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Summary record of the 2832nd meeting

Topic:
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was followed. He thought that parts I and II of the draft were equally important and that the general principles could not be discussed until the scope of the convention had been considered. The idea of considering the draft articles on a part-by-part basis therefore seemed to him to be artificial, if not arbitrary.

27. Mr. GALICKI said that while part II appeared to constitute the core of the draft articles, it would be difficult to discuss that part before part I, which also contained some crucial points.

28. Mr. PELLET said that it would be wise to begin with part I before considering part II, and to leave the rest of the draft for later. Flexibility would be needed, and members of the Commission who wished to speak more than once should be allowed to do so.

29. Mr. DAOUDI said that the Commission should start at the beginning, as all the elements of the draft were linked.

30. Mr. YAMADA (Special Rapporteur) said that he did not mind beginning with part I or part II, and would leave the decision to the Commission.

31. Referring to the comments made by Ms. Xue, he said that the draft groundwaters convention, unlike the 1997 Watercourses Convention, provided for the regulation of "other activities", which would include, for example, the use of pesticides in agriculture, which might pollute groundwaters.

32. The CHAIRPERSON invited members of the Commission to constitute the Planning Group and Drafting Committee.

The meeting rose at 5.20 p.m.

2832nd MEETING

Tuesday, 3 May 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, 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. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Opertti Badan, 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 (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the third report of the Special Rapporteur on shared natural resources (A/CN.4/551, Corr.1 and Add.1).

2. Ms. ESCARAMEIA congratulated the Special Rapporteur on his exhaustive research into the legal and scientific aspects of the topic. As general comments, she endorsed the proposed structure of the draft convention and considered part II particularly important, as general principles were fundamental. She did not agree with those who argued that bilateral or regional agreements in specific areas provided sufficient guidance: such agreements would always favour the stronger parties, a state of affairs that was totally unacceptable where environmental issues were at stake.

3. The 1997 Watercourses Convention should not be followed too slavishly. While it set out useful principles, such as equitable and sustainable utilization, the obligation not to cause significant harm and a general obligation to cooperate, the new convention covered bodies of water that raised far more sensitive issues.

4. It was her understanding that the proposed articles dealt only with those States that had an aquifer in their territory, or had some connection to an aquifer. However, third States could also play a role in the maintenance of aquifers, through charges and discharges. Accordingly, they too should be covered in the draft articles, as they clearly had an obligation to cooperate and exchange information.

5. The issue of compensation in the event of harm should also be addressed in the draft articles, rather than simply left to the operation of general rules on liability. She would also like to see the precautionary principle referred to by the Special Rapporteur in the report spelled out more strongly, in a separate article.

6. Turning to the individual draft articles, she said it would be useful to specify, perhaps in the commentary either to article 1 or to article 4, those situations in which aquifers were not covered by the present convention, being already covered by the 1997 Watercourses Convention. She also strongly endorsed the use of the term "impact", which was broader than "harm", in draft article 1, paragraph (b).

7. Turning to draft article 2, paragraph (a) (Use of terms), she agreed with the use of the expression "geological formation" rather than "rock formation", for the reasons given by the Special Rapporteur. There might be some merit in retaining the term "water-bearing", as it corresponded to the layperson's notion of an aquifer. She also endorsed the deletion of the word "exploitable". In paragraph (b), the bracketed phrase "[each associated

with specific geological formations]” was redundant and should be deleted. The phrase “more than two” aquifers had been corrected to read “two or more” in the text of paragraph (b); accordingly, paragraph 9 of the report needed to be amended in consequence.

8. Concerning the notion of an artificially rechargeable aquifer, mentioned in paragraph (e) and in paragraph 10 of the report, a State where an aquifer was artificially recharged should perhaps be subjected to more stringent obligations of non-pollution than a State where aquifers were recharged naturally, by rain, for example.

9. In the first sentence of draft article 3, paragraph 1, the word “encouraged” was too weak: transboundary aquifer States should be strongly urged to enter into bilateral or regional arrangements. If third States could in some way affect or be affected by aquifers, even though the aquifers were not in their territory, they should also be involved in such arrangements. She sought clarification from the Special Rapporteur on that point. Paragraph 3 also seemed to accord the draft convention a very subsidiary role by encouraging States to conclude bilateral or regional agreements without respect for the general principles set forth in the draft, an approach which, as stated by the Special Rapporteur elsewhere in the report, was unacceptable. A reference to compliance with those general principles should therefore be included in paragraph 3.

10. With respect to part II, draft article 5, paragraph 2 (a), she wondered how, in practice, the “sustainability” of an aquifer or aquifer system could be assessed over the long term. Several authors referred to the “economic recoverability” of an aquifer, and consideration should be given to using that concept as a criterion.

