

Document:-
A/CN.4/2903

Summary record of the 2903rd meeting

Topic:
<multiple topics>

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Article 26 (Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization)

Draft article 26 was adopted.

Article 27 (Coercion of an international organization by a State)

Draft article 27 was adopted.

Article 28 (International responsibility in case of provision of competence to an international organization)

59. The CHAIRPERSON, speaking as a member of the Commission, said that the word “*attribution*” (“provision”) seemed inappropriate, as it failed to correspond to the idea of “transfer of competence” referred to during the consideration of the draft article.

60. Mr. KOLODKIN (Chairperson of the Drafting Committee) recalled the explanations he had given during his introduction of the report of the Drafting Committee with regard to the replacement of the word “transfer” by the word “provision”.

Draft article 28 was adopted.

Article 29 (Responsibility of a State member of an international organization for the internationally wrongful act of that organization)

61. Mr. PELLET said that he had participated in the work of the Drafting Committee on draft article 29 and, although he did not oppose its adoption, he wished his reservations to be duly recorded. He was extremely pleased with the addition of paragraph 2, but thought that the commentary should state that the presumption in question was rebuttable, since there were cases when State responsibility could be joint or several. He found the wording of paragraph 1 to be dangerous, as it left the impression that there could be other cases in which a member State could be held responsible for an internationally wrongful act and it posed a grave threat to the security of legal relations. He would have greatly preferred either that the Commission should retain the initial negative formulation found in paragraph 96 of the Special Rapporteur’s fourth report or that paragraph 96 should read: “A member State ... is responsible ... only in the case when ...”.

The meeting rose at 1 p.m.

2903rd MEETING

Wednesday, 2 August 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Candiotti, 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. Melescanu, Mr.

Momtaz, Mr. Niehaus, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

The obligation to extradite or prosecute (*aut dedere aut judicare*) (concluded) (A/CN.4/571)

[Agenda item 10]

PRELIMINARY REPORT OF THE SPECIAL
RAPPORTEUR (concluded)

1. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on the preliminary report on the obligation to extradite or prosecute (*aut dedere aut judicare*).

2. Mr. GALICKI (Special Rapporteur) expressed his gratitude to members for their constructive and friendly criticism of his report, which, as previously noted, amounted to no more than a very preliminary set of initial observations concerning the substance of the topic, drawing attention to the most important points requiring further consideration, and including a general road map for the Commission’s future work. He had deliberately raised a large number of potential areas of difficulty, with a view to obtaining suggestions for solutions both from the Commission and from the Sixth Committee. The members of the Commission had duly taken into account the preliminary nature of the report and their opinions would be of great value in the preparation of his next report, in which draft rules on the concept, structure and operation of the obligation *aut dedere aut judicare* would be gradually formulated.

3. A great variety of opinions had been expressed during the debate, relating to both substance and form. Some speakers had suggested that the title of the topic should be amended—by, for example, replacing the word “obligation” by the word “principle”—but, at least for the time being, the existing title should, in his view, be retained. The concept of an “obligation” *aut dedere aut judicare* seemed to provide a safer starting point for further analysis than would the concept of a “principle”. That did not, of course, exclude the possibility—even perhaps the necessity, as suggested by some members—of considering the parallel question of a countervailing right of States to extradite or prosecute.

4. There had been fairly wide agreement that the scope of the work on the topic should be restricted, as far as possible, to the main issues directly relating to the obligation to extradite or prosecute and to the principal elements of that obligation, namely “*dedere*” and “*judicare*”. He shared that view, especially with regard to the need for a very careful treatment of the relationship between the obligation to extradite or prosecute and the principle of universal jurisdiction, the distinction between which should be clearly drawn. In that connection, the definitions of universal jurisdiction and of the *aut dedere aut judicare* rule cited in the report should be treated as illustrative of one possible approach, and did not

necessarily reflect his own preferences. More detailed analysis of the obligation seemed necessary, especially with regard to the “*judicare*” component, where the extent of the obligation of States to prosecute could be understood in different ways, even on the basis of existing treaties. It would need to be established how far international and domestic legislation and practice extended the application of that obligation. The “*dedere*” component of the obligation might also cause difficulty in relation to a possibility, mentioned by him although questioned by one member, of extending the substantive scope of extradition to include the enforcement of foreign sentences. Such possibilities and procedures did, however, exist under some internal and international legislation.

