and responsible manner.

31. A further point was that the problem of sovereignty had been only half-solved. The draft articles affirmed it as a general principle, but, without disregarding General Assembly resolution 1803 (XVII) of 14 December 1962 on permanent sovereignty over natural resources, it nevertheless also indicated that sovereignty was to be exercised in accordance with the limitations established by the draft articles. There was a technical distinction to be made: sovereignty meant having decision-making power, but the means of exercising that power could and should be limited, inasmuch as international law was evolving in that direction. Decision-making power should not be confused with regulation of the exercise of that power. The footnote to draft article 2 (a) in the report of the Working Group (A/CN.4/L.683) stated that the commentary would indicate that the phrase “water-bearing” had been employed to draw a distinction with gas- and oil-bearing geological formations. That was an important distinction and one that kept alive the link with other geological formations.

32. The new draft article 19 should not be construed as suggesting that the draft articles as a whole were simply a set of standards governing utilization and prevention of contamination. They were much more, and their significance was not confined to environmental matters alone. He endorsed the general philosophy behind the

<sup>132</sup> *Ibid.*, 2834th meeting, p. 21, para. 34.

<sup>133</sup> *Ibid.*, p. 19, para. 14.

<sup>134</sup> *Ibid.*, p. 22, para. 44.

<sup>135</sup> *Ibid.*

provisions on monitoring, management and responsible use of resources. He found the reference in draft article 12 to “competent international organizations” fairly vague, and would prefer a reference to international or regional organizations.

33. In conclusion, he said that the topic had evolved considerably since its inception under the aegis of Mr. Rosenstock.<sup>136</sup> Even though Mr. Pellet had suggested that a section on reservations should be included, in his own view, it was now ripe for completion. However, the international community had a responsibility to deal with all shared natural resources, not just groundwaters. The Commission’s current work on the topic would have a bearing on other exercises involving regulation or the adoption of principles, *inter alia*, on gas and oil.

34. Mr. MATHESON said he was fully satisfied with the report of the Working Group and with the text of the draft articles, which should be referred to the Drafting Committee. The Chairperson of the Working Group and the Special Rapporteur deserved special thanks for producing so expeditiously a draft that covered many technical issues and matters of importance to States. Although the question of form had not yet been decided, the text appeared to be taking the form of a future framework convention. That was an appropriate format for a text containing specific obligations and dealing with a specific resource. He hoped that the Drafting Committee would bear that point in mind when working on the text.

35. Mr. Operti Badan had raised the important question of the relationship between the text and regional or bilateral agreements. As had often been noted, the only way to achieve effective regulation of an underground aquifer that had transboundary characteristics was through cooperation and agreement among the aquifer States. That, indeed, would be the primary source of obligation and implementation. The Commission therefore needed to take care not to encroach on the ability of bilateral and regional groups of States to regulate aquifers effectively; it should not derogate from existing agreements or undermine the ability of States to make special provision to deal with their aquifers in a manner that best suited their populations.

36. The Commission should exercise considerable caution with regard to the subject of gas and oil. The draft articles on aquifers did not necessarily provide an appropriate model for oil and gas. Aquifers had special characteristics, especially vulnerability to use and pollution, which differed substantially from those of oil and gas. Moreover, before venturing into such a politically sensitive area, the Commission needed a new mandate from the General Assembly: its work on that subject could not be merely an extension of the work done on aquifers. Vital interests of States were at stake, and the Commission needed to know whether the international community really wanted it to regulate that difficult and important area.

37. Mr. CHEE congratulated the Chairperson of the Working Group and the Special Rapporteur on producing

a set of draft articles worthy of adoption on first reading. His initial misgivings as to whether the topic of groundwaters was worthy of the Commission’s attention had been dispelled by the Special Rapporteur’s unstinting efforts. Water shortages had become a threat to the whole future of humanity.

38. Articles 4 and 5 of the draft, dealing with equitable and reasonable utilization and sharing of resources, were the core articles. Allocation of water resources would be a crucial question, decisions regarding which should be entrusted to the joint management mechanism envisaged in draft article 13. Another important provision was draft article 11 on prevention, reduction and control of pollution. Those activities too could be brought under the control of the joint management mechanism, as could monitoring activities pursuant to draft article 12.

39. Draft article 14, on planned activities, provided for assessment of activities and reciprocal notification by aquifer States. The link between those obligations and the general obligation to cooperate contained in Part II of the draft articles should in some way be given greater prominence. Draft article 17 dealt with the protection of aquifer systems and related facilities in time of armed conflict. While incidents involving the destruction of oil installations had already occurred, that provision rightly envisaged the comparable case of deliberate damage to water resources. Draft article 19 dealt with bilateral and regional arrangements of the sort that already existed in South America and Africa. However, further clarification of the Special Rapporteur’s decision to opt for the term “arrangement” rather than “agreement” would be helpful.

