Document:-
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Summary record of the 2971st meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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to include not only response measures but also measures to restore the environmental status of the aquifer or its water quality. As the paragraph now stood, the "appropriate measures" to be taken included "response measures". The notion of restoration was implied by the phrase "mitigate such harm, having due regard for the provisions of draft articles 4 and 5" and would be clarified further in the commentary.

131. Thirdly, there had been a suggestion that there should be a specific provision on compensation. It had been recalled that the earlier draft articles proposed by the Special Rapporteur had contained a provision corresponding to article 7, paragraph 2, of the 1997 Watercourses Convention. On first reading, the text had been deleted on the understanding that this was an area that would be governed by other rules of international law such as those relating to State responsibility or to liability for acts not prohibited by international law, and thus did not require specialized treatment in the draft articles. The commentary would reflect that understanding.

132. In view of the extended scope, the title of the draft article now read "Obligation not to cause significant harm".

133. Owing to time constraints, he would complete his introduction of the remaining draft articles at the Commission's next plenary meeting.

The meeting rose at 1.05 p.m.

2971st MEETING

Wednesday, 4 June 2008, at 10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Shared natural resources (*continued*) (A/CN.4/588, sect. B, A/CN.4/591, A/CN.4/595 and Add.1, A/CN.4/L.722, A/CN.4/L.724)

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE (*continued*)

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to resume his introduction to the draft articles on the law of transboundary aquifers contained in document A/CN.4/L.724, as adopted on second reading by the Drafting Committee.

2. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) said that draft article 7 (General obligation to cooperate) was an important provision for shared natural resources arrangements and also served as a backdrop for the application of other provisions on specific forms of cooperation, such as the draft articles on regular exchange of data and information, as well as on protection, preservation and management. Some Governments had proposed that the reference to good faith in paragraph 1 be deleted, but the Drafting Committee had decided not to amend the draft article because the principle of good faith was crucial to the achievement of equitable and reasonable utilization and the appropriate protection of a transboundary aquifer or aquifer system. In paragraph 2, it had also decided to retain the more permissive term "should", rather than the term "shall" proposed by Governments. Paragraph 2 did not exclude the possibility of using existing mechanisms. The commentary would indicate the type of mechanisms to be envisaged, as well as the types of cooperation, such as management, monitoring and assessment, exchange of information on databases and ensuring their compatibility, coordinated communication, early warning and alarm systems and research and development. The title of the draft article had been retained as adopted on first reading.

3. Draft article 8 (Regular exchange of data and information) dealt with the obligation of aquifer States to exchange information on a regular basis. After having considered a number of proposals for amendments made in the comments by Governments, the Drafting Committee had decided to retain the wording adopted on first reading,[122] with no change in substance. The commentary would make it clear, as suggested in the comments by Governments, that a collective effort should be made to integrate existing databases of information and make them compatible, whenever possible. It would also indicate that States must be encouraged to establish inventories of aquifers. The title of the draft article adopted on first reading had not been changed.

4. Draft article 9 (Bilateral and regional agreements and arrangements), which had originally been draft article 19, had not been amended as to substance. In view of its programmatic nature, it had been decided to place it in the part relating to general principles. Pursuant to that draft article, aquifer States were encouraged to enter into bilateral or regional agreements or arrangements in respect of activities relating to their transboundary aquifers. However, such arrangements must not adversely affect, to a significant extent, the utilization of water by other aquifer States without their express consent. The commentary would explain that the words "without their express consent" were not intended to signify a veto. The title of the draft article adopted on first reading had not been changed.

5. Part III, entitled "Protection, preservation and management", consisted of draft articles 10 [9] to 15 [14], which constituted a sequence of obligations. Since their wording had been painstakingly negotiated by the Drafting Committee on first reading, it had considered that any amendments were to be primarily in the nature of refinements. As noted at the preceding meeting, the draft article

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[122] *Yearbook … 2006*, vol. II (Part Two), pp. 91 *et seq.*, paras. 75–76.

on planned activities had been included in Part III to harmonize the structure of the draft articles and not have a separate part with only one article.

6. According to draft article 10 (Protection and preservation of ecosystems), which had formerly been draft article 9, aquifer States were required to protect the ecosystem dependent on the aquifer or the aquifer system. The Drafting Committee had considered a proposal to include activities in all States, including those where a recharge zone was located. It had decided not to make that amendment, as it would have shifted the balance achieved in the draft articles, including imposing a more onerous obligation on the State where a recharge zone was located than already provided for in draft article 11 [10], particularly its paragraph 2. It had taken the view that any effort to extend protection to a non-aquifer State could be dealt with in the context of that article. The question of the possible impact of storage and disposal on the protection and preservation of ecosystems would be discussed in the commentary to the draft article. The title of the draft article had not been changed.

