

Document:-
A/CN.4/2833

Summary record of the 2833rd meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2005, vol. I

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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

example, article 1, on the scope, stated that the convention applied to the utilization of transboundary aquifers and aquifer systems without defining the term "utilization" or the "other activities" that had or were likely to have an impact on those aquifers or aquifer systems. As to measures of protection and management, they were unknown since, by definition, they came into existence only through the application of the framework convention. There was thus nothing to give the slightest indication of the scope of application or the purpose of the draft articles. However, the difference between "principal" and "incidental" utilization should be made clear, especially since utilization had to be both equitable and reasonable, concepts that were far from being construed uniformly in general international law.

4. The omission of certain institutional elements from the draft had already been mentioned by other speakers, with whom he concurred. Yet another example of the Special Rapporteur's tendency to be unrealistic was the fact that all States, whether upstream or downstream, were given equal consideration. It was therefore surprising that so little consideration was given to third States affected by the recharge and discharge of an aquifer, even though they clearly had a role to play and thus rights to defend.

5. Referring to what he termed the "mirage" of scientific and technical assistance for developing countries proposed in article 18 of the draft, he recalled the impact that similar provisions had had on such legal instruments as the United Nations Convention on the Law of the Sea. Lastly, he said that a general principle such as that of permanent sovereignty of States over natural resources should be stated elsewhere than in the preamble.

6. Mr. OPERTTI BADAN said that his comments would follow the structure proposed in the third report. Firstly, he welcomed the fact that the Special Rapporteur had not prejudged the final form the draft articles would take. He also noted with satisfaction that the Special Rapporteur had received technical assistance in drafting his report from the UNESCO International Hydrological Programme and the Japanese Ministry of Foreign Affairs.

7. Turning to the preamble, he agreed that the principle of State sovereignty over natural resources should be included in the operative portion of the text, since it was fundamental.

8. As to the scope, he was not convinced by article 1, subparagraph (b), unless the activities in question were carried out by the aquifer States and not by third States, in which case such activities would be regulated by general international law, particularly the law of responsibility. Subparagraph (a), meanwhile, could give rise to ambiguous interpretations as to which States had the right of utilization. It was explained that domestic aquifer systems were excluded from the scope of the draft articles, which applied only to transboundary aquifers. The purpose of regional agreements such as the agreement on the Guaraní aquifer was precisely to enable aquifer States to agree on the equitable and reasonable utilization of that natural resource. The encouragement to cooperate given

to aquifer States was thus very useful, as was the indication that an aquifer system could consist of a series of two or more aquifers, thereby distinguishing it from transboundary aquifers and transboundary aquifer systems. However, it was not clear what would happen if States did not agree that a given aquifer was a transboundary aquifer. Such disagreement must not deprive them of their right to utilize groundwaters. The inclusion of a provision specifically recognizing that right would make the draft clearer from a legal point of view. On the other hand, it was unnecessary to redefine "transboundary", since there was a *communis opinio* on that notion, which appeared in many other international instruments.

9. As to the distinction between a recharging and non-recharging aquifer, he had serious doubts about its usefulness in legal terms, even though it might exist scientifically. In his view, the distinction was not strong enough to warrant the creation of a rule. Moreover, the notion of a rechargeable aquifer called for the introduction of the notion of sustainability.

10. With regard to bilateral and regional arrangements, it was true that if one accepted the principle of sovereignty, States could not be obliged to conclude such agreements; nevertheless, the convention should stipulate the obligation of States in whose territory a transboundary aquifer system was located to cooperate with a view to equitable and reasonable utilization of water resources. On that point there must be some flexibility. In any event, the rational use of a natural resource like groundwaters by the States that possessed it might be a good example of how the international community could promote respect for basic values without arrogating the right to regulate them as if they were universal in nature. In the case of water, it was obvious that the principle of geographical proximity and criterion of integration came into play in the use of shared natural resources. The draft convention should encourage States to cooperate in the use of such resources and to take their integration agreements into account so that understandings that facilitated greater integration of infrastructures might be reached. The MERCOSUR countries had begun work on an agreement that would be based on scientific studies currently being carried out on the Guaraní aquifer.