40. The advice received from technical consultants and experts from bodies such as the FAO in the course of informal briefings had been of enormous assistance to the Working Group. He was confident that the Commission’s work on aquifer systems and protection of transboundary groundwaters would eventually constitute a valuable legacy to the world’s population. Lastly, regarding the form to be taken by the instrument, he endorsed Mr. Matheson’s view that it should take the form of a framework convention.

41. Mr. OPERTTI BADAN said he agreed with Mr. Matheson’s remark that the Commission’s work on aquifers was unlikely to be transposable to other areas such as oil and gas, but disagreed with his suggestion that a new mandate was needed. In response to General Assembly resolution 54/111 of 9 December 1999, the Commission had elaborated in 2002 a tentative work programme and timetable for the remainder of the quinquennium, which had included a report on oil and gas.<sup>137</sup> That information had been communicated to the General Assembly, and no mention had been made in the Sixth Committee of any need to alter the mandate given to the Commission in 1999.

42. Mr. KEMICHA endorsed the important point made by previous speakers that it was not feasible to transpose the approach used for aquifers to the domain of oil and

<sup>136</sup> *Yearbook ... 2000*, vol. II (Part Two), annex, p. 141.

<sup>137</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 100, para. 520.

gas, for political, technical and also normative reasons, in the light of the United Nations resolutions already adopted on the matter. As Mr. Operti Badan had pointed out, the Commission already had a mandate for its future work. However, at the start of the next quinquennium, the newly constituted Commission could review the question in the light of political, legal and other considerations. For his own part, he would want to see a very broad consensus reached before the Commission addressed the subject of oil and gas.

43. Mr. BAENA SOARES said that, as one of the longest-serving members of the Commission, he was a strong believer in mandates. Since the Commission already had a mandate from the competent authority, it must not shrink from carrying it out. It could hardly request the General Assembly to reiterate or alter that mandate, or decide to fulfil it only in part; to do so would undermine its credibility as a body.

44. Mr. CANDIOTI (Chairperson of the Working Group), thanking the members of the Commission for their comments and the support expressed, noted that no specific suggestions on the draft articles had been made. It should be remembered that the Commission was only beginning its consideration of the draft on first reading, and that much remained to be done before the work was completed.

45. The CHAIRPERSON, speaking as a member of the Commission, saluted the efforts that had produced results on a highly technical subject that had significant implications. At the previous session, he had said that the topic needed to be refocused, and he was gratified to see that that had been done, although he would have liked to see more emphasis placed on groundwaters, not least in the title of the Working Group's report.

46. If he heard no objection, he would take it that the Commission wished to refer the draft articles contained in the report of the Working Group on Shared natural resources to the Drafting Committee.

*It was so decided.*

*The meeting rose at 12.45 p.m.*

## 2880th MEETING

*Tuesday, 23 May 2006, at 10 a.m.*

*Chairperson:* Mr. Guillaume PAMBOU-TCHIVOUNDA

*Present:* Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Mr. Yamada.

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

[Agenda item 1]

1. The CHAIRPERSON extended a welcome to Sir Kenneth Keith, a judge of the International Court of Justice, and expressed gratification that the Commission's work aroused the interest of eminent figures in the field of international law. He then invited the Chairperson of the Drafting Committee on reservations to treaties to inform the Commission of the Committee's membership.

2. Mr. KOLODKIN (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of reservations to treaties was composed of Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Mansfield, Mr. Matheson and Mr. Yamada, together with Mr. Pellet (Special Rapporteur) and Ms. Xue, *ex officio*.

3. The CHAIRPERSON submitted the programme for the following fortnight, which would complete the first part of the session, and noted that the programme had been drawn up in such a way as to enable the Commission to complete its work as originally planned.

*The meeting rose at 10.14 a.m.*

## 2881st MEETING

*Tuesday, 30 May 2006, at 10 a.m.*

*Chairperson:* Mr. Guillaume PAMBOU-TCHIVOUNDA

*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. Kateka, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

## Diplomatic protection\*\* (*concluded*) (A/CN.4/560, sect. D, A/CN.4/561 and Add.1–2, A/CN.4/567, A/CN.4/575, A/CN.4/L.684 and Corr.1–2<sup>138</sup>)

[Agenda item 2]

### REPORT OF THE DRAFTING COMMITTEE

1. Mr. KOLODKIN (Chairperson of the Drafting Committee) introduced the texts and titles of the draft articles adopted by the Drafting Committee, as contained in document A/CN.4/L.684 and Corr.1–2, which read:

\* Resumed from the 2872nd meeting.

\*\* Resumed from the 2871st meeting.

<sup>138</sup> Mimeographed; available on the Commission's website. The text reproduced in this volume includes the corrigenda A/CN.4/L.684/Corr.1–2.