7. With regard to draft article 11 (Recharge and discharge zones), which had previously been draft article 10, the Drafting Committee had decided to make the meaning of paragraph 1 clearer by indicating that aquifer States were to take appropriate measures in respect of recharge and discharge zones "that exist within their territory". That had only been implied in the previous formulation. That amendment helped to distinguish more clearly between the situation dealt with in paragraph 1, relating to the obligations of aquifer States, and that in paragraph 2, relating to the obligations of non-aquifer States in whose territory a recharge or discharge zone was located. Paragraph 1 had been divided into two sentences in order to make a distinction between the scope of the obligations involved. In the first sentence, the obligation of aquifer States related to recharge or discharge zones located in their territory. In the second, it related to impacts on recharge and discharge processes not only in their territory, but also potentially in the territory of other States. The Drafting Committee had also decided to replace the concept of "special" measures by "appropriate" measures in order to ensure the consistency of the text with that of draft article 10 [9]. It had considered other proposals, particularly that of requiring aquifer States, "to the extent possible", to eliminate detrimental impacts on the recharge and discharge processes, but it had decided against that proposal. It had agreed to add the word "prevent" before the word "minimize" in order to strengthen the obligation of protection of aquifer systems and to bring the text into line with that of draft article 6, paragraph 2. The obligation to "prevent" or "minimize" meant that, in the first place, States had an obligation, whenever possible, to prevent a detrimental impact. In cases where that was not possible, the obligation was to minimize such detrimental impacts.

8. Paragraph 2 dealt with the obligation of all States in whose territory a recharge or discharge zone was located. For example, in the case of a recharge zone located in the territory of a non-aquifer State, that State would have an obligation not to disrupt any such recharge process, as it could have a detrimental effect on the entire aquifer system. The Drafting Committee had decided not to extend the scope of draft article 10 to include States in whose territory a recharge zone was located and had preferred to refer at the end of paragraph 2 to the obligation of non-aquifer States to cooperate also in the protection of related ecosystems. Accordingly, under draft article 10, aquifer States had an obligation to take appropriate measures to protect and preserve ecosystems dependent on their aquifers or aquifer systems. Under draft article 11, paragraph 2, all States in whose territory a recharge or discharge zone was located also had an obligation to cooperate with aquifer States to protect the related ecosystems. The title of the draft article had not been changed.

9. Draft article 12 (Prevention, reduction and control of pollution), which had formerly been draft article 11, related to a particular type of "harm" and emphasized the management of pollution control of the aquifer, whether the aquifer was actually utilized or not. The Drafting Committee had considered the replacement of the term "precautionary approach" by the term "precautionary principle", but had decided to retain the former, as adopted on first reading, because, although the two concepts were substantively the same, it was less disputed in terms of the protection, preservation and management of aquifers and it had a more practical orientation to it. The Drafting Committee had also considered a proposal made in the comments by Governments that the words "eliminate, to the extent practicable" should be included, but it had decided not to do so because the existing wording provided for preventive action before any pollution occurred. It had also been necessary to strike a balance between the obligations imposed and lawful activities that would, in practice, allow human access to the water of the aquifer. Accordingly, the draft article and its title had been retained as adopted on first reading.

10. Draft article 13 (Monitoring), which had formerly been draft article 12, applied to aquifer States and served as a precursor to draft article 14 on management. In order to manage an aquifer or an aquifer system properly, it was necessary to ensure monitoring, which could be done jointly, but, if not, it was important for aquifer States to share data on their monitoring activities. Paragraph 1 set out the general obligation to monitor and the sequence of monitoring activities. Two minor amendments had been introduced: in the second sentence, the definite article "the" qualifying "competent international organizations" had been deleted, since no particular international organization was being singled out; and, in the third sentence, the word "however" had been deleted and the words "are not" had been replaced by the words "cannot be". Paragraph 2 dealt with the modalities and parameters for monitoring. It was important for aquifer States to agree on the standards and methodology to be used for monitoring and on ways of harmonizing different standards and methodologies. It had been suggested that the first sentence should be qualified by adding the words "where possible", but the Drafting Committee had considered that the wording was already sufficiently flexible. The standards and methodology could be "agreed" or "harmonized", including through international practices developed by experts in the field. The title of the draft article had been retained as adopted on first reading.

11. Draft article 14 (Management), which had formerly been draft article 13, dealt with the establishment and implementation of plans for the management of aquifers or aquifer systems. Consultations among aquifer States were an essential component of the management process. In the view of groundwater experts, there was great value in the joint management of aquifers or aquifer systems and it should be done wherever appropriate. In practice, however, it might not always be possible to establish such a mechanism. The establishment and implementation of such plans could thus be done individually or jointly. It had been proposed that the establishment and implementation of such plans should be not only "in accordance with the provisions of the present draft articles", as provided for in the text adopted on first reading, but also in accordance with regional agreements or arrangements. In view of the forward-looking and general nature of the draft articles, however, the Drafting Committee had not been able to reach a clear consensus on whether or not it would be appropriate to make such a reference and had decided, as a compromise, to delete the words "in accordance with the provisions of the present draft articles", it being understood that the commentary would make it clear that the principles embodied in the draft articles were intended to provide a framework to assist States in formulating plans for the management of the aquifer or aquifer system. The title of the draft article had been retained as adopted on first reading.

