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**Summary record of the 2834th meeting**

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45. Mr. CHEE pointed out that article XVI of the Helsinki Rules on the Uses of the Waters of International Rivers,<sup>4</sup> revised in 2004 by the International Law Association at its seventy-first conference held in Berlin,<sup>5</sup> 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

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

<sup>5</sup> The Berlin Rules are available on the website of the International Law Association ([http://www.internationalwaterlaw.org/documents/intldocs/ILA\\_Berlin\\_Rules-2004.pdf](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.

Special Rapporteur, in striving for concision, had not provided sufficiently detailed explanations on some points. As to the final form that the draft would take, he agreed with those members who had criticized the Special Rapporteur's decision to present his proposals in the form of draft articles of a convention while maintaining that he did not wish to prejudge the question of their final form. However, he was less concerned than some members with the inclusion of a reference to permanent sovereignty in the preamble or elsewhere in the draft; he did not believe that there was any risk of undermining that principle even if such a reference was omitted altogether.

5. Turning to specifics, he said that while the wording of draft article 1 was acceptable as a whole, an effort should be made to further clarify the relation between transboundary aquifers and aquifer systems on the one hand and national aquifers and aquifer systems on the other, and also between aquifer States and third States. Clarification of the technical scope of the terms defined in draft article 2 would give members of the Commission a clearer understanding of the legal effect of the terms used, and thus of the content of the legal regime to be proposed. Article 3 should figure prominently in the architecture of the draft, inasmuch as it confirmed the legitimacy, legality and primacy of bilateral and regional arrangements. Draft article 4 was a step in the right direction, since it gave automatic precedence to the draft convention over the 1997 Watercourses Convention in the event of a conflict between the two and, in certain circumstances, gave it precedence over other international agreements in disputes relating to groundwaters. The principle of equitable and reasonable utilization, which was the subject of draft article 5, was already enshrined in the 1997 Watercourses Convention and other international instruments, and was even more important in relation to groundwaters by virtue of their specific nature. However, he wondered if that concept should be viewed as an absolute or relative one, whether it entailed an obligation of result or of conduct, and how the requirement that aquifer States should "not impair the utilization and functions of such aquifer or aquifer system", as mentioned in draft article 5, paragraph 2 (a), was to be interpreted, as it was not clear whether the aim was zero risk or some form of graduated risk or risk threshold.

6. With regard to draft article 6, he asked if there was any difference between the "natural condition of the aquifer" referred to in paragraph 1 (a) and the "natural factors" referred to in paragraph 24 of the report. On draft article 7, and the question whether a threshold for harm was appropriate for groundwaters, he believed that the answer depended on whether, and to what extent, the problems related to harm were posed in the same terms as in the case of surface waters. More fundamentally, the precautionary principle, according to which the lack of scientific certainty should not prevent or delay the adoption of preventive measures, was particularly important with regard to groundwaters. He noted that the Special Rapporteur accepted that scientists had good reason for favouring the application of the precautionary principle, while remaining unconvinced that the precautionary principle had yet developed as a rule of general international law (para. 33). On the question of compensation raised in draft article 7, paragraph 3, he agreed with the views

expressed by the Special Rapporteur in paragraph 26 of the report.

7. With regard to draft article 13, on the protection of recharge and discharge zones, the best solution would be to try to clarify the rights and obligations of States other than aquifer States and their legal and practical links with aquifer States. Draft article 18, which dealt with scientific and technical assistance to developing States, was theoretically very important, particularly as it established a legal obligation to provide such assistance; the problem, however, was how to secure its practical application.

8. In conclusion, he agreed that the draft articles should be referred to the Drafting Committee, but only after they had been submitted to a working group for a decision on whether they should take the form of a convention, a protocol to the 1997 Watercourses Convention or a set of guidelines.

9. Mr. NIEHAUS said he agreed with the Special Rapporteur that a reference to the sensitive issue of permanent sovereignty over natural resources should be included in the preamble to the draft articles, regardless of whether it was mentioned elsewhere in the draft, in order to reflect the importance of that issue. He disagreed with those members of the Commission who felt that the draft was too weak. The Special Rapporteur had addressed a new and difficult topic with great skill and caution, in language appropriate to a framework convention. He agreed with the Special Rapporteur that a decision on the final form of the text should be taken only once the substance had been agreed upon. He also agreed with Mr. Brownlie that the text should be related more closely to the principles of general international law, in view of the crucial importance of applying those principles to the legal regulation of transboundary aquifers and aquifer systems.