11. In draft article 6, reference might be made, perhaps in paragraph 1 (c), to the vital importance of water for drinking purposes. Special emphasis should be laid on that most fundamental of uses, on which the very survival of the population depended.

12. On draft article 7, paragraph 1, she continued to find the threshold of “significant” harm unacceptable, both in the general rules of liability and, *a fortiori*, in the present context. Several authors had pointed out that the precautionary principle militated against the use of the term “significant harm”, and preferred to speak simply of “harm”, since the impact of certain activities might take many years to become apparent. The precautionary principle was included in the International Law Association Berlin Rules on Water Resources, adopted in 2004,¹ and she firmly believed that it should also be incorporated in the convention. In paragraph 3, the possibility that a third, non-aquifer State might cause harm to an aquifer State should be foreseen and a reference to compensation should be incorporated therein.

¹ The Berlin Rules are available on the website of the International Law Association (http://www.internationalwaterlaw.org/documents/intldocs/ILA_Berlin_Rules-2004.pdf). For the precautionary principle, see in particular article 23. See also International Law Association, *Report of the Seventy-first Conference (Berlin 2004)*, London, 2004, pp. 334-411.

13. Mr. MATHESON congratulated the Special Rapporteur on a valuable report that clearly defined the issues and offered carefully thought-out solutions. That work could have important benefits for the populations that depended on aquifers for basic human needs.

14. He wished to make three general points. First, the overriding consideration was that the utilization and protection of aquifers could ultimately be effectively accomplished only at the bilateral or regional level, with measures directed at specific aquifer systems and adapted to their particular conditions and to the needs of the aquifer States in question. The Commission could and should provide general principles to guide and encourage such bilateral and regional solutions, but it could not pretend to create a global solution. The States in whose territory an aquifer lay must have the flexibility to deal with their situations in the light of their own needs and conditions, and the choices they made must be respected. On the whole, that central consideration was given fair recognition in the Special Rapporteur’s proposals, although sometimes the language suggested was not entirely clear. In any event, the flexibility and authority of aquifer States should not be limited beyond what was provided in the current draft.

15. Secondly, he fully supported the Special Rapporteur’s emphasis on promoting the reasonable utilization and protection of aquifers. However, it was important not to impose requirements that were absolute or unrealistic or that might unduly compromise other important interests of aquifer States, including the satisfaction of their population’s vital needs and the protection of other aspects of the environment. For example, States could not realistically be expected to prevent all pollution of aquifers, to halt all uses that might cause depletion or to cease all activities that might cause some degree of harm. To do so would in some cases necessitate more than was technically or economically feasible and in other cases would unduly divert public resources from other pressing requirements. A fair balance must be struck between the protection of aquifers and their use to meet human needs. By and large, the Special Rapporteur had been very attentive to those considerations, although in that regard too the language proposed was sometimes unclear. It bore repeating that requirements more categorical than those provided for in the current draft should certainly not be imposed on aquifer States.

16. Thirdly, on the ultimate form of the provisions, he was among those who believed that the Commission would attract broader support for its proposals if it were to produce non-binding principles to encourage bilateral and regional arrangements, rather than a binding convention. While he respected the Special Rapporteur’s call for that question to be left in abeyance at the current stage, he believed that care should be taken not to prejudice it. The current text was drafted in the form of a binding convention, and contained terms such as “convention”, “articles” and “States Parties” that identified it as an international agreement. It contained language indicating binding legal duties, such as “shall” and “obligation”. To clearly indicate that the use of such terms was only provisional pending a decision on the final form, they might, for instance, be placed in square brackets. He also endorsed the Special

Rapporteur's recommendation that the final clauses need not be considered until that matter was resolved.

17. Mr. BROWNLIE warmly congratulated the Special Rapporteur on his hard work, backed up with valuable supplementary resources in the form of papers and studies, on a subject that was of enormous importance. The draft convention was comprehensive and ambitious and, subject to specific criticisms, deserved the Commission's support. He was concerned, however, that while experts on aquifers had been called in to assist, the Commission tended to overlook general international law, which was nevertheless an important resource, highly relevant to various projects and disputes between States. In article 4, the Special Rapporteur rightly dealt with the relationship between the draft articles and other conventions and international agreements, but so far there was no mention in the draft articles of the analogous problem of the relationship between the draft articles and general international law.