12. Draft article 15, which had formerly been draft article 14, related to planned activities. The Drafting Committee had not made any amendment to it. It should be recalled that the 1997 Watercourses Convention contained detailed provisions on planned activities, based on State practice. In contrast, a minimalist approach had been adopted on first reading. The draft article applied to any State that had reasonable grounds for believing that a planned activity in its territory could affect a transboundary aquifer or aquifer system and thereby have a significant adverse effect on another State. The threshold of "significant adverse effect" was different from that of "significant harm" and would be fully described in the commentary. The draft article provided for a sequence of measures that might be taken, such as an assessment of possible effects, timely notification of such effects, consultations and, if necessary, negotiations or independent fact-finding with a view to reaching an equitable solution. It would be explained in the commentary that the States concerned had an obligation to refrain, upon request, from implementing or permitting the implementation of the planned activity during the course of the consultations or negotiations. The title of the draft article had not been changed.

13. Part IV, which had previously been Part V, was entitled "Miscellaneous provisions" and contained draft articles 16 to 19. The purpose of draft article 16, formerly draft article 15, was to emphasize "cooperation" rather than "assistance". The original two sentences of the *chapeau* had been collapsed into one, according to which States were required to promote scientific, educational, technical, legal and other cooperation for the protection and management of transboundary aquifers or aquifer systems, either directly or through competent international organizations. As agreed on first reading, the list of activities referred to was neither cumulative nor exhaustive. The types of cooperation listed represented some of the various options available to States to fulfil the obligation to promote cooperation. States were not required to engage in each of the types of cooperation listed, and the commentary would explain that they would be allowed to choose their means of cooperation, including the provision of financial assistance. The Drafting Committee had nevertheless made some changes to the list: in subparagraph (*a*), it had included the concept of strengthening capacity-building, as provided for in Agenda 21,[123] to emphasize the need for training, including endogenous training; subparagraph (*g*) had been restructured for consistency with the preceding subparagraphs; and, with a view to strengthening cooperation among developing States in managing transboundary aquifers or aquifer systems, a new subparagraph (*h*) had been added to stress the need to provide support for the exchange of technical knowledge and experience. The draft article was now entitled "Technical cooperation with developing States", partly because its scope had been broadened to include other forms of cooperation.

14. Draft article 17, which had formerly been draft article 16, dealt with emergency situations. The Drafting Committee had made several changes to it. First, the paragraphs had been reorganized. The *chapeau* of paragraph 2 had been deleted in the light of the incorporation of some of its elements into paragraph 1. Consequently, subparagraph (*a*) had become paragraph 1, while subparagraphs (*a*) (i) and (*a*) (ii) had become subparagraphs (*a*) and (*b*), respectively. Former subparagraph (*b*) had become paragraph 4. A number of aspects had been considered as to substance. In paragraph 1, it had been proposed that the words "and to the environment" should be added after the words "serious harm to aquifer States or other States". Without discounting the importance of environmental protection, it had been considered that the purpose of the draft article was to provide a mechanism to cope with emergency situations and that the focus should therefore be on aquifer States and the other States concerned. The words "other States" referred to States which might be affected by an emergency, in particular those which might have a relation with an aquifer or an aquifer system. It had also been pointed out that there was some inconsistency between paragraphs 1 and 2 as previously worded. While paragraph 1 was broadly worded to define an emergency as posing an imminent threat of serious harm to aquifer or other States, paragraph 2 seemed to focus on an emergency which affected a transboundary aquifer or aquifer system, a link which was missing in paragraph 1. That apparent inconsistency had been overcome by adding the words "affects a transboundary aquifer or aquifer system" after the word "that" in paragraph 1 and deleting the entire *chapeau* of the former paragraph 2.

15. On the basis of comments by Governments, it had been further suggested that the word "suddenly" should be deleted and that the words "imminent threat" should be replaced by the words "imminent risk". However, it had been considered that the element of "suddenness" was

[123] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, Annex II.

crucial for the application of the draft article. As indicated in the commentary to the draft article adopted on first reading, "suddenness" did not exclude situations which could be predicted in a weather forecast and it did cover latent situations, such as those that occurred suddenly, but were a consequence of factors accumulated over a period of time. Thus, the rise in sea levels as a result of global warming could lead to the salination of an aquifer that might lie adjacent to the seacoast or in territorial waters.

16. With regard to the replacement of the words "imminent threat", it had been recalled that the 1997 Watercourses Convention used similar terminology. It would be explained in the commentary that "imminent threat" had a factual meaning which should not be conflated with notions associated with threats to international peace and security and any attendant consequences that might ensue in accordance with the Charter of the United Nations.