10. With regard to the scope of the draft convention, he wondered if cases might not arise in which the distinction between national and transboundary aquifers or aquifer systems was not clear-cut, as when, for example, part of an aquifer lay along a border. Perhaps the draft convention should make some provision for dealing with possible disputes over the character of the water resources that were to be regulated. He wondered, moreover, if the agreement referred to in paragraph 6 of the report, which would allow States other than aquifer States to use transboundary aquifers and aquifer systems, needed to be unanimous. Although that issue was probably best dealt with in a bilateral or regional agreement rather than in a framework convention, it did illustrate the complexity and the highly technical nature of the topic.

11. Unfortunately, that complexity did not seem to be reflected in draft article 2, on the use of terms. For the sake of clarity, the list of definitions should be expanded to include more terms than the six listed. He also noted the need to amend the phrase "a series of more than two aquifers", in the third sentence of paragraph 9 of the report, to align it with the corrected wording of paragraph (b), namely, "a series of two or more aquifers". A stronger wording was needed in draft article 3, paragraph 1, on the entitlement of any State in whose territory an aquifer or aquifer system was located to participate in the

negotiations on a bilateral or regional arrangement, to ensure equality of opportunities to participate in those negotiations. In contrast, draft article 5, was admirably clear on the important principle of equitable and reasonable utilization. He agreed with the Special Rapporteur that the issue of liability should be dealt with in another forum. Lastly, he endorsed the suggestion to set up a working group to consider proposals for improvements to the draft articles before referring them back to the Commission for consideration.

12. Mr. GALICKI said that, thanks to the Special Rapporteur, members of the Commission had received a solid grounding in geology, hydrology and other areas of natural science of which they needed some knowledge if they were to find appropriate solutions to the legal problems relating to transboundary aquifers and aquifer systems. He fully agreed with the Special Rapporteur that a decision on the final form of the draft articles should be taken only once agreement had been reached on their substance. For the time being, at least, it was useful to be able to compare a draft in the form of a convention with existing regulations applicable to transboundary aquifers, such as the 1997 Watercourses Convention.

13. Inclusion of a reference to General Assembly resolution 1803 (XVII) seemed a good way to satisfy those States that were strongly in favour of mentioning the principle of permanent sovereignty over natural resources without actually referring to it in the operative part of the text. However, a decision on the final wording of the preamble should be postponed until a later stage. The scope of the draft convention, as formulated in draft article 1, reflected the general structure and content of the draft as a whole, but paragraph (b) of that article was somewhat vague; the term “other activities” was not sufficiently precise, and that lack of precision was exacerbated by the use of the term “impact” rather than the term “harm” used in draft article 7. Although the Special Rapporteur explained in paragraph 6 of his report that “[t]he term ‘impact’ should be construed as a wider concept than ‘harm’”, it was not clear to what extent the impact of “other activities” should be covered by the draft convention, especially in cases where such activities were carried out by non-aquifer States outside the territories of aquifer States. Perhaps the list of definitions of terms contained in article 2 could be extended to include terms such as “harm”, “significant harm” and “impact”.

14. Article 3 of the draft, entitled “Bilateral and regional arrangements”, departed from the terminology of the 1997 Watercourses Convention, which referred to “agreements”. That departure seemed unjustified if the “arrangements” were to rank as international legal instruments. The justification given by the Special Rapporteur in paragraph 12 of his report was not fully convincing, especially in the light of his statement in paragraph 14 that “bilateral and regional arrangements take priority, as *lex specialis*, over the draft convention”.

15. The subject of article 4, the draft convention’s relation to other conventions and international agreements, seemed at first glance to be a purely formal problem, yet that was far from the case. In paragraph 16 of the third report the Special Rapporteur acknowledged

the possibility of dual applicability of the draft convention and the 1997 Watercourses Convention. That state of affairs might be unavoidable, as the definition of a watercourse in article 2, paragraph (a), of the 1997 Watercourses Convention described surface waters and groundwaters as “constituting by virtue of their physical relationship a unitary whole”. The existence of two parallel legal systems, one governing transboundary aquifers and aquifer systems, and the other, watercourses, understood as including groundwaters connected with surface waters, was bound sooner or later to lead to conflict situations. It might be open to question which legal system should prevail, since the 1997 Watercourses Convention was a more comprehensive instrument, covering combined systems of surface waters and groundwaters, whereas the draft convention was limited to groundwaters located in aquifers.