5. He concurred with the observation that, on the question of the crimes covered by the obligation *aut dedere aut judicare*, some traditional limitations on extradition might make the process difficult, or even impossible, to apply. The question would require careful consideration. He shared the view, however, that the Commission should not consider the technical aspects of extradition law but should concentrate on the conditions for triggering the obligation. The so-called “triple alternative” that he had posited in connection with the competence of international criminal tribunals should, as noted by some members, be treated very carefully and considered only within limited parameters. The distinction between extradition and surrender of suspects to the International Criminal Court should be clearly emphasized.

6. As for the final form that the Commission’s work should take, a majority of members had been of the view that the most suitable format would probably be draft articles, although it was still too soon to take a decision on the matter. On the basis of that view, however, he would, in subsequent reports, gradually move in the direction of drafting rules on the concept, structure and operation of the obligation *aut dedere aut judicare*.

7. Another important problem, which had been raised by practically every speaker and was crucial to the outcome of the Commission’s work, related to the legal background of the obligation. Members had been cautious in their response to the question raised in the report as to whether the legal source of the obligation should be restricted to the treaties that bound the States concerned or whether it should be extended to appropriate customary norms or general principles of law. While members had generally recognized the treaty basis for such an obligation, some doubts had been expressed as to whether the obligation also existed under customary law.

8. One member had been critical of the separate treatment in the text of international custom and general principles of law, on the one hand, and national legislation and practice of States, on the other, in connection with the sources of the obligation to extradite and prosecute. That approach had been adopted with the aim of stressing the importance of the legislative, executive and judicial practice of States in formulating the obligation in question. Moreover, as another speaker had mentioned, national laws and practice filled some gaps left by international legislation. Another speaker had recalled that the topic was directly linked with domestic criminal law systems.

He fully concurred with the latter two observations, which did not in any way conflict with the fact that domestic practice was essential to the existence of customary rules of international law, in accordance with Article 38 of the Statute of the International Court of Justice. It had been impossible to establish a full range of examples of State practice in the preliminary report, but it would undoubtedly be necessary to do so later. He fully agreed that a thorough analysis of the topic should take far more account of international and national judicial decisions than the report had done. He assured the Commission that the limited number of examples of such decisions in the report was owing to its preliminary nature and was not intended to play down their importance. The same applied to certain shortcomings in the bibliography; he had not, at that preliminary stage, sought to make an exhaustive compilation of sources. The next report, however, would be based on a wider review of both jurisprudence and doctrine.

9. As for recognizing, at least for the time being, the existence of a generally binding customary obligation to extradite or prosecute that would be applicable to all offences under criminal law, an overwhelming majority of members of the Commission had expressed reservations on that score. Most were, however, supportive of a more selective approach, namely of identifying certain categories of crime, for which the idea of universal jurisdiction, as well as the principle *aut dedere aut judicare*, had already received more general recognition by States. A number of terms were used for such crimes in international practice, such as “international crimes”, “grave international crimes”, “crimes under international law”, “crimes of international concern” or “crimes against humanity”. In view of that diversification of crimes and offences, he agreed that it would be useful to identify categories of crime that could, through treaty or custom, be considered as a basis for the possible application of the obligation to extradite or prosecute. It would seem easier and more effective to formulate legal rules relating to such selected crimes by way of codification or progressive development of international law than to apply the obligation to all crimes and offences. That would not, of course, preclude the possibility of developing more general rules or principles at a later stage.