18. In lectures given at the Hague Academy of International Law, Professor Richard Baxter, a prominent international lawyer and judge at the ICJ, had expressed the view that if codification was not done carefully it could actually have a negative effect, inadvertently calling into question important pieces of customary or general international law.² If draft article 7, on the obligation not to cause harm, was meant to fill in gaps where customary law was not clear, or did not provide redress, then he could support article 7 to that extent. He wondered, however, whether the existence of article 7 and the absence of any proviso relating to principles of general international law was a desirable state of affairs. One of the seminal decisions of the ICJ, in the *Corfu Channel* case, had established the principle that a State was responsible for harm to neighbours caused by sources of which it had—or ought to have—knowledge (p. 245 of the decision). That principle should be protected in situations where an aquifer or aquifer system was the vehicle of harm to neighbouring States and the requisite degree of knowledge existed or could be imputed to the aquifer State. Draft article 4 should accordingly be supplemented with some formulation or proviso to protect existing principles of general international law. There was no reason why such principles should not apply to aquifers, even though in the *Corfu Channel* case they had happened to apply to the territorial sea of Albania.

19. Mr. GAJA said that the Special Rapporteur was to be praised for striving to reach conclusions that were both politically acceptable and responsive to the concerns expressed by the scientific community. Although many of his proposals could hardly be criticized, the general principles set out in the draft articles might appear rather too general, providing little guidance to the States concerned. The principle of equitable and reasonable utilization had been endorsed by the 1997 Watercourses Convention, but it was somewhat vague, in view of the number of factors that needed to be considered for its application. If two or more States reached agreement on a specific transboundary aquifer, it would be difficult to say whether the agreement did or did not comply with that principle. If

the application of the principle was entrusted to an international court or tribunal, the outcome would hardly be predictable. However, it would be difficult for the Commission to state more precise rules in such a complex and little-explored field.

20. The Special Rapporteur had provided the Commission with voluminous documentation, yet little of it specifically addressed issues relating to transboundary groundwaters. In 2004 States had been requested to provide information on their practice, but that request had brought to light little in the way of new materials other than bilateral and regional agreements, few of which related specifically to underground waters, while those that did covered only the provision of information and not the way the water resources should be apportioned, which was after all the crux of the issue (see A/CN.4/555 and Add.1).

21. With regard to the sovereignty that States claimed over groundwaters within their territory, the Special Rapporteur now appeared ready to concede that, although the territorial States were under a number of obligations, they "have sovereign rights over the natural resources located within their jurisdiction" (para. 19 of the report). He wondered whether it might not be wise to make that point in the draft articles themselves, in order to dispel criticism that the Commission was seeking to establish a regime whereby States had only limited sovereignty over the waters in their territory, because they had to share that sovereignty with other aquifer States. To spell out that States had sovereignty as well as obligations would at least overcome one of the obstacles to the acceptance of norms.

22. Given the definition of the scope in article 1, he agreed with Ms. Xue that the draft should make it clear to what extent, and where, activities that had or were likely to have an impact upon aquifers were regulated. As Ms. Escarameia had observed, that would also involve activities by non-aquifer States whose conduct might have an impact on aquifer States.

23. He was not entirely happy with the definitions of "recharging aquifer" and "non-recharging aquifer", which seemed unnecessary. They were based on the distinction between negligible and non-negligible contemporary water recharge, one that was not easy to make. In any case, since that distinction seemed relevant solely because different obligations were imposed under article 5, it would be preferable to differentiate less rigidly among aquifers in article 5 and to say that the issue of sustainability, and perhaps others as well, arose when there was contemporary recharge. Incidentally, the reference to sustainability did not imply that "the renewable natural resource must be kept at the level that would provide the maximum sustainable yield" (para. 21 of the report). That applied to fisheries, but not necessarily to groundwaters, which States concerned might well decide not to exploit to the limit of sustainability.

24. The future convention on the law of transboundary aquifers would not be a new Charter of the United Nations. It was therefore not appropriate to say in article 4, paragraph 1, that the provisions of the 1997 Watercourses

² R. R. Baxter, "Treaties and custom", *Collected Courses of the Hague Academy of International Law, 1970-I*, vol. 129, 1971, Leyden, Sijthoff, pp. 25–105.

Convention “apply only to the extent that they are compatible with those of the present Convention”. That statement presupposed that all the States which shared an aquifer were parties to the new convention. However, all obligations under the 1997 Watercourses Convention would remain in force *vis-à-vis* any aquifer State which was a party to that Convention but not to the new instrument. In that regard, it might be useful to draw up a protocol to the 1997 Watercourses Convention.

25. Similarly, obligations arising under a regional convention towards a State that was not a party to the new instrument could not be affected. As it currently read, however, article 4, paragraph 2, might give an impression to the contrary. Perhaps a drafting change could specify that, for those States for which it became binding, the instrument was not intended to take precedence over other international agreements.