17. Paragraph 2 (*b*) had been the subject of a detailed discussion, which had been decided only by a vote in favour of the initial wording proposed by the Special Rapporteur. Some members of the Drafting Committee had wanted the word "eliminate" to be deleted or possibly attenuated by the words "to the extent possible", while others would have liked the text to use the words "prevent and limit" or "prevent, mitigate and control". It had been considered that the word "eliminate" imposed an obligation that was onerous to fulfil and gave rise to an implicit obligation to pay compensation. Other members had argued that the obligation was not to "eliminate harmful effects", but to "take practicable measures necessitated by the circumstances", which allowed for a wider margin for action. It was an obligation of conduct rather than an obligation of result. It was also pointed out that that obligation itself did not denote an implied obligation to compensate. As pointed out in the commentary on the draft article adopted on first reading, the paragraph required only that all practicable measures should be taken, meaning those that were "feasible, workable and reasonable". In addition, only such measures as were "necessitated by the circumstances" needed to be taken, meaning those that were warranted by the factual situation of the emergency and its possible effect on other States. It might also be noted that, to the extent that the draft article was concerned with response measures of notification without delay of, and cooperation with, potentially affected States, it did not deal with questions of compensation, which would remain governed by the relevant rules of general international law. The commentary would indicate that the words "any harmful effects" referred back to "the aquifer or aquifer system or any affected States". As noted on first reading, the reference to draft articles 4 and 6 in paragraph 3 did not prevent States from invoking circumstances which, in international law, precluded wrongfulness.

18. Paragraph 4, which had originally been paragraph 2 (*b*), made it an obligation for States to provide assistance and dealt with the types of assistance that all other States could provide to the States affected by the emergency situation. The word "trained", which had been used to describe "emergency response personnel", had been deleted and the word "equipments" had been replaced by the word "equipment". The title of the draft article had been retained as adopted on first reading.

19. Draft article 18 (Protection in time of armed conflict), which had formerly been draft article 17, had not been changed as to substance. It reaffirmed that, during times of armed conflict, the principles and rules of international law applicable in international and non-international armed conflict applied to the protection and utilization of transboundary aquifers and related installations. For example, the Hague Convention of 1907 (IV) respecting the Laws and Customs of War on Land and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) provided for the protection of water resources and related works and the utilization of such resources and works during armed conflict. The title of the draft article had been retained as adopted on first reading.

20. Draft article 19 (Protection of data and information vital to national defence or security), which had formerly been draft article 18, created a very narrow exception to the requirement on the provision of information. The 1997 Watercourses Convention contained the same rule, so that the main issue before the Drafting Committee had been whether there was a compelling reason to depart from it. As would be recalled, that had been one of the most contentious provisions during its consideration by the Working Group on shared natural resources and the Drafting Committee on first reading. It had been decided at the time to focus on the confidentiality of data or information by qualifying it as "essential" rather than on whether such information was vital to national defence or security. The majority of the members of the Drafting Committee had taken the view that there was no compelling reason to deviate from the wording of the 1997 Watercourses Convention and had therefore decided to revert to that text. The end of the first sentence had been amended to read "information vital to its national defence or security" and the title had been amended accordingly. Questions concerning the possible protection of industrial secrets and intellectual property would be dealt with in the commentary.

21. In conclusion, he pointed out that the draft articles under consideration did not deal with the relationship between them and existing or future obligations. Those matters depended on the final form the draft articles would take. The commentary would recall that the plenary had referred draft article 20, entitled "Relation to other conventions and international agreements", as proposed by the Special Rapporteur in his fifth report, to the Drafting Committee. After having considered that draft article, the Drafting Committee had decided to omit it from the current text, on the understanding that the Commission's report on its work would reflect the discussion that had taken place on it. In the main, it had been considered that issues concerning the relationship with other instruments were linked to questions of the final form the draft articles would take and that it was premature for the Commission to deal with them, particularly as they raised a variety of policy considerations which were best left to negotiating parties to decide.

22. The CHAIRPERSON thanked the Chairperson of the Drafting Committee for his introduction and invited the members of the Commission to consider the draft articles article by article with a view to adopting them as a whole.

Preamble and draft article 1

The preamble and draft article 1 were adopted.

Draft article 2

23. Mr. CANDIOTI, drawing attention once again to a mistake in the French text of subparagraph (*e*), said that the words "*On entend par*" introduced a list or a definition that was supposed to be complete, whereas types of utilization were given by way of example and were not exhaustive.

24. Mr. CAFLISCH said that he agreed with Mr. Candioti and proposed that the words "*On entend par 'utilisation d'aquifères et de systèmes aquifères transfrontières'* " should be replaced by the words "*L'utilisation d'aquifères et de systèmes aquifères transfrontières 'inclut'*" (or " '*comprend*' ").

25. The CHAIRPERSON requested the Secretariat to make the necessary change in the French text of draft article 2 (*e*).

Draft article 2 was adopted.

Draft articles 3 to 15

Draft articles 3 to 15 were adopted.

Draft article 16

26. Mr. GALICKI said that there was some inconsistency between the title of draft article 16 and the list of different types of cooperation in the *chapeau*, since the term "technical cooperation" was used twice, but in two different ways, in the broad sense, in the title and in the narrow sense, in the *chapeau*. He therefore proposed that the term "technical" in the title should be deleted.

27. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) said that, without prejudging the Special Rapporteur's opinion, he would tend to agree with Mr. Galicki's proposal.