16. Theoretically, there could be situations in which the physical characteristics of the waters governed by the two conventions changed: in dry seasons, certain rivers sometimes disappeared temporarily. If they were connected with underground aquifers, the aquifers could be covered for the dry half of the year by the draft convention, and for the other half, by the 1997 Watercourses Convention. To avoid such paradoxes, the relationship between the two conventions as proposed in article 4, paragraph 1, of the draft convention should be thoroughly reviewed. The discussion should take into account the proposals made, *inter alia*, on reformulation of the instrument into a draft protocol to the 1997 Watercourses Convention. Such an approach should not be seen as diminishing the new instrument’s importance, and it could help create a unified, comprehensive legal system governing both surface waters and groundwaters in all their possible configurations.

17. Using such an approach, the draft articles could address specific problems concerning transboundary aquifers, while also acknowledging the general principles and applicable provisions of the 1997 Watercourses Convention. If, however, the Commission decided to have a separate convention on the law of transboundary aquifers, certain provisions could be further improved, as compared to the 1997 Convention. For instance, the phrase in article 7, paragraph 3, “to discuss the question of compensation”, which was taken from article 7, paragraph 2, of the 1997 Watercourses Convention, could be reconsidered in the light of the fact that the draft convention did not, in principle, deal with matters of liability. The language of many provisions could be made stronger and more formal. Draft article 8, paragraph 2, for example, used the weak formulation “States are encouraged”, and draft article 9, paragraph 2, contained the wording “States shall employ their best efforts”.

18. In any case, it seemed advisable not to refer to draft articles to the Drafting Committee at the present stage, but rather to convene a working group, under the chairpersonship of the Special Rapporteur, to consider in detail the scope, substance and form of the future instrument on transboundary aquifers. He would welcome the opportunity to participate in such a group.

19. Mr. BAENA SOARES acknowledged the difficulty of breaking new ground on a technically complex and as

yet ill-defined topic. As the Special Rapporteur had indicated, while the draft articles were presented as being part of a convention, that did not prejudice their final form. He himself thought that States should be given freedom to determine the form of the text ultimately to be adopted.

20. It was essential that the principle of permanent sovereignty over natural resources, enshrined in General Assembly resolution 1803 (XVII), should figure in the draft. He did not consider that to be a sensitive question, nor did he think it should simply be mentioned in the preamble. Like other speakers, he believed that the principle should be included as a separate article in the operative part of the text in order to give it the requisite weight.

21. The Special Rapporteur was right to acknowledge the importance of bilateral and regional agreements. Agreements and negotiations in good faith constituted the most effective form of cooperation between aquifer States, which, after all, had access to the most authoritative information about the specific situation of an aquifer.

22. Mr. Opertti Badan had referred on a number of occasions to the Guaraní aquifer. The Special Rapporteur had given the Commission some general information on a four-year project being implemented with the support of the World Bank and the Organization of American States with a view to gaining a better understanding of the physical and technical characteristics of that aquifer. The Council of MERCOSUR had invited an ad hoc group to elaborate a draft agreement among member States with a view to establishing principles and criteria for the use of the Guaraní aquifer. He had had the honour of participating in that group's work, the results of which were now being considered by the Foreign Ministries of Argentina, Brazil, Paraguay and Uruguay. Three considerations had guided the group's work: permanent sovereignty over natural resources, the obligation not to cause significant harm, and conservation through rational and sustainable utilization of the aquifer (A/CN.4/549, paras. 46–47). What had emerged above all from the experience was the spirit of cooperation that would undoubtedly also prevail in other regional arrangements or agreements. That example of cooperation in the use of the Guaraní aquifer formed part of a set of initiatives of the four MERCOSUR countries to work towards economic integration.

23. The 1997 Watercourses Convention had its own specific objective and provisions. While it was entirely understandable that it should have served initially as a compass to guide those venturing into *terra incognita*, the draft under consideration catered for different conditions and circumstances. It had its own autonomous life, and the pertinence of the 1997 Convention to groundwaters was relatively tenuous. He saw little use in continuing to consider the hypothesis of dual applicability unless more technical information was provided. He also hoped that the draft would gain much wider support than the 20-odd ratifications that the 1997 Watercourses Convention had so far attracted.

24. The Special Rapporteur had made felicitous proposals in draft article 6, on factors relevant to equitable and reasonable utilization of aquifer systems. He had in mind the references to the economic and social needs of the

aquifer States (para. (b)) and to the population dependent on the aquifer or aquifer system (para. (c)). With regard to utilization, he recalled the obligation not only to preserve aquifer resources for future generations, but also for the benefit of the present generation.