26. With regard to the question of compensation in the case of harm caused to another aquifer State, he largely concurred with Mr. Brownlie’s remarks. The assertion in article 7, paragraph 3, that the State causing harm was under an obligation “where appropriate, to discuss the question of compensation” conveyed the impression that there was no obligation to provide compensation. He understood that the assumption underlying the assertion was that the harm-causing State had taken all the required measures to prevent the causing of harm. As it stood, however, the text stated that significant harm was “nevertheless” caused—in other words, caused notwithstanding the obligation to prevent the causing of harm, rather than notwithstanding compliance with that obligation. That was perhaps a drafting problem. An additional source of confusion might be that paragraph 3 also spoke of eliminating and mitigating such harm, elements that would seem to apply regardless of whether or not the obligation of prevention had been complied with. It should be made clear that the obligation to discuss, rather than to provide, compensation presupposed that the obligation of prevention had been complied with by the harm-causing State.

27. As to the method to be followed in future work on transboundary groundwaters, the best course would be to establish a working group to discuss the various provisions and reach a consensus. The text should then be referred to the plenary, which would in turn refer it to the Drafting Committee for further refinement. That process might take a few weeks, and it might be difficult to adopt the articles on first reading until 2006, but it would also give the Commission the opportunity to receive comments and information from States before finalizing the articles.

28. Mr. CHEE commended the Special Rapporteur’s excellent paper. He noted, however, that it failed to address the need to set up an operational organ to enforce the terms of the convention. It was common practice to include a provision to that effect in international water treaties, an example being the Bellagio Draft Treaty, which contemplated, in article III, the establishment of a commission entrusted with enforcement and oversight responsibilities.³

³ R. D. Hayton and A. E. Utton, “Transboundary groundwaters: the Bellagio draft treaty”, *Natural Resources Journal*, vol. 29,

29. Another important element that was missing was a dispute settlement procedure. International water treaties usually provided for peaceful settlement through mediation, conciliation or adjudication of the sort envisaged in Article 33 of the Charter of the United Nations. Indeed, from the Madrid Declaration on International Regulation regarding the Use of International Watercourses for Purposes other than Navigation (Madrid Declaration)⁴ to the 1966 Helsinki Rules on the Uses of the Waters of International Rivers,⁵ all statements of principles of law governing the utilization of international water resources had advocated recourse to the mediation and conciliation procedure. Some of those statements had made such recourse mandatory. Article XV of the Bellagio Draft Treaty also provided for the accommodation of differences to prevent the escalation of the dispute, and article XVI called for referral of the dispute to the ICJ if an agreement could not be reached.⁶

30. In view of those considerations, he was not certain that the time was ripe to produce a draft convention on the subject. In that regard he referred to an essay by a former Special Rapporteur of the Commission, Mr. McCaffrey, entitled *The Law of International Watercourses: Non-Navigational Uses*, in which the author concluded that, “[o]n the basis of the available evidence of [S]tate practice as well as recent codifications and the 1997 [Watercourses] Convention, it may be concluded that the law in this field has progressed only to the point that the general principles and rules governing the non-navigational uses of internationally shared surface water are applied to internationally shared groundwater resources as well”;⁷ thus, the law of international groundwaters could be said to be, at best, in the embryonic stages of development. In the author’s view, the different characteristics and behaviour of groundwaters would seem to justify stricter standards and more stringent protection than were applicable to surface waters. The current legal regime governing surface waters, as expressed in the 1997 Watercourses Convention, might, Mr. McCaffrey concluded, “be sufficiently flexible to be capable of adaptation to the particular requirements of groundwater, but this situation should prevail only until a special regime could be tailored for international groundwater.”⁸

31. Mr. ECONOMIDES said it was important to decide whether the topic under consideration involved codification, progressive development, or both. The Special Rapporteur had referred to the “scarcity of State practice and legal instruments” in the area (para. 3 of the report). Apparently, there was not yet a sufficient body of past practice to enable the Commission to engage in a codification exercise; it must therefore proceed by analogy. Clearly, the question of transboundary surface waters and groundwaters went beyond issues of national sovereignty and was a matter for international law. He agreed with

No. 3 (1989), pp. 663–720, at p. 684.

⁴ Institute of International Law, *Annuaire de l’Institut de droit international*, Madrid session, April 1911, vol. 24 (1911), Paris, Pedone.

⁵ International Law Association, *Report of the Fifty-second Conference (Helsinki 1966)*, London, 1967, pp. 484 *et seq.*

⁶ Hayton and Utton, *loc. cit.* (footnote 3 above), pp. 714 and 718 respectively.

⁷ Oxford University Press, 2001, p. 433.

⁸ *Ibid.*

Ms. Escarameia that if the 1997 Watercourses Convention was followed too closely, the force of the present draft articles would thereby be diminished. It was therefore necessary to proceed with the topic without undue haste; the agreement of a large number of States was of the essence, and he concurred with Mr. Gaja that at the current stage it was preferable for the topic to be discussed in a working group rather than in the Drafting Committee.