10. A majority of speakers had agreed with the suggestion in paragraph 61, item (10) of the preliminary plan of action in the report that the Commission should also analyse the relationship between the obligation to extradite or prosecute and other principles of international law. There had, however, been significant differences of opinion as to the substantive scope of the principles to be taken into account. It seemed to be generally agreed that the principle of human rights protection should be borne in mind throughout the Commission’s work on the topic and that more attention should be paid to human rights law. He concurred with those suggestions and with the more general suggestion that the elaboration of possible rules should be restricted to those of a secondary nature. He was grateful for the many friendly warnings on possible pitfalls awaiting him and hoped to be able to avoid them with the help of other members of the Commission. He also welcomed the support expressed for his proposal that he should address a written request to Governments for

information concerning their practice with regard to the obligation *aut dedere aut judicare*, especially in respect of more recent practice. The questions raised in paragraph 59 of the report could be included in chapter III of the Commission's report on its fifty-eighth session, which traditionally dealt with specific issues on which comments would be of particular interest to the Commission.

Draft report of the International Law Commission on the work of its fifty-eighth session

11. The CHAIRPERSON invited the Rapporteur to introduce the draft report of the Commission on the work of its fifty-eighth session.

12. Ms. XUE (Rapporteur) said that the draft report comprised 13 chapters, the first three of which were introductory while the remainder addressed substantive matters. The report on the work of the fifty-eighth session would be considerably longer than was usual, owing to the fact that the Commission had completed its consideration of a number of topics on its agenda.

13. The CHAIRPERSON invited the Commission to consider chapter VI of the draft report.

CHAPTER VI. Shared natural resources (A/CN.4/L.694 and Add.1 and Corr.1)

A. Introduction (A/CN.4/L.694)

B. Consideration of the topic at the present session

C. Text of the draft articles on the law of transboundary aquifers adopted by the Commission on first reading

1. TEXT OF THE DRAFT ARTICLES

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO

14. Mr. YAMADA (Special Rapporteur) said that document A/CN.4/L.694/Add.1/Corr.1 contained linguistic and technical corrections to document A/CN.4/L.694/Add.1. Two further amendments, however, should be made to that corrected text. First, in paragraph (2) of the general commentary, the proposed new version of the fifth sentence should be amended by deleting the final phrase "if such work were to be undertaken". The sentence would thus end with the words "on oil and natural gas". Second, an additional phrase should be inserted at the beginning of the sentence to be added at the end of the same paragraph; the sentence would thus read: "One member held the view that, when that second reading is completed, the decision would be taken whether to proceed further with respect to oil and natural gas."

15. The CHAIRPERSON, referring to paragraph 1 of section C in document A/CN.4/L.694/Add.1, noted that the text of the draft articles had already been adopted on first reading.

16. Mr. PELLET said that, in the French text of the opening sentence of paragraph 1, the phrase "*le texte du projet d'articles adopté*" implied that the draft was complete. If, as was his understanding, that was not the case, the phrase should read "*le texte des projets d'article adoptés jusqu'à présent*" [the text of those draft articles adopted so far].

17. The CHAIRPERSON, supported by Mr. CANDIOTI, said it was his understanding that there would be no further additions to draft articles 1 to 19, as adopted by the Commission on first reading.

18. Mr. YAMADA (Special Rapporteur) explained that, when the Commission had been requested to include the topic of shared natural resources in its programme of work, it had been widely supposed—although there had been no consensus on the matter—that the topic would cover three categories of natural resources, namely groundwaters, oil and gas. On being appointed Special Rapporteur he had suggested that the Commission should confine its attention to groundwaters. That approach had been approved and the Commission had completed its first reading of draft articles on the law of transboundary aquifers. The commentaries to the draft articles were designed to facilitate Governments' task of submitting comments and observations, which should then guide the Commission when it proceeded to a second reading of the text.