25. Two articles (articles 8 and 9) were devoted to modalities of cooperation. Aquifer States were left to determine the manner of their cooperation and were encouraged to exchange information. It was important to stress the need for provision of specific data that gave a better picture of the aquifer system. Without such information, it would be extremely difficult to establish plans and standards for utilization.

26. The inclusion of an article on the obligation not to cause harm (article 7) between the articles on equitable and reasonable utilization and on the obligation to cooperate was logical. He agreed with the Special Rapporteur that the threshold of “significant harm” was appropriate and should be retained; that was one of the central obligations in cooperative exercises.

27. The statement in the beginning of paragraph 33 that “[t]he objectives of the draft articles are not to protect and preserve aquifers for the sake of aquifers but to protect and preserve them so that humankind could utilize the precious water resources contained therein” should be rephrased. It might be misconstrued, particularly in its use of the word “humankind”, which might be taken to imply that aquifer systems were part of the common heritage of humankind. If the concept of a common heritage of humankind was not applied to other natural resources such as oil and gas, there was no reason why it should be applied to water.

28. Lastly, he commended the Special Rapporteur on the prudent approach he had adopted. He had calculated an appropriate period for the draft to mature, one that neither precipitated nor held back the process. He had no objection to the establishment of a working group and if one was set up, he would welcome the opportunity to participate in it.

29. Mr. KOLODKIN congratulated the Special Rapporteur on his seminal report, which drew on a wide range of materials. Owing, no doubt, to his own lack of familiarity with the topic of transboundary groundwaters, he had always had some difficulty in differentiating it from that of international watercourses. Even after reading the third report, he still saw the topic as a sub-topic or extension of that of international watercourses. State practice offered precious few examples of independent regulation of aquifers, and the international legal instruments that dealt with transboundary watercourses frequently covered aquifers as well. Similarly, at the bilateral and regional levels, aquifers were governed by the same rules that applied to other transboundary watercourses. Nevertheless, the report showed that some transboundary aquifers and aquifer systems had their own specific characteristics that might necessitate special regulation differing from that of other international watercourses.

30. The draft before the Commission was largely—and, in his view, rightly—based on the 1997 Watercourses

Convention. Only one third of the 21 substantive articles were new. About the same number were to all intents and purposes borrowed from the 1997 Convention, and the remainder were largely based on it. In a number of cases the question arose whether there was any need to modify the language of the 1997 Watercourses Convention, and several of the departures made from that Convention required explanation in the commentary. It was quite natural that the two texts should largely coincide, since in many respects their subjects overlapped. A significant number of transboundary groundwaters would be regulated by the 1997 Watercourses Convention, and only a few aquifers would be governed by the new instrument; indeed, one could not rule out the possibility of disputes arising between States over which of the two applied.

31. The new instrument should, in the first place, be a legally binding instrument like the 1997 Watercourses Convention. Secondly, again like that Convention, it should be a framework convention. It must contain basic general principles with which aquifer States that were parties to the instrument must comply, whether or not pursuant to agreements concluded amongst themselves. States should be offered sufficient flexibility when concluding agreements to take due account of the specific nature of each individual aquifer or aquifer system, the particular nature of relations among the States concerned, their levels of social and economic development and the related factors to which Ms. Xue had alluded, the actual priorities for the use of aquifers at the specific time involved, and many other elements. He concurred with Mr. Matheson on the need for such flexibility. At the same time, the future instrument must also offer guidance on the conclusion of agreements *inter se*.

32. In the absence of such agreements, or in situations where not all transboundary aquifer States were parties to them, States that were not bound by the agreements had the right to act independently with respect to the aquifer, as Mr. Operti Badan had pointed out. But that freedom, reinforced by the principle of sovereignty over natural resources located within national territory, was not and could not be absolute. Strictly speaking, it did not exist even now. In the absence of the instrument now being envisaged, there was general international law, the relevant rules of which, as Mr. Brownlie had pointed out, were applicable to the conduct of States, including in respect of transboundary aquifers. Those rules were not solely the provisions on liability for acts not prohibited by international law, but also customary rules on responsibility for internationally wrongful acts. In that connection, he saw no need for the inclusion in the draft of any provisions on its relation to general international law, although its relevance might, for instance, be confirmed in the preamble.