11. The issue of the draft convention's relationship to other international conventions and agreements might become an extremely delicate one in the future. He did not think it useful to establish an explicit link between the 1997 Watercourses Convention and the draft under consideration. Not only did the two instruments have different objects, they also dealt with different legally protected interests that were protected differently at the international level. In addition, neither of the two conventions should take precedence over the other.

12. The draft set out the principle of equitable and reasonable utilization of a transboundary aquifer or aquifer system, which had a definite impact on the conduct or behaviour of the States concerned. The objective criteria to be taken into account in that context were, firstly, surface area, and secondly, the volume of the aquifer in each State, measured in cubic metres. The latter criterion was linked both to the surface area and to the depth of the

water, which varied. Mention should also be made of conventional criteria that made it possible not only to determine surface area and volume but also to take account of the needs of certain regions that had fewer water resources. In such cases the criteria of reasonableness and equity, which related not to the quantity but to the quality of the resource's utilization, came into play.

13. The Commission should give due consideration to the question of the establishment of development plans for aquifers or aquifer systems to ensure the rational utilization of such resources. In that connection, draft article 5 suggested that a search should be made for sufficiently flexible approaches that reflected the need to balance the interests involved while addressing urgent problems and requirements. The concepts of "agreed lifespan of an aquifer or aquifer system as well as future needs of and alternative water sources for aquifer States" must likewise be taken into account.

14. In conclusion, he wished to stress a number of points. Firstly, the draft convention should be viewed as a source of encouragement for the conclusion of agreements on aquifers and aquifer systems, and not as a replacement for existing or future rules. Secondly, the Commission's objective was to formulate non-binding principles, even if the rules that aquifer States formulated themselves were binding in nature. Thirdly, general international law must be respected, both by States, when concluding regional and bilateral agreements, and by the Commission. Fourthly, it must never be forgotten that the Commission was dealing with transboundary watercourses and not international watercourses. Fifthly, the draft convention should promote the conclusion of agreements and cooperation with a view to the reasonable utilization of a transboundary aquifer by the States concerned. If that objective was not achieved, however, that did not mean that individual States should refrain from using their resources in that part of the aquifer or aquifer system located in their territory. The inclusion in the draft convention of a specific provision to that effect would avert many problems in the future. Lastly, it was the shared exploitation of resources, and not the ownership thereof, that was addressed in integration agreements dealing with natural resources.

15. Mr. KABATSI commended the Special Rapporteur on his excellent report, which was the product of extensive consultation and reflected the views of States, scholars and the bodies concerned on some rather sensitive issues such as permanent sovereignty over natural resources. The Special Rapporteur had tried to balance all the interests involved and had managed to present a complete set of draft articles which provided an excellent basis for the Commission's deliberations.

16. Like other members of the Commission, however, he feared that the Special Rapporteur's proposals were rather too general to be truly useful as part of a convention. Certain expressions and terms should be clarified, such as "negligible" in article 2, subparagraphs (e) and (f), "significant extent" in article 3, paragraph 1, "equitable and reasonable" in article 5 and "significant harm" in article 7, paragraph 1.

17. If, however, the product of the study turned out to be a framework convention providing mainly general principles governing the utilization of transboundary groundwaters, one could safely assume that bilateral and regional agreements would be sufficiently precise and detailed to provide practical guidance for the utilization, management, protection and preservation of those resources.

18. As the Special Rapporteur pointed out in paragraph 26 of his report, groundwaters constituted a "fragile natural resource". That was why any harm caused by man-made sources to such resources, on which certain communities and countries might be entirely dependent, might be extremely difficult or even impossible to reverse. Serious thought must therefore be given to the expressions used, as some common terms were perhaps more easily applicable to other resources. He was thinking in particular of the use of the term "significant" to refer to harm caused to a State through an aquifer. If such harm could be detected, the States concerned should have an obligation to intervene without waiting for the harm to become "significant", and before it became irreversible.