32. On draft article 2 (Use of terms), Ms. Escarameia was right to point out that the bracketed phrase “each associated with specific geological formations”, in paragraph (b), was redundant. In paragraph 9 of the report the Special Rapporteur stated that the expression had been inserted to indicate that an aquifer system could consist of aquifers not only of the same geological formations but also of different geological formations. Yet article 2, paragraph (a), defined an aquifer as “a permeable geological formation”. That suggested that an aquifer could be associated with any geological formation, provided that it was permeable. He asked the Special Rapporteur for confirmation that that was the case. He also noted that the notion of utilization of the water had been totally eliminated from the definitions. While he agreed with the Special Rapporteur that the term “exploitable” invited controversy (para. 8), he still believed that that notion should be included in the definitions. He also wondered whether the phrase “underlain by a less permeable layer” was an integral part of the definition of “aquifer”. If, as was his impression, it was not, why was it needed?

33. Lastly, he noted that, whereas the previous proposal had referred to the water contained in the aquifer, the new text used the phrase “water contained in the saturated zone of the formation”. Did that mean that an aquifer was made up of several zones? What was an aquifer, strictly speaking? The text was not very clear on that point. Thus, it could be seen that the Commission was still groping its way forward, and that a number of major problems regarding the definition of “aquifer” had yet to be resolved.

34. With regard to draft article 3, all States which shared an aquifer should be encouraged to conclude bilateral and regional arrangements. As Mr. Matheson had said, that question could be regulated only at bilateral and regional levels. At the international level, indications could be given and principles elaborated that could be used in bilateral or regional negotiations. Two States which shared an aquifer could freely conclude an agreement, provided they respected the rights of others. However, article 3, paragraph 1, went too far in providing that, in some cases, such an arrangement could be entered into without the express consent of other States. The second sentence of the provision should be deleted. He was also in favour of replacing the word “encouraged”, in the first sentence, by a stronger term.

35. Mr. OPERTTI BADAN noted that the topic had initially been proposed under a common heading with gas and oil and that the Commission had subsequently focused its attention on water.⁹ Perhaps that was why the tendency to regard groundwater resources as shared was

being diluted. He was concerned that some statements by members might reopen questions which had been regarded as settled.

36. The Special Rapporteur had left open the question whether the final text would take the form of a convention, a group of principles or recommendations, preferring instead to retain a degree of flexibility. While the Commission might eventually conclude that a number of guiding principles for the management of groundwaters would suffice, without a need for norms, it should not prejudice the question of the form that the final product would take.

37. Water in a transboundary aquifer was subject not only to the principle of the sovereignty of the territory under which it was located, but also to regulations freely agreed by partner States on its shared use for the common good, rather than for the specific benefit of one of those States. That was an area in which the Commission could provide useful guidance.

38. Mr. Sreenivasa RAO welcomed the very full and well-researched third report prepared by the Special Rapporteur and recalled that, as former chairperson of a working group of the Sixth Committee whose work had led to the adoption of the 1997 Watercourses Convention, the Special Rapporteur was well versed in every aspect of the topic which might be raised by members of the Commission.¹⁰ It was true that the draft articles were very general in nature, replicating to a great extent the provisions of the 1997 Watercourses Convention. Some members might find that approach disappointing, but he felt that the Special Rapporteur really had no other option; a more detailed, prescriptive text could give rise to long debate and make it impossible to conclude discussions in the near future.

39. In that context, he recalled that discussion of the 1997 Watercourses Convention had continued for many years, and had included extensive debate on matters such as the threshold of significant harm, sovereignty, equitable and reasonable utilization and the obligation not to cause harm. There was a very real danger that those issues would return to haunt the Commission, which, however, would be unlikely to arrive at any definitive solution. It would therefore be pointless to reopen discussions. In his view, the term “significant harm” was in any case relatively meaningless. The adjective “significant” had been added for purely practical reasons, to prevent frivolous or politically motivated claims.

40. Turning to the specific topic of groundwaters, he recalled that there had been discussion within the Commission as to whether the draft articles on international watercourses could be considered to cover groundwaters where those waters were shared between States. The Special Rapporteur at the time, Mr. Rosenstock, had in fact proposed simply extending those draft articles, *mutatis mutandis*, to cover groundwaters.¹¹

⁹ See *Yearbook ... 2000*, vol. II (Part Two), chapter IX, p. 131, paragraph 726, and annex, p. 141; see also *Yearbook ... 2003*, vol. II (Part Two), pp. 15–16, paragraph 40.

¹⁰ See the report of the Sixth Commission meeting as a Plenary Working Group (A/51/869).

¹¹ *Yearbook ... 1994*, vol. II (Part One), document A/CN.4/462, annex, pp. 120–121, paras. 38–39.