28. Mr. KAMTO, supported by Mr. FOMBA, said that "technical cooperation" was a standard term that made a distinction between the cooperation referred to in draft article 16 and the general obligation of cooperation stated elsewhere. It did encompass the elements contained in the *chapeau* and its deletion would deprive the provision of its specificity. The wording was thus entirely appropriate.

29. Ms. ESCARAMEIA said that, in English, the problem was not the same as in French because the words "technical cooperation" were to be found both in the title and in the *chapeau*, although they did not apply to the same things.

30. Mr. VASCIANNIE said he also thought that the use of the word "technical" to refer to two different things gave rise to a problem. He had assumed that the Special Rapporteur would provide an explanation in the commentary, but perhaps it would be better to amend the text of the article. He suggested that the word "technical" should be kept in the title and that the *chapeau* should be amended to read: "States shall, directly or through competent international organizations, promote scientific, educational, legal and other forms of technical cooperation with developing States…". That would clearly show that the forms of cooperation referred to in the *chapeau* were all technical in nature.

31. Ms. XUE said that the adoption of Mr. Vasciannie's proposal would amend the substance of the text. Since scientific cooperation and technical cooperation were two entirely different things, she proposed that the wording of the *chapeau* should be left as it stood and that the title should be amended to read: "Scientific and technical cooperation…".

32. Mr. GALICKI proposed that an explanation of the two different meanings of the term "technical cooperation" as used in draft article 16 should be given in draft article 2 (Use of terms).

33. Mr. YAMADA (Special Rapporteur) said that he had originally thought of using the term "technical assistance", but had then replaced it by the term "technical cooperation" in order to make it clearer that reference was being made not only to a "North–South" relationship, but also to a "South–South" relationship. He agreed with what Mr. Kamto had said and confirmed that the word "technical" should be retained in order to avoid unnecessary complications. He would explain in the commentary that the term had a broader meaning in the title and a narrower one in the rest of the provision.

34. The CHAIRPERSON said that, if he heard no objection, he would take it that the members of the Commission adopted draft article 16 as proposed by the Drafting Committee, it being understood that the Special Rapporteur would provide the explanations in question in the commentary to the draft article.

It was so decided.

Draft article 16 was adopted.

Draft article 17

35. Mr. NOLTE said that referring to "affected or potentially affected States" in paragraph 2 (*b*) would be more in keeping with the provision as a whole.

36. Ms. XUE thanked the Chairperson of the Drafting Committee for having given a faithful account of the Drafting Committee's discussions on draft article 17. A substantive issue which was all the more important in that it would also arise in connection with the new topic included in the Commission's agenda, namely, "Protection of persons in the event of disaster",[124] had to do with the word "eliminate" in paragraph 2 (*b*), which gave rise to a problem, particularly in the case of an emergency situation resulting from natural causes, because it would appear to impose an obligation on the State concerned that was practically impossible to fulfil. She hoped the Special Rapporteur would clarify that point in the commentary so that States would have clear guidance.

[124] See *Yearbook … 2006*, vol. II (Part Two), p. 185, para. 257 and Annex III, p. 206.

37. Mr. YAMADA (Special Rapporteur) said that Ms. Xue's statement would probably be reflected in the summary record of the current meeting or in section B of the chapter on shared natural resources in the Commission's annual report. Replying to Mr. Nolte, he said that he had not referred to States already affected in paragraph 2 because the situation to which it referred was that there had not yet been any serious damage in States other than the one where the emergency had taken place. Perhaps that could be explained in the commentary.

38. Ms. ESCARAMEIA said that Ms. Xue's comments could, as the Special Rapporteur had indicated, be reflected in the Commission's report, but not in the commentary, since the stage reached now was the second reading, when the commentary could only reflect a consensus.

39. Ms. XUE, supported by Mr. SABOIA, said that she simply wanted the commentary to explain, as the Special Rapporteur had done in the Drafting Committee, that the obligation provided for in paragraph 2 was an obligation of means, not an obligation of result.

40. Mr. KAMTO said he regretted that the Commission was reopening discussions in plenary on matters that had already been decided on by the Drafting Committee. When a member had taken part in the Drafting Committee's work and a decision had been taken, that member should be in a position to accept the consensus reached so that the Commission could get on with its work. He himself had expressed concerns similar to Ms. Xue's and had proposed that the Drafting Committee should add the words "and, if possible," before the word "eliminate", but, following the discussions, he had seen that it was not necessary.

41. Mr. YAMADA (Special Rapporteur) said that, in the commentary to the draft articles adopted on first reading, he had already explained that what was involved was an obligation of means, not one of result. He therefore did not see how the current wording could be a problem. To prevent any confusion, however, he could state in the commentary that what was important was that the State concerned should try "in good faith" to eliminate any harmful effect of the emergency.

42. Ms. XUE said that, in that case, she had no further objection.

43. The CHAIRPERSON said that, if he heard no objection, he would take it that the members of the Commission adopted draft article 17 as proposed by the Drafting Committee, it being understood that the Special Rapporteur would include the explanations he had referred to in the commentary.

It was so decided.

Draft article 17 was adopted.

Draft articles 18 and 19

Draft articles 18 and 19 were adopted.