19. Turning to the question of permanent sovereignty over natural resources, he said he did not believe that States could be prohibited from affirming such sovereignty, especially in the absence of agreements and as long as they respected the principles of general international law. However, the importance of the issue must not be overemphasized. Accordingly, if the Commission intended to draw up provisions governing the reasonable and equitable utilization of such resources by States, the question of sovereignty must be subjected to such regulation and to bilateral and/or regional agreements for the equitable benefit of the States concerned.

20. Lastly, he agreed with the Special Rapporteur that it was not appropriate to decide on the final form the draft articles would take until the substance had more or less been agreed upon. The same was true for the preamble, which should be dealt with only after the draft articles had been agreed upon and all factors to be incorporated therein were known. In general, he welcomed the proposals contained in the third report, especially the proposed draft convention on the law of transboundary aquifers, which a working group could perhaps refine before it was referred to the Drafting Committee.

21. Mr. KEMICHA said that the Special Rapporteur had stayed as close as possible to the 1997 Watercourses Convention and departed from it when the special nature of aquifers so required. He agreed with Mr. Pellet that the main weakness of the report was the Special Rapporteur's extreme caution and, indeed, his reluctance to express a view on the future of the Commission's work on the subject. The terminology employed in phrases such as "aquifer States [...] are encouraged to enter into a bilateral or regional arrangement among themselves" in article 3, paragraph 1, or "aquifer States are encouraged to take a precautionary approach" in article 14 of the draft suggested that the Commission was considering not a draft convention that was binding on the States that signed it, but simple recommendations for States to

use as they saw fit. The fact that the Special Rapporteur wrote in paragraph 13 of the report that “[t]he draft convention is deemed to be a framework convention” did not clarify that point. He agreed with other members of the Commission who argued that the ambiguity should first be dispelled. He was convinced that the Special Rapporteur had not wanted to decide on the matter so that the Commission might do so.

22. Ms. XUE commended the Special Rapporteur for the considerable amount of work he had done and the volume of documentation compiled and also for being so receptive to the opinions of colleagues and States. She wished to start by making three general comments. Firstly, given the scarcity of fresh water and the growing demand for resources for the social and economic development of States, it was important for the Commission to take up the question of transboundary groundwaters, particularly in view of the fact that, after decades of studying the non-navigational uses of international watercourses, the Commission was technically in a better position to look further into the issue of groundwaters. However, after an exchange of views with the scientific community and States, the Commission had realized that the practical utilization of transboundary groundwaters was rather limited and that very few documents dealt specifically with the subject, a situation that complicated the Special Rapporteur’s work. The very nature of underground waters—a limited, confined and fragile resource with distinct physical properties, the utilization of which might vary depending on the social and economic conditions of the country concerned—called for flexibility and greater latitude for bilateral and regional arrangements than was the case with international watercourses. However, that was not the impression given by the wording of the draft, which seemed even stricter, or less flexible, than article 3 of the 1997 Watercourses Convention. Placing emphasis on bilateral and regional arrangements did not mean that general principles should not come into play. On the contrary, they could help States negotiate and conclude agreements that the States parties concerned could accept.

23. Secondly, as pointed out by the Special Rapporteur and other members, the study should not be regarded as a mere extension of the 1997 Watercourses Convention. Given the non-renewable nature and physical character of groundwaters, their protection and preservation should be emphasized in policy considerations. The criterion of sustainability should be applied not only to water utilization, but also to protection of the ecological conditions of the aquifer or aquifer system. Consequently the third area listed under the scope of the draft, “Measures of protection, preservation and management”, should be placed before the second, “Other activities”, and policy objectives should be clearly formulated. Similarly, activities carried out by a third State having no aquifer in its territory, that might have an adverse impact on an aquifer of a neighbouring State, should also be taken into account.