19. Although any future work on oil and gas would lie within the framework of the topic of shared natural resources, the existence of divergent views within both the Commission and the Sixth Committee made it inadvisable, at the current stage, to debate those aspects of the topic, since any such discussion might hamper the completion of the second reading of the draft articles on the law of transboundary aquifers.

20. Mr. KEMICHA said that, on the one hand the Special Rapporteur was correct in stating that he was presenting a set of draft articles which had been adopted on first reading and that, as such, they constituted a finished product. On the other hand, Mr. Pellet was also correct in pointing out that the Commission had not completed its consideration of the wider topic of shared natural resources. The Special Rapporteur had therefore been right to make it clear in the most recent version of paragraph (2) of the general commentary that one member wished a decision on whether to include oil and natural gas to be taken upon completion of the second reading. In paragraph 1 of section C it might be wise to add the words "on the law of transboundary aquifers" after the words "draft articles", to underline the fact that the draft articles in question were part of a larger project.

21. Mr. PELLET said he had merely wished to know whether the Commission had finished its work on the draft articles on transboundary aquifers. Since it would appear that it had done so, it would be wise not only to include the wording proposed by Mr. Kemicha, but also to add, in paragraph 2 of section A of the chapter, in document A/CN.4/L.694, the explanation which had just been supplied by the Special Rapporteur. That paragraph should record the fact that the Commission had decided to begin its work on the topic with a study of confined groundwaters, and paragraph 5 of section B should explain that the 19 draft articles adopted on first reading were a complete set of draft articles on the law of transboundary aquifers. It was not immediately obvious to someone who had not been a member of the Drafting Committee or Working Group that the draft articles did not represent a complete set of articles on the whole topic of shared natural resources,

and it would therefore be useful to remind readers that the Commission had split the topic into several parts.

22. The CHAIRPERSON asked Mr. Pellet whether his concerns would be partially allayed if the contents of footnote 1 were incorporated in the main body of the text of section A.

23. Mr. PELLET said that the Commission's practice with regard to explaining the background to its consideration of a topic varied greatly from one topic to another; sometimes the background was recapitulated in great detail, while at others it was mentioned only cursorily. In the present case, the background was very important and should not merely be consigned to a footnote. Paragraph 5 of section B needed to be recast in order to make it clear that the 19 draft articles constituted a complete set of draft articles on the law on transboundary aquifers.

24. Mr. KEMICHA said it was important to underscore the idea that the draft articles were no more than a first stage and that the Commission's work on shared natural resources should continue. It should be clearly stated somewhere in the introduction that the Commission had adopted on first reading a first set of draft articles, on the law of transboundary aquifers, so as to allow for the possibility of further work in the future on other kinds of shared natural resources. As it stood, the text suggested that the Commission had completed its consideration of the entire topic.

25. Ms. XUE (Rapporteur) said that a debate over a simple matter was becoming very complicated. Mr. Pellet had suggested that more background information should be included in sections A and B of chapter VI. However, anyone who read the entire text would understand what the position was. As to the question of whether the draft text before the Commission contained a complete set of articles on groundwaters, the answer was in the affirmative as to the substance, but it should also be borne in mind that the Commission had not yet decided whether the draft articles should ultimately take the form of a convention, a set of principles or some other form. If the Commission were to opt for a convention, the draft articles would not be complete, as they would require the addition of final clauses. If the Commission were to choose another form they might already be complete. The reference in paragraph 5 of section B to a set of 19 draft articles made it plain that the Commission had finished the substantive part of its work.