The preamble and the draft articles reproduced in document A/CN.4/L.724, as a whole, as amended, were adopted on second reading.

Responsibility of international organizations (*continued*)* (A/CN.4/588, sect. E, A/CN.4/593 and Add.1, A/CN.4/597, A/CN.4/L.725 and Add.1)

[Agenda item 3]

Report of the Drafting Committee

44. The CHAIRPERSON invited the Chairperson of the Drafting Committee to introduce the text of the draft articles on responsibility of international organizations as provisionally adopted by the Drafting Committee (A/CN.4/L.725 and Add.1).

45. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) said that the eight draft articles (46 to 53) before the Commission dealt with the invocation of the international responsibility of an international organization and were intended to form a chapter of Part Three on the implementation of the international responsibility of an international organization, based on the model of the draft articles on responsibility of States for internationally wrongful acts.[125] Part Three ended with draft article 53, which contained a "without prejudice" clause and would be further reviewed in the light of the Working Group's conclusions. The Drafting Committee had not dealt with the question of the invocation of the international responsibility of a State by an international organization because it had considered that the question went beyond its terms of reference and would have required the amendment of other draft articles, including those on State responsibility.

46. Draft article 46 (Invocation of responsibility by an injured State or international organization) corresponded to article 42 of the draft articles on State responsibility. At the request of some members of the Commission, the case of an international organization being authorized to act on behalf of the international community as a whole had been dealt with in draft article 52 [51], paragraph 3.[126] The words "party" or "parties", which could give the impression of referring only to the parties to a treaty, had been replaced by the words "State(s) or international organization(s)" throughout the text of the draft articles. It would be explained in the commentary that the "group of States or international organizations" referred to in subparagraph (*b*) of draft article 46 could be composed of States or international organizations or a combination thereof.

47. Draft article 47 (Notice of claim by an injured State or international organization) corresponded to article 43 on State responsibility. The text proposed by the Special Rapporteur had been favourably received and the Drafting Committee had simply merged paragraphs 1 and 2, as had been suggested. The draft article thus consisted of two paragraphs, one on the requirement that notice of the claim should be given by the injured State or international organization and the other, on the content of such notice.

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* Resumed from the 2968th meeting.

[125] See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq*., para. 76.

[126] The number between square brackets refers to the corresponding article in the sixth report of the Special Rapporteur, *Yearbook … 2008*, vol. II (Part One), document A/CN.4/597.

48. Draft article 48 (Admissibility of claims), which was based on article 44 of the draft articles on State responsibility, had been added on the recommendation of the Working Group to respond to the request of several members who had considered it necessary. It consisted of two paragraphs, each stating a condition for admissibility under international law. The first was the requirement of nationality and applied only to claims made by a State. The second was the requirement of the exhaustion of local remedies, which applied to claims both by States and by international organizations.

49. The rule of the exhaustion of local remedies had given rise to a lengthy discussion. The proposal that it should be dealt with in two separate paragraphs depending on whether it applied to claims by States or claims by international organizations had not been retained, but questions had been raised as to its existence, scope and content in connection with a responsible international organization. Some members had hesitated to transpose a requirement that was applicable to diplomatic protection in the context of inter-State relations to claims against international organizations, while others had raised doubts as to the existence within an international organization of local remedies that would have to be exhausted. The wording adopted clearly limited that provision to claims that were subject under international law to the requirement of the exhaustion of local remedies. The commentary would emphasize that the provision did not aim to expand the scope of the requirement to claims for which such a requirement did not already exist. In international law, that requirement applied to certain claims brought on behalf of an individual. In the context of the draft articles under consideration, it would also apply to claims brought against an international organization by a State which exercised diplomatic protection on behalf of one of its nationals, for example, when he or she had been injured by an international organization administering a territory. It might also apply to claims brought by another international organization for personal injuries inflicted on one of its agents (or one of his or her family members), a situation that could be regarded as similar to the exercise of diplomatic protection. Lastly, the requirement of the exhaustion of local remedies would apply in respect of certain claims alleging human rights violations by an international organization. In contrast, it would not apply to claims for direct injuries to a State or another international organization inflicted by an international organization.

50. It would be made clear in the commentary that paragraph 2 did not apply to the case where the members of an international organization were bound by the rules of the organization to resort to certain internal procedures or mechanisms when invoking the responsibility of their organization. The commentary would also indicate that the words "remedy provided by that organization" referred primarily to those remedies that might be available to the individual concerned within the responsible organization, while, however, not excluding the possible existence of other effective remedies outside the organization, which might, for example, have accepted the jurisdiction of domestic courts in respect of certain categories of claims brought by an individual, such as employment-related claims. The commentary would explain that the term "local remedies", which might be ambiguous in the case of international organizations, had nevertheless been retained in order to indicate the kinds of situations where the requirement of the exhaustion of such remedies was likely to apply.