24. Thirdly, as with surface waters, it must be conceded that mere utilization might adversely affect the resources. She agreed with the views expressed by other members that the element of harm should be assessed case by case. Senior members of the Commission would recall that,

after having considered the terms “serious” or “appreciable” harm, the Commission had chosen the criterion of “significant harm” to mean harm that was more than trivial.¹ The Commission might also opt for the term “harm” without any modifier. In practice, it would not make much difference; in any event, it would not be interpreted to mean that any harm would give rise to liability or a claim for damages. The question as to what harm should be considered trivial and thus tolerable depended very much on the actual case and the relevant factors involved. It should be borne in mind, however, that the modifier did not have policy implications. In the *Corfu Channel* case, the obligation to exercise due diligence had been a determining factor in incurring the responsibility of the State to which the harm had been attributed, regardless of the degree. In the area of natural resources and the environment, however, the standard of harm could not be formulated in absolute terms because policy considerations relating to the utilization of resources were often based on a balance between the right to use and the duty to protect. If the deletion of the modifier meant that no harm whatsoever should be allowed, it might make it impossible for States even to use groundwaters.

25. Turning to a number of specific issues, she noted first that the notion of sovereign rights over natural resources as set out in paragraph 19 of the third report was a very important element that should be duly reflected in the future instrument. However, the question was not whether such sovereign rights should be absolute or not, whether or not they were limited. The key element was that the aquifer or aquifer system was transboundary, that it was thus under several national jurisdictions and that States should therefore respect each other’s sovereign rights and had a duty to cooperate. For international lawyers that went without saying, and such a statement might seem unnecessary. For States, however, that was the point of departure for elaborating the legal principles that ought to guide their activities affecting the resources located in their territories.

26. Secondly, she questioned the desirability of distinguishing between recharging and non-recharging aquifers, since, as the Special Rapporteur explained in paragraph 22 of his third report, “[i]n most cases, the quantity of contemporary water recharge into an aquifer constitutes only a fraction of the main body of water therein, which has been kept there for hundreds and thousands of years”. In other words, such recharge should not be given much weight when considering the sustainability of resources.

27. Thirdly, the question of compensation in draft article 7 was important, but the current wording might be problematic. The absence of agreements on activities between States did not necessarily mean that they could not reach an agreement on the settlement of damages. Besides, international liability rules could also come into play. It would therefore be preferable to use more general wording in article 7, paragraph 3.

¹ For discussions of the Commission on these issues see, *inter alia*, *Yearbook ... 1987*, vol. I, 2001st–2011th meetings, *passim*; *Yearbook ... 1988*, vol. I, 2045th–2064th meetings, *passim*; *Yearbook ... 1990*, vol. I, 2183rd meeting, para. 6 *et seq.*, 2185th–2186th meetings, *passim*; and *Yearbook ... 1992*, vol. I, 2272nd meeting, para. 4 *et seq.*

28. Lastly, on the form of the draft, she agreed with the proposal that a working group should be convened to review the question in the light of current research and comments received from States. Of course the Commission might still not be able to reach an agreement on the subject, but it would in any case be premature to refer the draft to the Drafting Committee.

29. Mr. BROWNLIE noted that the general principle enunciated in the *Corfu Channel* case had been quite clear: if a State exercising territorial sovereignty had knowledge or ought to have had knowledge of a cause of harm to a neighbouring State, then the principle applied in an environmental context. If the State exercising territorial sovereignty allowed its groundwater to be a medium for chemical effluents or nuclear waste, even as the result of an accident, that should count as damage if the harmful substances eventually reached a neighbouring State.

30. Mr. MANSFIELD said that all members were aware of the huge amount of time and energy that the Special Rapporteur had devoted to the preparation of his third report and of the assistance he had received from experts from UNESCO and the Study Group of the Japanese Ministry of Foreign Affairs. The Special Rapporteur had done well to consult hydrogeologists and other experts to ensure that the Commission had the most up-to-date scientific information and that the legal norms it developed made sense at the practical level to specialists. He had also been right to present concrete formulations on a fairly complete set of issues.