26. Sections A and B of chapter VI clearly reflected the Commission's work over the previous five years. In paragraph 1 of section C, it might, however, be possible to add, after the words "draft articles" the phrase "on the law of transboundary aquifers". Mr. Kemicha's proposal to refer to "a first set" of draft articles would, however, be misleading, as it would imply that a second set of draft articles on transboundary aquifers was to be prepared. The Special Rapporteur had already orally amended document A/CN.4/L.694/Add.1/Corr.1 to make it clear that only one member had expressed the view that, when the second reading was completed, a decision would be taken whether to proceed further with respect to oil and natural gas. The

Commission was still waiting for a decision from the Sixth Committee on that question.

27. Mr. KEMICHA, supported by Mr. MOMTAZ, said that paragraphs (1) and (2) of the general commentary to the law of transboundary aquifers, currently contained in document A/CN.4/L.694/Add.1 and Corr.1, should be moved to section A of chapter VI.

28. Ms. ESCARAMEIA said she was in favour of the Special Rapporteur's amendments to paragraph (2) of the general commentary, but opposed to moving paragraphs (1) and (2) of the general commentary to the introduction. It would be wrong to affirm in the introduction to chapter VI that the Commission had debated whether to proceed further with respect to oil and natural gas. On the contrary, the Working Group had met and had decided unanimously that the Commission had a mandate from the General Assembly to cover all three issues, and that any decision to alter that mandate lay with the General Assembly and not with the Commission.

29. Mr. BAENA SOARES said he endorsed paragraph (2) of the general commentary as amended and corrected by the Special Rapporteur. In his view, the Commission had completed its first reading of the first part of its task. He had been concerned about the conditionality implicit in the original amendment to paragraph (2), which had, however, been eliminated by the Special Rapporteur's deletion of the words "if such work were to be undertaken". The addition of the words "One member held the view that" reflected the Working Group's views much more closely. He personally believed that the Commission should deal with all three aspects of the topic.

30. Mr. KEMICHA said that his original proposal, which had been intended to convey the idea that the Commission should be given a possibility to reflect on the advisability of dealing with oil and natural gas, had been motivated, not by ideological considerations, but by respect for the freedom of decision of the Commission that were shortly to be elected. His present proposal was merely that, in a report which was to be submitted to the General Assembly of the United Nations, it would be logical to place the two paragraphs describing the context of and background to the Commission's work in the introductory section.

31. Mr. PELLET said that his concern was to ensure that readers of the report would understand the background to the Commission's deliberations. He had no ulterior motive and no position on the substance of the report. Matters had been straightforward until the Rapporteur had taken the floor. After that they had become extraordinarily complicated. They had been straightforward because all he had been asking was that it should be made plain in the report that the draft text had received only a first reading. For that reason it naturally had no final clauses. There was no basis for asserting that a draft text was incomplete because it lacked final clauses, which were of course a matter for a diplomatic conference. A draft text was complete once the Commission had reached the end of its deliberations on the topic. He therefore insisted that it should be made clear to the reader that the Commission had completed its first reading of the draft articles on transboundary aquifers.

32. Mr. Kemicha's position was reasonable. It was not clear from a reading of paragraphs 1 and 2 of section A how, having been entrusted with the topic of shared natural resources, the Commission had arrived at the subject of aquifers. The statement in the last sentence of paragraph 2 that "[t]he 2005 Working Group did not complete its work" was completely misleading. It was absolutely essential to add wording along the lines of that contained in footnote 1 explaining that a decision had been taken first to focus on aquifers.

33. Mr. KOLODKIN (Chairperson of the Drafting Committee) proposed that the second sentence of paragraph (1) of the general commentary in document A/CN.4/L.694/Add.1, starting with the words "It was generally understood", should be moved to paragraph 1 of section A, of which it would become the second sentence.

34. The CHAIRPERSON, speaking as a member of the Commission, said that, after the last sentence in paragraph 2 of section A, which read "The 2005 Working Group did not complete its work", there might be a case for inserting the words "In particular, the Working Group will resume its deliberations on the related questions of oil and natural gas after the adoption of the present draft articles".