33. At the same time, the conduct of States that were not parties to specific agreements on aquifers must be regulated in the future instrument. That was why the provisions being formulated by the Commission must remain fairly general, like those of the 1997 Watercourses Convention. The draft submitted by the Special Rapporteur corresponded, on the whole, to the considerations he had just outlined. He would nevertheless have preferred the Commission to determine at the present juncture whether

it was formulating a legally binding instrument, as he advocated, or a set of recommendations. As to the form, he would not rule out a protocol to the 1997 Watercourses Convention, although he had no objection in principle to a separate treaty.

34. Turning to specific provisions, he said he had serious doubts about draft articles 3 and 4. He agreed with Mr. Galicki that the reason for the emergence of the term “arrangements” was not clear. It could be construed as covering both legally binding arrangements, in other words, international legal instruments, and also non-binding arrangements such as political or so-called “administrative” arrangements. Or it could be construed as covering only the latter. In which sense was it used in draft article 3? If it was used in the first sense, then there was an obvious overlap between draft articles 3 and 4. If it was used in the second sense, then one wondered what was the purpose of draft article 4, which determined the relation of the draft convention with texts that were not international legal instruments. And in that case, was it right that draft article 3, paragraph 3, should give a non-international legal arrangement priority over an international treaty?

35. The second sentence in draft article 3, paragraph 1, seemed unduly detailed. If the article was retained, thought should be given to deleting that sentence. Nor was he convinced that article 311, paragraph 2, of the United Nations Convention on the Law of the Sea was a good model for article 4, paragraph 2, of the draft. That Convention, unlike the present draft, could hardly be viewed as basically a framework instrument. Paragraph 2 should refer, not to agreements compatible with the draft convention in its entirety, but to those compatible with its general principles. It might be useful to look into the advisability of replacing draft articles 3 and 4 with article 3 of the 1997 Watercourses Convention. Certainly, any departure from that text must be given full justification, which in his view was lacking at present.

36. If the distinction between recharging and non-recharging aquifers was to be retained, then the absence in draft article 5, paragraph 2 (*b*), of any reference to sustainability was justified. The applicability of that concept to recharging aquifers, especially when there was no alternative to their use, was by no means indisputable, however. Would it not be sufficient simply to retain the existing references to equitable and reasonable utilization in article 5?

37. He also favoured retaining the qualifier “significant” for the word “harm”, for reasons already mentioned by others. It was not entirely clear why the title of draft article 7 omitted the term “significant”, in contrast to the corresponding article of the 1997 Watercourses Convention. He did not agree with those who wanted to develop the reference in article 7, paragraph 3, to compensation, and to liability in general, since that issue was covered by the norms of general international law. The paragraph was modelled on article 7, paragraph 2, of the 1997 Watercourses Convention, which would be better left untouched.

38. Draft article 10, paragraph 1, on monitoring, was formulated in far too categorical a fashion. It was hardly possible to establish a universal obligation to agree on

harmonized standards and methodology for monitoring a transboundary aquifer or aquifer system. It would be more realistic to refer to the obligation to cooperate in monitoring matters and to exchange information. The paragraph's wording was more appropriate to agreements between aquifer States or agreements at the regional level.

39. Draft article 13, an important innovation in comparison with the 1997 Watercourses Convention, introduced the concept of detrimental impact. Yet terms like "impact" (art. 1), "significant harm" (arts. 7 *et al.*), "serious harm" (art. 19), "adverse effects" (art. 16) and "significant adverse effect" (art. 17) were also used. Some comments on or explanations of the wide variety of terms used were needed.

40. Draft article 15 was devoted to management. Unlike the corresponding article in the 1997 Watercourses Convention, however, it gave no explanation of that notion, which was used in a wide variety of senses in various international treaties. There, too, it might be worth following the example of the 1997 Watercourses Convention.

41. Paragraph 37 of the report, commenting on article 16, stated that it was based on article 11 of the 1997 Watercourses Convention. That was not entirely true, however. Article 16 set out the obligation of aquifer States themselves to assess the potential effects of their planned activities. Article 11 of the 1997 Watercourses Convention, however, spoke of exchange of information, consultation and negotiation on the possible effects of planned measures. He was not convinced that the nine articles devoted to planned measures in the 1997 Watercourses Convention should be compressed into two in the draft convention.

42. His specific comments on the articles should not be construed as in any way disparaging the draft. On the contrary, impressive progress had been made on the topic. Those who favoured discussing the draft in a working group were doubtless right, but the need for its subsequent referral to the Drafting Committee must be constantly borne in mind. Consideration of the draft on first reading at the Commission's next session seemed to him to be entirely feasible.