51. Draft article 49 [48] (Loss of the right to invoke responsibility), which corresponded to article 45 of the draft articles on State responsibility, had been adopted without change, but some discussions had taken place in the Drafting Committee on the relationship between subparagraphs (*a*) and (*b*), the wording of subparagraph (*b*) and the nature and modalities of a waiver or acquiescence in the lapse of a claim. Some members had been of the opinion that, given the nature and structure of international organizations, they should not be easily considered as having waived a claim or acquiesced in its lapse. The point had also been made that a waiver must be valid. In particular, it must not have taken place under coercion and, in the case of an international organization, it must have been made by a competent organ in accordance with the internal rules of the organization. The commentary would provide some indications on the specificities of a waiver by an international organization, emphasizing, for example, that such a waiver must not be easily assumed. In the light of draft article 50 [49], the commentary would also make it clear that a waiver could only be made individually, without prejudice to the rights of other injured States or international organizations.

52. Draft article 50 [49] (Plurality of injured States or international organizations) was the equivalent of article 46 of the draft articles on State responsibility. Since the text of the draft article had been favourably received in plenary, the Drafting Committee had merely made a few drafting amendments. The words "entity" or "entities" in the title and in the text had been replaced by the words "State(s) or international organization(s)". The words "the responsibility of the international organization which has committed the internationally wrongful act" were to be replaced by the words "the responsibility of the international organization for the internationally wrongful act", as suggested by the Special Rapporteur, in order to cover situations such as those dealt with in draft articles 12 to 15, in which an international organization might incur responsibility for an internationally wrongful act committed by a State or another international organization. Such a situation could arise, for example, in the event of an international organization aiding or assisting in, exercising direction and control over, or coercing a State or another international organization in the commission of an internationally wrongful act; or in the case of decisions, recommendations and authorizations addressed by an international organization to member States or international organizations. After a discussion, it had finally been decided that the word "separately" should be retained, but it would be explained in the commentary that that did not rule out the possibility that some or all of the injured States or international organizations might jointly invoke responsibility. The commentary would also emphasize that a waiver or acquiescence in the lapse of a claim by one of the injured States or international organizations in accordance with draft article 49 [48] did not affect the rights of the other injured States or international organizations. Lastly, the commentary would indicate that, in the

situation where an international organization and one of its members were injured by an internationally wrongful act of another international organization, the internal rules of the injured international organization could determine which entity was entitled to make the claim, without prejudice to the legal position of third parties.

53. Draft article 51 [50] (Plurality of responsible States or international organizations) was the equivalent of article 47 of the draft articles on State responsibility, and also dealt with subsidiary responsibility, which had been discussed at length in the Drafting Committee. It would be recalled that some members of the Commission had proposed in plenary that paragraph 1 should include a specific reference to draft article 29. Others had expressed the concern that the paragraph could be interpreted as precluding the simultaneous invocation of the primary responsibility of the organization and only the subsidiary responsibility of a member of the organization. In that regard, some members of the Drafting Committee had raised the possibility of the conditional invocation of subsidiary responsibility pending the outcome of the claim against the organization bearing primary responsibility. All those points were covered in paragraph 2 on subsidiary responsibility, which replaced the second sentence of paragraph 1 dealing with that question. The words "only to the extent that" had been replaced by the words "insofar as" in order to introduce greater flexibility as to the timing of subsidiary responsibility. Paragraph 3 was the former paragraph 2 as proposed by the Special Rapporteur, who had explained, for the sake of clarity in relation to the corresponding article on State responsibility, that subparagraph (*b*) referred to the State or international organization "providing reparation".

54. Draft article 52 [51] (Invocation of responsibility by a State other than an injured State or by an international organization other than an injured international organization) was based on article 48 on State responsibility. With regard to paragraph 1, the Drafting Committee had held a lengthy discussion on the concept of the "collective interest of the group", whose interpretation might, in the opinion of some members of the Commission, give rise to problems. It had also discussed whether a distinction should be made between the members of a responsible international organization and non-members as far as their right to invoke the responsibility of the organization was concerned. It had decided to retain the wording proposed by the Special Rapporteur, with some minor drafting changes. It had explained that paragraph 1 did not deal with the obligations owed to the international community as a whole, which were addressed in paragraphs 2 and 3. Paragraph 1 referred primarily to certain categories of multilateral treaties to which an international organization could be a party and which established obligations that could not be split as between the parties. Thus, it did not cover all cases in which an obligation arising from a multilateral treaty had been breached or all situations in which the members of a group of States or international organizations shared a collective interest. It referred to very specific cases in which the obligation breached was owed to the parties "as a group" and each member of the group was entitled to claim compliance as a guardian of the collective interest.

55. Although some elements of vagueness would remain as to the precise scope of paragraph 1, an attempt would be made in the commentary to offer some examples of the situations that were covered, thus providing further clarification of the notions of an obligation "owed to a group of States or international organizations" and an obligation "established for the protection of the collective interest of the group". It would also be made clear that paragraph 1 did not cover every breach by an international organization of its obligations *vis-à-vis* its members: the source and content of the obligation would determine whether the obligation was due to the members "as a group".