31. He himself had found it particularly interesting to learn how different underground aquifers were from surface waters, not just in their behaviour but also in their vulnerability to contamination and their ability to respond to clean-up measures. Those differences might also extend to their significance for the future of mankind in a world in which fresh water was in increasingly short supply. In that regard, it might well have been reasonable to deal with groundwaters by way of a protocol to a convention on watercourses in the early 1970s, when the Commission had embarked on its work on what would become the 1997 Watercourses Convention.² But for those members who had had the benefit of the detailed briefings by technical experts arranged by the Special Rapporteur, it was difficult to see how that could be considered an appropriate approach at present. For the other members, it might be useful to include more information about the reasons behind particular choices and formulations and, in particular, to explain, as some had already suggested, why some formulations differed from their equivalents in the 1997 Watercourses Convention.

32. He supported the Special Rapporteur's decision to present the Commission with a complete set of formulations in the form of draft articles, without prejudice to a decision on the final form. Some members had wondered whether that was not moving too fast and whether it might not be preferable to focus on elaborating general principles before considering other matters, such as protection

and management. He personally was all for taking the time and care necessary to ensure that the quality of the Commission's work did not suffer, and he was confident that the Commission was less likely to be perceived externally as moving too fast than it was as moving too slowly. Even assuming, under the most optimistic scenario, that the Commission completed a first reading in 2006, work would not be completed until midway through the next quinquennium. More importantly, it was critical for the success of the work that the Commission engage the interest of Governments and elicit their responses. Given the busy nature of life in the legal offices of most foreign ministries, such issues would be given greater attention if they were presented as a reasonably full picture that could be completed relatively quickly, rather than as isolated issues with little indication as to the final form of the work or how long it would take. The relatively complete set of draft articles gave Governments a solid and serious basis for discussion, which could only facilitate the work of the Special Rapporteur and the Commission. In that connection, he had no difficulty accepting the Special Rapporteur's recommendation to leave the decision on form until later. Doing so would affect the drafting, but it remained to be seen by how much, and it might be better to refer the question to a working group; he would support the establishment of such a body.

33. With regard to the scope of the future instrument, Mr. Mansfield was pleased that his suggestion for restructuring article 1 had met with support. However, he agreed with other members that the Commission should focus more clearly on the activities of third States that might occur outside the territories in which the aquifers were located but had an impact on them.

34. The definitions in article 2 were acceptable, although they might warrant some refining at a later stage, in particular the definitions of recharging and non-recharging aquifers, which were certainly necessary for the reasons set out in the report.

35. Article 3, on bilateral and regional arrangements, needed further discussion. He agreed that the Commission could not, in a text with a global focus, purport to prescribe how particular aquifers or aquifer systems should be managed. However, if it formulated general principles appropriately, a departure from them at the bilateral or regional level called for some justification.

36. Where the relationship with other instruments was concerned, Mr. Gaja's point regarding article 4, paragraph 1, needed to be taken into account. He welcomed the distinction made in article 5 between recharging and non-recharging aquifers. Paragraph 2 (b) was a helpful attempt to give meaning to the concept of reasonable use in the context of a non-recharging aquifer. He was also pleased that in article 7, paragraph 2, the Special Rapporteur had retained the phrase "have or are likely to have an impact on". As to article 7, paragraph 3, while he was aware of the vulnerability of aquifers to pollution, he was not certain that the inclusion of the qualifier "significant" would in fact prove to be "significant", but perhaps a working group could look into the issue. Lastly, the inclusion of a specific article on monitoring was important,

² See *Yearbook ... 1974*, vol. II (Part One), document A/9610/Rev.1, pp. 311–316, and *ibid.*, vol. II (Part Two), documents A/5409 and A/CN.4/274, pp. 37–291.

and the provisions on protection, preservation and management would be critical to the perceived value of the final outcome.