41. He also took note of Mr. Gaja's proposal concerning the possibility of drafting a protocol to the 1997 Watercourses Convention on the question of groundwaters, but was of the view that the matter could be resolved more simply, especially in the light of the misgivings expressed by Mr. McCaffrey in the article cited by Mr. Chee.

42. He agreed with Mr. Matheson that the Commission should show great flexibility and, so long as general principles could be arrived at based on available information and consistent with the Commission's past work, he trusted the Special Rapporteur's judgement and familiarity with the topic; if the latter had seen fit to draft articles which were fairly general in nature, he fully supported that decision. In any case, the matter required further review in a working group.

43. Mr. PELLET acknowledged the thoroughness of the third report but said that at times he would have preferred to see more detailed information on the reasoning behind the Special Rapporteur's decisions. The reader was often simply referred to previous reports or discussions, and while many of the issues at hand had already been discussed, that was not always the case. Even where the issues had been discussed, a reminder of the reasoning that had led to the choice of specific terms or language would not have gone amiss.

44. With regard to the definitions contained in draft article 2, he wondered if the term "aquifer" could still be applied if the permeable layer was not saturated, as was implied in paragraph (a). He also wondered why paragraph (c) referred to an aquifer or aquifer system, parts of which were situated "in different States" rather than the more usual formulation "in two or more States". While he welcomed the addition of paragraphs (e) and (f), especially in the light of the distinction made in draft article 5, paragraph 2, with regard to recharging and non-recharging transboundary aquifers or aquifer systems, he wondered whether the expression "contemporary water recharge" was an accepted term of art or one coined by the Special Rapporteur. In the former case the source should be indicated and in the latter case the term should be defined in the draft, or at least in the commentary.

45. Regarding the explanation of the term "geological formation" contained in paragraph 8 of the report, which covered materials other than rock, he wondered what specific materials were referred to. Such matters should be explained in the report and also in the commentary. He also wondered why, in paragraph 9 of the report, an aquifer system was described as a series of "more than two" aquifers, rather than a series of "two or more" aquifers, as in draft article 2, paragraph (b). Furthermore, there was no need to include the words "water-bearing" in draft article 2, paragraph (a), or the words "each associated with specific geological formations" in paragraph (b) of that article.

46. It was also highly regrettable that the comments and observations received from Governments and relevant intergovernmental organizations (A/CN.4/555 and Add.1), the paper entitled *Shared Natural Resources: Compilation of international legal instruments on groundwater resources* and other background documentation

prepared by the Special Rapporteur had been distributed in English only.¹²

47. In reading the draft articles one could not but be struck by their resemblance to the 1997 Watercourses Convention. That resemblance was quite legitimate given the closely related nature of the subjects, just as it was legitimate that they should depart from the 1997 Watercourses Convention, where required by the special characteristics of aquifer systems. Thus, the Special Rapporteur's explanations for some of the departures from the text of the 1997 Watercourses Convention, while at times somewhat over-succinct, were perfectly understandable. He could accept the Special Rapporteur's preference for the term "arrangement" in draft article 3, paragraph 2, over the word "agreement" in article 3, paragraph 2, of the 1997 Watercourses Convention, and also his reasons for preferring the language chosen in draft article 5, paragraph 2, to that of article 5, paragraph 1, of the 1997 Watercourses Convention (para. 22). He also agreed with the new wording of draft article 6—which, truth be told, was an improvement on that of the 1997 Watercourses Convention. While he also welcomed the new draft article 9, paragraph 2, he felt that the reason for the inclusion of that paragraph should be more fully explained, and that it might be better located at the beginning or end of draft article 10.

48. There were a number of other instances where the language of the draft articles constituted an improvement on the 1997 Watercourses Convention, and he sincerely hoped that those improvements would be retained by the Drafting Committee and the Commission. He was thinking in particular of draft articles 10 and 18—though he had few illusions concerning the generosity of rich countries and the private sector's thirst for profit; and draft article 19, paragraph 1, on emergency situations, which was worded better than the corresponding article of the 1997 Watercourses Convention. In draft articles 16 and 17 the Special Rapporteur had quite rightly simplified the unnecessarily complicated procedures under the 1997 Watercourses Convention in favour of more flexible and realistic mechanisms for notification and consultation. However, draft article 20 on armed conflict, which simply reproduced article 29 of the 1997 Watercourses Convention, and draft article 21 on national defence or security, contributed little or nothing new and were not useful for the draft's goals; draft article 20, and probably draft article 21 as well, should not be referred to the Drafting Committee. Draft article 4 on the relation to other conventions and international agreements, pursuant to which the provisions of the draft convention prevailed in matters concerning transboundary aquifers or aquifer systems, should be placed at the end of the draft convention.