56. Some members of the Drafting Committee had expressed concern about conferring on the members of an international organization the right to invoke the responsibility of the organization under the general regime on international responsibility. Others had pointed out that the question was not specific to draft article 52 [51], but also related to draft article 46. In that regard, it must be emphasized that those two draft articles dealt only with the invocation of responsibility and not with the issue of possible remedies; they must therefore not be interpreted as allowing the members of an international organization to act towards that organization in a manner inconsistent with its internal rules. Furthermore, special rules applying between an international organization and its members could be dealt with in a general provision on *lex specialis*.

57. Paragraph 2 of draft article 52 [51] had not given rise to comments in plenary and had been adopted as proposed by the Special Rapporteur, with only a minor drafting change. Paragraph 3 dealt with the right of an international organization to invoke the responsibility of another international organization for the breach of an obligation owed to the international community as a whole. Based on comments by States and international organizations, the Special Rapporteur had proposed that this right should be limited to international organizations which had been given the function of "safeguarding the interest of the international community underlying the obligation". In plenary, some members of the Commission had considered that wording too broad, while others had found it too restrictive. Following a lengthy discussion, the Drafting Committee had agreed to limit the entitlement in question to those situations in which safeguarding the interest of the international community underlying the obligation breached "is included among the functions" of the international organization invoking responsibility. The commentary would indicate whether that criterion had to be assessed by reference to the rules of the organization, including its character and purposes. The word "protecting" had been replaced by the word "safeguarding" in order to avoid any confusion with the recent principle of the "responsibility to protect". The commentary would also reflect the concerns that had been expressed about the possibility that a regional organization might act in defence of the interests of the international community as a whole.

58. Paragraph 4 of draft article 52 [51] had not given rise to comments by the Commission and had been left as it stood, except that the words "any State or international organization" had been replaced by the words "a State or an international organization". Paragraph 5 had also been adopted as proposed by the Special Rapporteur,

with the addition of a reference to paragraph 2 of draft article 48 [47 *bis*]. Paragraph 1 of that draft article had not been mentioned, since the condition of nationality of claims did not apply to the invocation of international responsibility under draft article 52 [51]. The commentary would emphasize that point, while also indicating that the solution was in conformity with the correct interpretation to be given to article 48, paragraph 3, of the draft articles on State responsibility, despite the ambiguity that the provision contained.

59. Draft article 53 (Scope of this Part) contained a "without prejudice" clause relating to the invocation of the responsibility of an international organization by a person or entity other than a State or an international organization. That additional draft article had been proposed by the Special Rapporteur in response to the concerns of some members of the Commission, and the Drafting Committee had considered that it should be included for the sake of clarity, even though Part Two of the draft articles on the content of the international responsibility of an international organization already contained a similar provision and Part Three of the articles on State responsibility did not. The purpose of the wording retained was to preserve those situations where a person or entity other than a State or an international organization would have a legal entitlement to invoke the international responsibility of an international organization. That "without prejudice" clause should therefore not be read as conveying any presumption in favour of the existence of such an entitlement. If it was decided to include provisions on countermeasures in the draft articles, some changes might have to be made in the title of draft article 53 and in the references to "this Part" and "the present Part".

60. The CHAIRPERSON thanked the Chairperson of the Drafting Committee for his introduction and invited the members of the Commission to consider draft articles 46 to 53 on responsibility of international organizations article by article with a view to adopting them as a whole.

Draft articles 46 to 51

Draft articles 46 to 51 were adopted.

Draft article 52

61. Mr. KAMTO, noting that the Drafting Committee had chosen to replace the word "protecting" by the word "safeguarding" in paragraph 3, said that he would like the distinction between those two words to be more clearly explained in the commentary because it was not obvious.

62. Mr. HASSOUNA said that, since the title was too long, he wished to know whether it could be simplified to read: "Invocation of responsibility by a non-injured State or international organization" or whether the words "other than" had to be retained.

63. Mr. GAJA (Special Rapporteur) suggested that the first sentence of paragraph 1 could be used for that purpose. The title would thus be slightly shorter and would read: "Invocation of responsibility by a State or international organization other than an injured State or international organization".

Draft article 52, as amended, was adopted.

Draft article 53

Draft article 53 was adopted.

The draft articles contained in document A/CN.4/L.725, as a whole, as amended, were adopted.

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

[Agenda item 1]

64. Mr. KOLODKIN (Chairperson of the Planning Group) said that the Planning Group would be composed of the following members: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia (*ex officio*), Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue and Mr. Yamada.

The meeting rose at 11.50 a.m.

2972nd MEETING

Thursday, 5 June 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Expulsion of aliens (*continued*)**
(A/CN.4/588, sect. C, A/CN.4/594)

[Agenda item 6]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. NIEHAUS congratulated the Special Rapporteur on his fourth report, which addressed two questions: the non-expulsion by a State of its nationals when it related to persons having two or more nationalities, and deprivation of nationality, which was sometimes used as a preliminary to expulsion. The first question, dealt with in chapter I of the report, harked back to a time-honoured and undisputed legal concept, namely that it was for a State to determine under its own law who were its nationals. Alongside the interest of the State and its right to make that determination, however, the legitimate interests and

* Resumed from the 2968th meeting.

** Resumed from the 2969th meeting.