37. Mr. MATHESON, referring to part II of the draft articles, said that in his view it was essential to maintain the threshold of “significant harm”, which had been adopted after careful consideration in the 1997 Watercourses Convention. As the Special Rapporteur had pointed out, the term was flexible and took account of the vulnerability of aquifers to pollution. For the same reasons, as well as for consistency’s sake, the word “significantly” should be inserted in article 5, paragraph 2 (a), before “impair the utilization and functions of such aquifer or aquifer system”. Article 7 provided that aquifer States must take “all appropriate measures to prevent the causing of significant harm to other aquifer States”. That gave States adequate flexibility to take the steps that were best suited in a particular situation to prevent or mitigate harm. The same language should be used in article 5, paragraph 2 (a): aquifer States must be required to take all appropriate measures to avoid significant impairment to the utilization and functions of the aquifer. It would also be useful for the commentary to give some explanation of what “impairment” meant in practical terms. In addition, it had been suggested that the requirement in article 5, paragraph 2 (a) that States take into account the sustainability of the aquifer was too weak. There again, the Special Rapporteur had explained that a strict rule of sustainable use would not be appropriate, given the limited recharge capabilities of most aquifers. In reality, such a rule would deny aquifer States the use of the resource. It seemed to him that aquifer States must be given the flexibility to decide how to balance the objective of sustainability against the need to make use of the resources for the benefit of their populations.

38. Article 6 provided a very useful explanation of the factors to be taken into account for reasonable and equitable utilization of an aquifer. Those factors should include the degree to which an aquifer State had invested in the development and protection of the aquifer. It was not entirely clear whether subparagraph (f) included that consideration. The point should therefore be clarified either in the text or in the commentary.

39. He agreed that the issue of compensation, evoked in article 7, should be dealt with elsewhere. The Commission had already seen that the question of liability for transboundary harm was a complex matter that could not be reduced to a simple statement of obligation. The principles on such liability completed on first reading in 2004³ would apply to any harm caused to other aquifer States, a fact that might be noted in the commentary. For the time being, it would be wise not to make the language on compensation more definitive or more complicated.

40. Mr. Sreenivasa RAO, referring to draft articles 5 to 7, said that it was essential to provide States with sufficient flexibility to apply those principles to their particular circumstances. However, the mechanism that the Commission was elaborating must also be tailored to fit

the special characteristics of the resource in question. Two factors must be taken into consideration: the needs of States, which varied from one country to another, and requirements concerning the resources, which also differed. Those were not matters that could be objectively assessed in defining equitable and reasonable utilization. The distinction was important: equitable utilization sought to accommodate the interests of States, while reasonable utilization must be suited to the characteristics of the resource itself. As they stood, the articles did not offer immediate guidance to States. Any further clarification should be placed in the commentary, not in the text of the article, which should be left unchanged. Such an approach, which was not new, having been followed for the topic of international liability, met the concerns of members without altering the text.

41. With regard to the pace of work, it was probable that the principles defined for the 1997 Watercourses Convention could have been applied *mutatis mutandis* to groundwaters. Yet even if the Commission came to the same conclusions as in 1997, the time spent delving further into the question, notably by consulting experts, had clearly been profitable.

42. It must be borne in mind that all human interaction entailed harm. The utilization of an aquifer by one State necessarily led to a lesser utilization by another. Thus, the criterion of reasonableness was fundamental; however, it could be expressed in general terms. On the other hand, an assessment of harm made it possible to introduce the notion of prevention. That aspect must be developed within the scope of draft articles 5 and 7.

43. Draft article 7 addressed the classic doctrine of harm as a result of utilization. But as prevention had been dealt within the context of liability, a set of principles on prevention should be included. States must take all necessary precautions before utilizing a given resource, a point for which provision was made in draft article 5, paragraph 2 (a), pursuant to which States must refrain from “impairing” the aquifer. “Impair” did not mean “to cause harm” in the sense of article 7, but it might be considered that impairment could cause harm and that States must therefore avoid impairment through measures of prevention. If harm occurred despite prevention and reasonable utilization, the question of compensation should then be addressed, in conformity with the principle set out in article 7. The question of compensation had evolved since the 1997 Watercourses Convention. Viewing it from a broader perspective, by incorporating the notion of prevention, might lead to a set of different articles dealing with harm caused despite prevention and reasonable utilization. The working group should focus on that aspect of the question.