49. In the examples just mentioned, he approved of the Special Rapporteur's reasons for departing from the text of the 1997 Watercourses Convention, although he would often have welcomed a fuller explanation of those reasons. In other cases, however, the Special Rapporteur had not explained his reasons for departing from the text of that Convention. Many of the discrepancies could not

¹² The distribution of these documents was limited to the members of the Commission. Document A/CN.4/555 and Add.1 is reproduced in *Yearbook ... 2005*, vol. II (Part One).

simply be attributed to problems of translation. For example, he personally was not convinced that the wording of draft article 3 improved on the corresponding article of the 1997 Watercourses Convention, because its overly cautious wording could lead to difficulties in interpretation and implementation. Neither was he convinced that draft article 9, paragraph 3, and draft article 15 improved on article 9, paragraph 2, and article 24 respectively of the 1997 Watercourses Convention. He failed to understand why draft article 12 did not reproduce the wording of article 20 of the 1997 Watercourses Convention on the need to “individually and, where appropriate, jointly” protect and preserve ecosystems, although that wording was used elsewhere, in draft article 14. Unless the language of a draft article represented a clear improvement on that of the 1997 Watercourses Convention, the language of the latter should be retained.

50. The Special Rapporteur shared with most special rapporteurs an unfortunate tendency to seek to delay for as long as possible any decision by the Commission with regard to the final form that the draft would take. That approach was not without its drawbacks. In draft article 3, paragraph 1, draft article 5, paragraph 2 (*b*), and draft article 8, paragraph 2, aquifer States were “encouraged” to take various measures. Such language would be entirely acceptable in a soft law text, but was completely meaningless in a binding convention. Draft article 9, paragraph 2, and draft article 14 used similarly soft wordings, and also contained explanations that would be perfectly acceptable in a commentary but had no place in a convention.

51. It was therefore important that the Commission decide in plenary session whether it was attempting to draft a recommendation, guidelines or a convention, before asking the Drafting Committee to develop a final text, as the hard and soft law approaches called for very different drafting techniques. He himself was strongly in favour of drafting a convention, if only because the topic was inseparable from that of international watercourses. Perhaps the best solution, however, as suggested by Mr. Gaja, might be to propose the adoption of a protocol to the 1997 Watercourses Convention to take account of the specific characteristics of transboundary groundwaters. In any case, in order for the Drafting Committee to prepare a viable text, the Commission must decide what type of instrument it wished to draft. That issue could be further discussed in a working group.

52. He wished to make a few specific points before concluding. Firstly, draft article 4, paragraph 2 should be interpreted—like article 311, paragraph 2 of the United Nations Convention on the Law of the Sea, on which it was modelled—as giving priority to the Convention over other agreements. In fact, the whole issue of the relationship between the draft articles and other instruments needed to be studied more closely. It was difficult to see how draft article 4, paragraph 2, fitted in with draft article 3. Secondly, as the Special Rapporteur rightly pointed out in paragraph 24 of his report, natural factors and parameters needed to be taken into account; for that reason, he thought it would be better to include an express reference in draft article 6 to draft article 9, paragraph 1, and draft article 10, paragraph 1, which included indicative lists of such factors and parameters. Thirdly,

draft article 9, paragraph 2, should be moved either to the beginning or to the end of draft article 10. Fourthly, given the paramount importance of applying the precautionary principle to aquifers and, in particular, non-recharging aquifers, it was very unfortunate that the Special Rapporteur had approached that principle with such caution in paragraph 33 of his report and in draft article 14, which merely “encouraged” aquifer States to take a precautionary approach. Lastly, while he was aware that it was not the Commission’s practice to include the wording of final clauses in draft texts, he regretted the fact that the Special Rapporteur’s draft did not envisage a clause on reservations. He believed that a majority of the members of the Sixth Committee would welcome, especially in an instrument that involved the codification of international law, provisions dealing as specifically as possible with reservations. Of course, it would be for the future negotiators of any convention or protocol to draft the details of the final clauses, but if the Commission were to propose the inclusion of final clauses in the draft articles, those clauses should contain a reference to reservations.

53. In concluding, he stressed that his main difficulties with the draft concerned its overall lack of incisiveness, particularly with regard to precautionary measures, and the problems that would arise if the Commission were to refer it to the Drafting Committee in its current form without first determining what form it should eventually take.

54. Mr. Sreenivasa RAO agreed with Mr. Pellet that the Commission needed to give clear instructions to the Drafting Committee on the form that the text was to take, but wondered if the Commission was really in a position to provide such clarity given its members’ comparative ignorance of the characteristics of groundwaters and the lack of conceptual continuity in the various international arrangements in that area. There would be little point in drafting a convention based on arbitrary agreements reached by the Commission that were not supported by State practice or legal doctrine. Any convention would need to be universally acceptable to States and applicable in a wide range of local circumstances as well as sound from a scholarly viewpoint. The draft should be considered by a working group before it was sent to the Drafting Committee, so that it could be fleshed out and improved, particularly with regard to what constituted “equitable and reasonable utilization”.