43. Mr. CANDIOTI commended the Special Rapporteur's excellent work and in particular his focus on the Guaraní aquifer, which was under the jurisdiction of the four MERCOSUR States. He endorsed the structure and general thrust of the draft, which served as a good basis for elaborating a set of principles on the subject. Although the decision on the form would have to be addressed at a later stage, the principles should, in his view, be formulated as normative proposals. He agreed with those members who felt that a number of provisions needed to be improved in the working group or in the Drafting Committee.

44. The principle of the sovereignty of aquifer States over their natural resources should be included in the operative part of the text, not merely in the preamble. The explicit affirmation of that principle in one of the draft articles was consistent with the legal character of the transboundary aquifer and the crucial role assigned

to aquifer States in the draft. The Special Rapporteur had rightly argued that the utilization and management of a transboundary aquifer was exclusively a matter for the aquifer States and that on no account was an internationalization or universalization of such aquifers to be contemplated.

45. Turning to the individual draft articles, he endorsed the three paragraphs of article 1, on the scope of the draft. As to the order in which they were presented, he supported Ms. Xue's proposal to accord more prominence to the protection, preservation and management of aquifers in view of their fragile and vulnerable nature and the vital human needs which they must meet.

46. On draft article 2, he agreed with the new definitions of "aquifer" and "aquifer system", but was in favour of deleting the bracketed phrases in paragraphs (a) and (b). He had doubts whether the distinction made in paragraphs (e) and (f) between "recharging" and "non-recharging" aquifers was appropriate and relevant at the current stage of consideration. The Commission should postpone to a later date discussion of whether separate norms were needed as a consequence of that distinction.

47. In draft article 3, he, too, would prefer a more forceful wording of the entitlement of aquifer States to enter into bilateral or regional arrangements for the management of transboundary aquifers and the obligation of each aquifer State to respect the rights of the others. It was also right to provide, in paragraph 2, for the harmonization of such arrangements with the other principles of the draft, the consideration of the characteristics and special uses of a particular aquifer or aquifer system, and the obligation of the aquifer States to consult and negotiate in good faith.

48. The rules proposed in article 4 were appropriate, but should perhaps be relocated at the end of the draft. He also endorsed the principle of equitable and reasonable utilization as formulated in article 5, as well as the substance of the principles set out in draft articles 6 to 11.

49. He agreed with those members who had recommended the inclusion of a precautionary principle through a stronger wording than that currently found in article 14. Protection of transboundary aquifers against the risk of pollution should be a priority in all matters relating to their utilization and management.

50. Mr. CHEE noted that the issue of permanent sovereignty over natural resources would be dealt with in the preamble, in the final stages of work on the draft. In his view, States must be prepared to accept certain restrictions on their sovereignty under any treaty which they concluded.

51. On draft article 1, he noted that the reference in paragraph (b) to "other activities" was too vague to establish who was responsible for the impact on an aquifer or aquifer system. The word "activities" seemed merely to relate to the activities of States, whether or not parties to the convention.

52. He did not think that draft article 3 was necessary; given the large number of bilateral or regional

arrangements for managing transboundary aquifers already in existence, an additional cooperation mechanism would be superfluous. Article 3 would be more useful in regions where no such arrangements existed.

53. Draft article 4, paragraph 1, referred to the relation between the proposed draft convention and the 1997 Watercourses Convention. However, only a handful of Member States had yet ratified that Convention, which, moreover, made only one reference to groundwaters, in its article 2, paragraph (a), which reflected the concept of hydrological interdependence. In paragraph 16 of the third report, the Special Rapporteur admitted that the 1997 Convention's relevance to groundwaters was somewhat peripheral. Nonetheless, the 1997 Convention could perhaps serve as a framework for the current draft.

54. Draft article 5, paragraphs 1 and 2, drew heavily on article 5 of the 1997 Convention. The information contained in paragraph 22 of the report on the recharge of aquifers constituted an important contribution to the developing law on groundwaters. Draft article 7, paragraph 2, would be clearer if the word "adverse" were inserted before "impact".

55. Draft article 8 referred to the general obligation of States to "cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith", and reasonable utilization, and encouraged States "to establish joint mechanisms or commissions". Such mechanisms were already the basis for almost all existing transboundary water arrangements. The provisions of draft article 9 were of great importance in securing international cooperation on the protection and conservation of aquifers. Draft article 10, on monitoring, was a new and welcome proposal. He also endorsed articles 12, 13 and 14, which could be implemented if the necessary technology and information were available.