44. In short, the draft must ensure reasonable, equitable and sustainable utilization of resources to meet the needs not only of future generations but current ones as well, for what people could not do for themselves they could not do for others.

³ *Yearbook ... 2004*, vol. II (Part Two), chap. VII, para. 175.

45. Mr. CHEE pointed out that article XVI of the Helsinki Rules on the Uses of the Waters of International Rivers,⁴ revised in 2004 by the International Law Association at its seventy-first conference held in Berlin,⁵ had spoken of “significant harm”, which would appear to be appropriate. He also sought further clarification as to the meaning of the term “recharging aquifer”.

46. Mr. YAMADA (Special Rapporteur) said that the shortcomings in his report were due to the fact that the draft was still preliminary; with the help of the Commission’s comments, it would be improved.

47. In reply to Mr. Chee’s question, he said that at an informal meeting to be held that afternoon he would be showing a highly instructive film on the Guaraní Aquifer System, which was a recharging aquifer.

48. While he had asked the members of the Commission to focus on the substance of the draft rather than the form, he had not ruled out a discussion on that point. Some delegations in the Sixth Committee had called for guidelines, but many States wanted a legally binding document (A/CN.4/549 and Add.1, paras. 73–74). If necessary, presentation in the form of a convention could easily be changed to that of guidelines. As the form and the substance were interrelated, he hoped that the working group would look into that question.

49. He was aware that some members thought that he was proceeding too quickly. However, States expected the Commission to complete its work on transboundary groundwaters fairly soon. Moreover, he had the feeling that the Commission played a less important role than it had when first established some 50 years earlier. It was therefore essential to meet the expectations of States. As Mr. Mansfield had pointed out, even if the draft was completed in first reading in 2006, many years of work still lay ahead.

Organization of work of the session (*continued*)

[Agenda item 1]

50. The CHAIRPERSON reminded members that the European Society of International Law had offered to hold a joint meeting with the Commission on the subject of the responsibility of international organizations. The Bureau would consider that proposal at its next meeting.

The meeting rose at 12.55 p.m.

2834th MEETING

Friday, 6 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. 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. Mr. FOMBA said that water was a strategic resource vital to mankind’s survival and development, and was rightly a concern of the General Assembly and the Commission. While the question of surface waters had been settled with the adoption of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, international law with regard to groundwaters, regardless of whether they were connected to surface waters, had yet to be codified, or rather, progressively developed, a task not made easier by the paucity of State practice and international instruments in that area. Thorny questions therefore remained on how best to broach the subject, what kind of legal text should be proposed to States, what such a text should contain, and how to ensure that it was consistent with the 1997 Watercourses Convention and that the new instrument would be useful and effective in practice.

3. The Special Rapporteur had been well advised to seek the views of groundwater experts and, in particular, to include in the second part of his report, references to State practice and provisions from the few existing relevant international instruments. As far as regional arrangements were concerned, he would be interested to know if there were any transboundary aquifers or aquifer systems in West Africa and, if so, whether there were any programmes for cooperation in their management. He would be glad to pass on to the Special Rapporteur any useful information he could obtain in that respect from various national or regional authorities or organizations in the region.

4. While he welcomed the comprehensive scope of the draft articles contained in the report, he noted that the

⁴ International Law Association, *Report of the Fifty-Second Conference (Helsinki 1966)*, London, 1967, pp. 477–533, at pp. 508–509.

⁵ The Berlin Rules are available on the website of the International Law Association (http://www.internationalwaterlaw.org/documents/intldocs/ILA_Berlin_Rules-2004.pdf). See also International Law Association, *Report of the Seventy-First Conference (Berlin 2004)*, London, 2004, pp. 335–412.