55. Mr. GAJA said that he had not intended to suggest replacing the draft convention with a draft protocol, but had simply meant to point out that article 4, paragraph 1, was not suitable for inclusion in a new instrument, although it could conceivably be included in a protocol to the 1997 Watercourses Convention. That was because it would be possible to apply the provisions of the 1997 Watercourses Convention to transboundary aquifers or aquifer systems “to the extent that they are compatible with those of the present Convention” only if the States parties to the first were also States parties to the second, or if the 1997 Watercourses Convention was made more flexible, by means of, for example, a protocol. While he did not think it was necessary to go that far, article 4, paragraph 1, needed to be reconsidered and redrafted. He agreed with Mr. Sreenivasa Rao that before being referred to the Drafting Committee, the draft articles should be

sent to a working group, for consideration, *inter alia*, of the final form they were meant to take.

56. Mr. MIKULKA (Secretary to the Commission) specified that document A/CN.4/555 and Add.1, referred to by Mr. Pellet, had been distributed in an unedited version in English only because the comments and observations from States and competent international organizations had been received at the last minute. As it was an official document of the Commission, it would be distributed in all official languages as soon as it had been translated. However, the paper entitled *Shared Natural Resources: Compilation of international legal instruments on groundwater resources* would remain available in English only, because there was no budget provision for translating a document of that nature.

Organization of work of the session (*continued*)

[Agenda item 1]

57. Mr. PAMBOU-TCHIVOUNDA (Chairperson of the Planning Group) announced that the Planning Group would be composed of Mr. Addo, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Matheson, Mr. Niehaus, Mr. Operti Badan, Mr. Pellet, Mr. Sepúlveda and Ms. Xue.

58. Mr. MANSFIELD (Chairperson of the Drafting Committee) announced that the Drafting Committee on the topic of reservations to treaties was currently composed of Mr. Comissário Afonso, Ms. Escarameia, Mr. Gaja, Mr. Matheson and Ms. Xue.

59. The CHAIRPERSON invited any other members wishing to join the Drafting Committee on that topic to inform Mr. Mansfield of their interest.

60. Mr. PELLET (Chairperson of the Working Group on the long-term programme of work) said that the Working Group was officially composed of Mr. Baena Soares, Mr. Galicki, Mr. Kamto, Mr. Koskenniemi and Ms. Xue, with Mr. Niehaus (member *ex officio*) as Rapporteur. However, all members of the Commission were welcome to attend the Working Group's meetings.

The meeting rose at 1 p.m.

2833rd MEETING

Wednesday, 4 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. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Operti Badan, 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 (*continued*)

1. Mr. PAMBOU-TCHIVOUNDA thanked the Special Rapporteur for his third report on shared natural resources: transboundary groundwaters (A/CN.4/551 and Add.1). The cornerstone of the report was undoubtedly the draft articles, a text that was ambitious and carefully thought out, but also unrealistic in scope. It was ambitious owing to the very nature of the topic. Groundwaters did not reveal themselves easily to laymen, and it might prove difficult to determine where they ran and how their utilization should be organized. For lawyers, such dangers were a function of the methodology employed, yet the global approach that had been chosen meant sacrificing the specific nature of groundwaters on the larger altar of shared natural resources. It would in fact have been useful to refocus the topic, not least of all by giving it a new title, in order to avoid placing such disparate natural resources as gas, oil and water on the same footing. The use of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses as a model also tended to blur the specific characteristics of groundwaters, while the categories established in the 1997 text, though quite useful at the time, had since disappeared. That was the case, for example, with the distinction drawn between upstream and downstream States, which was central to the attribution of responsibility. That distinction must be resurrected in order to make the draft more functional.

2. As to the cautious approach taken by the Special Rapporteur, he recalled that on the previous day the members of the Commission had questioned the direction the exercise was taking and the form that the final outcome should take. Yet in his third report the Special Rapporteur himself indicated the path to be followed. In paragraph 2 he proposed "a complete set of draft articles for a convention on the law of transboundary aquifers". In paragraph 13 he stated that "[t]he draft convention [was] deemed to be a framework convention and aquifer States [were] expected to respect the basic principles stipulated therein in formulating ... arrangements". States were nevertheless "authorized to depart from those principles if the special characteristics of a particular aquifer [required] certain adjustments". That was why he himself advocated the elaboration of a framework convention, the structure that best accommodated compromise, was articulated around general principles and was well adapted to the principal fields of environmental law.

3. The fact remained that excessive generality could undermine any intellectual construct, and from that standpoint the scope of the draft was sometimes unrealistic. For