56. With regard to draft article 15, he had already suggested the establishment of a boundary commission to serve as an administrative arm of the convention. The provisions of article 8, paragraph 2, might be reproduced, as a second paragraph of article 15. Such enforcement and management bodies already existed in relations between the United States and Canada, the United States and Mexico, and between many other States.

57. Article 17 was an important provision, the subject of timely notification having already been addressed in the 1957 Lake Lanoux arbitration between France and Spain and the 1974 Convention on the protection of the environment (Nordic Environmental Protection Convention) between Denmark, Finland, Norway and Sweden. Draft article 20, however, seemed more applicable to surface water.

58. On a more general note, he said that he had not found any indication of the impact of the Bellagio Draft Treaty.<sup>1</sup> How the 1986 Seoul Rules on International Groundwaters<sup>2</sup>

and the 2004 Berlin Rules on Water Resources<sup>3</sup> would influence the future direction of international law in that area remained to be seen. It was unfortunate that the work of Mr. McCaffrey<sup>4</sup> and other writers on groundwaters was still not fully appreciated. Nevertheless, the Commission should continue to work towards producing an instrument which could be signed by all States with an interest in international cooperation on aquifers and aquifer systems. He would support all efforts directed to that end.

### **Effects of armed conflicts on treaties (A/CN.4/552,<sup>5</sup> A/CN.4/550 and Corr.1–2<sup>6</sup>)**

[Agenda item 8]

#### FIRST REPORT OF THE SPECIAL RAPPORTEUR

59. The CHAIRPERSON invited Mr. Brownlie to introduce his first report on the effects of armed conflicts on treaties (A/CN.4/552), and drew attention to the memorandum by the Secretariat (A/CN.4/550 and Corr.1–2), which contained a comprehensive examination of practice and doctrine concerning the question.

60. Mr. BROWNLIE (Special Rapporteur), introducing his first report on the effects of armed conflicts on treaties, said that his own conception of the subject was that it had a clear centre of gravity: the draft constituted a package of articles that it had been difficult to break down into parts, since it formed a cohesive whole.

61. The first goal of the draft was to clarify the legal position. The second was to promote and enhance the security of legal relations between States. Therefore, the underlying agenda was to limit the occasions on which it might be said that the incidence of armed conflict had an effect on treaty relations. That had a bearing on the ambit of the concept of armed conflict. The third goal was to increase access to and utilization of State practice on the subject. Given the subject matter, the method adopted had been to provide a set of articles, without prejudice to the final form which the draft might take. In any event, because of the need to clarify the legal position, some expository drafting had been necessary.

62. Writers on the subject usually stressed the uncertainty attending the sources, but that concern might be exaggerated. The subject was dominated by the doctrine, whereas practice was thin on the ground. Any available practice had been brought into play, but much of it was more than 60 years old. That did not necessarily invalidate it: it was not necessarily the case that policy perspectives on the effects of armed conflict had changed qualitatively since 1920. As he saw it, the key change in the inter-war period had been the gradual shift towards pragmatism and away from the view that the incidence of armed conflict was beyond the realm of law and more or less non-justiciable. That being said, there was an obvious

<sup>3</sup> See 2832nd meeting, footnote 1.

<sup>4</sup> See, in particular, the seventh report of Mr. McCaffrey on the law of the non-navigational uses of international watercourses, *Yearbook ... 1991*, vol. II (Part One), document A/CN.4/436, paras. 17–49.

<sup>5</sup> Reproduced in *Yearbook ... 2005*, vol. II (Part One).

<sup>6</sup> Mimeographed; available on the Commission website.

<sup>1</sup> See Hayton and Utton, *loc. cit.* (2832nd meeting, footnote 3).

<sup>2</sup> International Law Association, *Report of the Sixty-Second Conference (Seoul 1986)* London, 1987 ("Committee on International Water Recourse Law, Report of the Committee", p. 8).



need for access to more evidence of practice, and especially recent practice.

63. The draft articles had a provisional character and a practical purpose: to generate an input of information and opinions from Governments. The need for evidence of State practice was clear enough, but the process of collecting practice and opinion would be more effective if Governments were presented with a package of draft articles that was more or less comprehensive.

64. The draft articles were intended to be compatible with the 1969 Vienna Convention on the Law of Treaties. There was a general assumption that the subject matter under examination formed a province of the law of treaties, rather than a development of the law relating to the use of force. As members would recall, article 73 of the 1969 Vienna Convention expressly excluded the subject of the effects of an outbreak of hostilities.