35. Mr. KEMICHA reiterated that he was simply proposing the insertion, after paragraph 1 of section A, of paragraphs (1) and (2) of the general commentary to the draft articles, which explained how the shift of focus from shared natural resources to aquifers had come about.

36. Mr. YAMADA (Special Rapporteur) pointed out that section A, which he had not drafted, was intended only as a very brief account of his appointment as Special Rapporteur and the subsequent proceedings in the plenary, the Drafting Committee and the working groups. To understand what had happened in the Commission, it was necessary to read its reports on the work of its previous sessions. As he had briefly explained in the general commentary, the Commission had started from the understanding that there were three categories of natural resources but that it would focus initially on groundwaters as a follow-up to the 1997 Watercourses Convention. That explanation, however, was perhaps rather too lengthy for inclusion in the introduction.

37. Mr. ECONOMIDES proposed that the Secretariat, with the assistance of the Special Rapporteur, should add wording to paragraph 1 explaining that the Commission's starting point had been the topic of shared natural resources and that it had now completed its work on the subject of aquifers.

38. Ms. XUE (Rapporteur) said that the substance of her remarks was fully reflected in paragraphs (1) to (3) of the general commentary to be found in document A/CN.4/L.694/Add.1, and that she had introduced no new element to complicate the debate. The draft report followed the general pattern of the Commission's reports: the introductory sections A and B were a simple account of the proceedings, while the background material was readily accessible in document A/CN.4/L.694/Add.1. She

urged the Commission to respect the usual format of the report, which should remain unchanged.

39. The CHAIRPERSON said that while it was true that the questions raised were elucidated in the commentary, a single additional sentence simply stating that the topic of aquifers had a number of ramifications would make the point even clearer and fully dispel the concerns expressed by some members. If he heard no objection, he would take it that the Commission wished to request the Secretariat to draft such a sentence for inclusion at the end of paragraph 1 of section A.

It was so decided.

On that understanding, paragraph 1 of document A/CN.4/L.694, as amended, was adopted.

Paragraphs 2 to 4

Paragraphs 2 to 4 were adopted.

Paragraph 5

Subject to the insertion of the relevant date and meeting number, paragraph 5 was adopted.

Paragraph 6

40. The CHAIRPERSON said that the opening phrase should read: "At its 2903rd meeting, on 2 August 2006".

Paragraph 6, as amended, was adopted.

Sections A, B and C.1 of chapter VI, as amended, were adopted.

C. Text of the draft articles on the law of transboundary aquifers adopted by the Commission on first reading (A/CN.4/L.694/Add.1 and Corr.1)

2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO

General commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

41. Mr. PELLET pointed out that, as orally corrected by the Special Rapporteur, the sentence to be added gave the impression that all members of the Commission but one were opposed to proceeding further with respect to oil and natural gas, whereas as he understood it the opposite was the case. The sentence should therefore read: "One member thought that it was only when that second reading is completed that the decision would be taken whether to proceed further with respect to oil and natural gas."

Paragraph (2), as amended by document A/CN.4/L.694/Add.1/Corr.1, by the Special Rapporteur, and by Mr. Pellet, was adopted.

Paragraph (3)

Paragraph (3), as amended by document A/CN.4/L.694/Add.1/Corr.1, was adopted.

Paragraph (4)

42. Mr. GAJA said he was concerned about the second sentence, which suggested that the draft articles should impose obligations on “third States”. The third sentence made it clear that the reference to the third States concerned States that did not share the transboundary aquifer in question. He accordingly proposed that the two sentences should be combined, to read: “It was decided that, in order to be effective, some draft articles would have to impose obligations on States which do not share the transboundary aquifer in question and, in certain cases, give rights to the latter States towards the States of that aquifer.”

43. Mr. KEMICHA said he greatly preferred the original version of the last sentence of paragraph (4) to the amended version proposed in document A/CN.4/L.694/Add.1/Corr.1.

44. Mr. YAMADA said the original version had given the impression that protection of the transboundary aquifer or aquifer system was a goal to be pursued above all other considerations. The proposed amendment was intended to dispel that erroneous impression.

45. The CHAIRPERSON suggested the formulation “In reaching those conclusions, the Commission dealt in particular with the protection of the transboundary aquifer or aquifer system.”

46. Ms. ESCARAMEIA said that the Chairperson’s compromise proposal merely stated the obvious. It went without saying that the Commission had dealt with the protection of transboundary aquifers, but it had also taken into account policy considerations such as situations of emergency when vital human needs were at stake. She supported the wording proposed by the Special Rapporteur in the corrigendum.

47. Mr. MANSFIELD endorsed Ms. Escarameia’s remarks. The original formulation suggested that protection of transboundary aquifers was the paramount consideration in absolutely all circumstances, which was not necessarily the case. The wording proposed in the corrigendum was a more balanced text.

Paragraph (4), as amended by document A/CN.4/L.694/Add.1/Corr.1 and by Mr. Gaja, was adopted.

Paragraph (5)

48. Mr. GAJA said that the English text of the first three sentences should be brought into line with the French version, which made the same point more clearly.

49. Mr. KATEKA said he did not agree with the assertion contained in the sentence “However it was the codification convention mainly reflecting the customary law and as such it has a certain authority.” The 1997 Watercourses Convention, and in particular its article 3, had been very controversial, as could be deduced from the fact that only 14 States had ratified it to date. He therefore proposed that the sentence should be amended to read: “However it was a framework convention reflecting a certain authority.”

Paragraph (5), as amended, was adopted.

Paragraph (6)

50. Mr. MOMTAZ said that the reference to “island States” in the third sentence was inappropriate. By definition, an island State did not have land borders. The phrase should be amended to read “islands shared by two or more States”.

51. Mr. KABATSI pointed out that it was not impossible for an island State to have land borders. Two or more States could share borders on a single island or on a number of islands.

52. Mr. MANSFIELD said that one way of overcoming the problem would be to amend the phrase to read “even island States whose land closely borders that of other States”. There might be cases in which an island State whose land closely bordered another State had an underground aquifer which shifted to the territory of the other State.

53. Mr. PELLET said that while what Mr. Mansfield had proposed was possible, he would welcome an example. As he saw it, the text sought to cover a situation such as that of Ireland, which was an island composed of two States, or of Borneo, an island shared by three States, which, he supposed, also had shared aquifers. Although Mr. Kabatsi had been right to point out that some islands were shared by several States, which was what the text was trying to say, he endorsed the proposal by Mr. Momtaz.

54. Mr. MOMTAZ said that the wording he had suggested covered the case referred to by Mr. Kabatsi.

55. Mr. PELLET said that the acronyms at the end of the paragraph should be spelled out on their first occurrence. It would also be useful to indicate, in the related footnote, in which paragraphs of the Special Rapporteur’s third report the relevant instruments had been cited. While not contesting the Special Rapporteur’s right to quote himself in the commentary, he did not think it was good practice, even though it seemed to have become a frequent one.

56. Mr. YAMADA (Special Rapporteur), referring to the point made by Mr. Momtaz, noted that there were about 10 identified transboundary groundwaters in the Caribbean islands alone.

57. Ms. ESCARAMEIA said she saw no reason to amend the reference in the text to “island States with land borders”. Many States occupied only part of an island. Clearly, Haiti and the Dominican Republic were island States which shared one island. Indonesia was an island State that shared land borders with several other States. Such States often had transboundary aquifers. The situation ingeniously envisaged by Mr. Mansfield was not what the Commission had had in mind. The point was to deal with the case in which two or more States occupied the same island and might have transboundary aquifers. While she did not understand why Mr. Momtaz objected to the text as it stood, she would not, however, oppose his proposal.