65. The next problem was the treatment of the concept of an armed conflict. When the topic had first been proposed as an addition to the agenda, justifiable concerns had been expressed that it would lead to a general academic exposition of the question. The Special Rapporteur therefore hoped that the Commission would be satisfied with a working definition, to be applied contextually, as opposed to an attempt at a complex codification, an approach which would be an unnecessary distraction.

66. The Secretariat memorandum to which he had referred in his report as a resource had not influenced his general approach to the subject, which had been fully developed before the memorandum had appeared. The memorandum had been crafted as a learned and substantial monograph, whereas his report was built around an axis of draft articles.

67. The subject had already shown its practical relevance in the area of the peaceful settlement of disputes. Just recently, the legal issues presented in the first report had figured prominently in the proceedings of the Eritrea–Ethiopia Claims Commission in The Hague. Thus, the first report had already been of use to judicial bodies.

68. The introduction to the substantive part of the report began with a brief exposition of the conceptual background underlying the various concepts which appeared in the doctrine regarding the effects of armed conflicts on treaties. There were four basic rationales: according to the first, largely outdated, rationale, war was the polar opposite of peace and involved a complete rupture of relations and a return to anarchy; it therefore followed that all treaties were annulled without exception and that right of abrogation arose from the occurrence of war regardless of the original intention of the parties. The second rationale, which to some extent was a modification of the first, held that the test was compatibility with the purposes of the war or the state of hostilities, and was also expressed in the form that treaties remained in force subject to the necessities of war.

69. The third rationale stated that the criterion was the intention of the parties at the time they had concluded the treaty. The fourth, which represented a separate strand in the doctrine, was related to the datum that since 1919,

and especially since the appearance of the Charter of the United Nations, States no longer possessed a general competence to resort to the use of force, except in case of legitimate defence and it therefore followed that the use of force should not be recognized as a general solvent of treaty obligations. The Special Rapporteur believed that the third rationale was the most workable and the most representative of the existing framework of international law; there would be no useful purpose in endeavouring to examine all the rationales at great length.

70. Turning to the text of the draft articles themselves, he said that the language of draft article 1 on the scope of the convention followed the provisions of article 1 of the 1969 Vienna Convention on the Law of Treaties. Draft article 2 on use of terms defined the terms “treaty” and “armed conflict” in its paragraphs (a) and (b) respectively. The definition of “treaty” followed the definition set out in the 1969 Vienna Convention and the definition of “armed conflict” was based on the formulation adopted by the Institute of International Law in its resolution of 28 August 1985 (hereinafter referred to as “resolution II/1985”).<sup>7</sup> The latter, while not totally comprehensive, was reasonably so and he felt that it was preferable to adopt a contextual approach and to deal with “armed operations which by their nature or extent are likely to affect the operation of treaties between States parties to the armed conflict or between States parties to the armed conflict and third States” (art. 2 (b)). Accordingly, despite discussion in the literature on the effects of war and the ambit of armed conflict, he had deliberately worded draft article 2, paragraph (b), to stress the contextual approach. The Commission might wish to address the question of whether or not to attempt a general codification of armed conflict as a first general principle, although he hoped it would choose not to do so.

71. The second general question of policy would be to decide whether or not armed conflict also included internal conflicts. His own preference would be to exclude non-international armed conflict and to focus on international armed conflicts, which inherently interrupted treaty relations between States. Of course, as noted in the report (para. 17), there was a point of view according to which internal armed conflicts could involve external elements and thereby “affect the operation of treaties as much as, if not more than international armed conflicts”. The Commission might wish to express its views, possibly in the commentary, on whether internal armed conflicts should be included. The wording of draft article 2, paragraph (b), left that question unresolved, but given situations such as those in the former Yugoslavia or, more recently, in the Democratic Republic of the Congo, where a national Government had chosen to incorporate irregular units in its command structure, the Commission might wish to take a policy decision on the issue of including non-international conflicts. He remained of the opinion, however, that the purpose of the draft articles was to reinforce, rather than weaken, the legal security of relations between States.

72. Draft article 3, on *ipso facto* termination or suspension, replicated article 2 of resolution II/1985 of the Institute of International Law and, given the wording of

<sup>7</sup> Institute of International Law, *Yearbook*, vol. 61, part II (session of Helsinki 1985), Paris, Pedone, 1986, pp. 278–282.

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

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

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

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

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

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

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

[Agenda item 1]

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

*The meeting rose at 1.05 p.m.*

## 2835th MEETING

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

*Chairperson:* Mr. Djamchid MOMTAZ

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

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

[Agenda item 8]

FIRST REPORT OF THE SPECIAL RAPporteur (*continued*)

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

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

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