58. Mr. CANDIOTI said that, like Ms. Escarameia, he found the phrase as it stood perfectly clear. If the sentence were to take account of the proposal by Mr. Momtaz, it would have to be reworded to read: “It has been ascertained that almost all States on the continents and States sharing certain islands also have transboundary groundwaters with their neighbours.”

59. Mr. ECONOMIDES said there was no reason to make a distinction between States on the continents and island States. What mattered was that almost all States with land borders, whether States on the continents or island States, had transboundary groundwaters. He therefore proposed that the phrase “on the continents and even island States” should be deleted.

60. Mr. KABATSI and Mr. MOMTAZ endorsed the proposal by Mr. Economides.

61. The CHAIRPERSON said that the sentence would then read “It has been ascertained that almost all States with land borders may also have transboundary groundwaters with their neighbours.”

Paragraph (6), as amended, was adopted.

The general commentary to the law of transboundary aquifers as a whole, as amended, was adopted.

Commentary to draft article 1 (Scope)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

62. Mr. PELLET said that paragraph (7), and in particular the sentence “The decision on the threshold will be left to later substantive draft articles”, was worded so as to imply that the text had not been completed. It would be preferable to specify the draft articles in question.

63. Mr. GAJA said that the last five sentences seemed to suggest that measurements should be taken both prior to and after the impact in order to ascertain whether an impact had occurred. In a way, that contradicted the idea of an obligation of prevention set forth in draft article 6. In his view, an impact could be asserted even before the event took place. The last three sentences should therefore be deleted, in order not to void the obligation of prevention by stating that the event first had to take place before it could be ascertained whether there had been any impact.

64. Mr. PELLET, agreeing with Mr. Gaja, said that if his own proposal was endorsed, it would be possible to see clearly what was involved from the draft articles to which reference would be made; it was unwise to try to anticipate events in a manner which, after all, was vague and questionable.

65. Mr. YAMADA (Special Rapporteur) said he had no objection to the proposals by Mr. Gaja and Mr. Pellet.

Paragraph (7), as amended, was adopted.

The commentary to draft article 1, as amended, was adopted.

The meeting rose at 1.10 p.m.

2904th MEETING

Thursday, 3 August 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

Cooperation with other bodies (concluded)*

[Agenda item 13]

DECLARATION BY REPRESENTATIVES OF THE COUNCIL OF EUROPE

1. The CHAIRPERSON welcomed Mr. De Vel, Director-General of Legal Affairs of the Council of Europe, and invited him to address the Commission.

2. Mr. DE VEL (Director-General of Legal Affairs, Council of Europe) said that the Council of Europe’s political life over the past year had been marked by the follow-up to the third Summit of Heads of State and Government, held in Warsaw on 16 and 17 May 2005. The Summit, which had endeavoured to define the Council of Europe’s place in the European and international institutional landscape with a view to giving it a precise political mandate for the years to come, had culminated in the adoption of an Action Plan and a final declaration: the Warsaw Declaration, in which the Heads of State and Government of the member States had noted that Europe was guided by a political philosophy of inclusion and complementarity and by a common commitment to multilateralism based on international law. They had committed themselves to enhancing the cooperation and complementarity of the Council of Europe and the other organizations involved in building a democratic and secure Europe by proposing to define a new framework for cooperation. To that end, they had instructed the Prime Minister of Luxembourg, Mr. Jean-Claude Juncker, to prepare, in his personal capacity, a report on relations between the Council of Europe and the European Union, taking into account the importance of the human dimension in building Europe. In the report he had submitted in April 2006, Mr. Juncker had concluded that there was a high degree of complementarity between the Council of Europe and the European Union in their fields of activity and experiences and had formulated a number of recommendations. In his view, the Governments of the member States of the European Union should immediately open the door to European Union accession to the European Convention on Human Rights. The European Union bodies should recognize the Council of Europe as the Europe-wide reference source for human rights. The Commissioner for

* Resumed from the 2899th meeting.