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Summary record of the 2989th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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more extensive pronouncements. The example showed a form of judicial self-restraint, which occasionally—although perhaps not always—was wise.

116. As to which other issues would be appropriate for consideration by the Commission, one totally uncharted area of the law, surprising as that might seem, was pipelines—not just in a maritime context but generally. Past experience with railways, telegraph and telephone lines, and the relationship to the General Agreement on Tariffs and Trade 1994 and the General Agreement on Trade in Services could be drawn on in considering that very interesting problem. Another fruitful topic was subsequent practice, which had haunted the Tribunal in the “*Hoshinmaru*” case and the “*Tomimaru*” case.

117. On diplomatic protection, the Commission’s solution, namely to refer to protection rather than to diplomatic protection, had been an elegant compromise and was in fact helpful for the Tribunal. His own personal preference, however, was for diplomatic protection to be considered more broadly, with less reference to historical notions and so as to encompass prompt release.

118. As to why so few cases had been brought before the Tribunal, many reasons could be proffered. First, it was a new and comparatively little-known institution. Very recently, for example, he had found that a London law firm that concentrated on law of the sea issues had never even heard of the Tribunal. That was one reason why regional workshops had been developed, not only to make the Tribunal better known but also to explain its fairly complicated procedures. Secondly, many cases were taken to the ICJ on the basis of specific clauses, pacts or treaties of friendship. According to the Tribunal’s own count, more than 100 treaties had been referred to the jurisdiction of the ICJ and only 3 to that of the Tribunals. Thirdly, under article 287 of the Convention, States had the option to declare their preference for one of three mechanisms: the Tribunal, the ICJ or arbitration. Of about 150 States Parties to the United Nations Convention on the Law of the Sea, just over 30 had made such a declaration, 28 of which had opted for the Tribunal. While certain States, for example Norway, had deliberately opted for arbitration, about 120 had done so by default, simply because they had neglected to make a declaration. He did not know whether the framers of the Convention had had such a result in mind, but it certainly disadvantaged the Tribunal. If States were to make a clear choice between the three options, it would be easier for the Tribunal to predict its workload.

119. Fourthly, he believed that the sheer size of the Tribunal, which comprised 21 judges, was a deterrent in itself. The larger the body of judges, the more difficult it was to hazard a guess as to the probable outcome of a case. It could be argued, on the other hand, that a broad spectrum of opinions would ensure a fairer ruling. He was at a loss to understand why States did not use the option available under article 15 of the Statute of the Tribunal to form an *ad hoc* chamber consisting of three, five, seven or any uneven number of judges, which could even include external judges. In the *Conservation and Sustainable Exploitation of Swordfish Stocks* case, there had been four judges from the Tribunal and one *ad hoc* judge. That option combined the merits of arbitration with those of

a standing body and cut down on costs, since no financing had to be provided with respect to either the Tribunal judges or the *ad hoc* judges. Unfortunately, however, that option was little known; he hoped it would be better exploited in the future.

120. Lastly, he wished to assure Mr. Brownlie that, far from compromising its independence, the Tribunal was proud of the positions it had taken. Courts and tribunals needed to be aware of one another’s positions in order to avoid controversies such as the one that had arisen in the *Tadić* case. It should be noted that the ICJ had been in favour of the Tribunal’s findings on provisional measures, totally opposed to its position on advisory opinions, and had found the Tribunal’s handling of the relationship between national and international law interesting in that it had highlighted a relatively unknown feature of the United Nations Convention on the Law of the Sea. In future, the Tribunal would make good use of the jurisprudence of the Court and of the Permanent Court of International Justice, as well as of arbitration where necessary and adequate, but would also deviate therefrom where necessary. Since it had a particular mandate with respect to environmental matters, in the future, its position on such matters was likely to differ significantly from those arrived at through arbitration or by the ICJ or, for instance, the Court of Justice of the European Communities.

121. The CHAIRPERSON thanked the President of the International Tribunal for the Law of the Sea for his presentation and the answers he had given to the numerous questions put by members.

Organization of the work of the session (concluded)*

122. The CHAIRPERSON announced that Mr. Pellet had been appointed to chair the Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*).

The meeting rose at 1.05 p.m.

2989th MEETING

Monday, 4 August 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. McRae, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Mr. Kolodkin (Vice-Chairperson) took the Chair.

1. Ms. JACOBSSON, recalling that, for lack of time, the Chairperson had requested her not to take the floor in the debate on the topic of the obligation to extradite

* Resumed from the 2985th meeting.

or prosecute (*aut dedere aut judicare*), assuring her that the discussions would continue at the next meeting, said that she had been very surprised to find that the Special Rapporteur had summed up the debate. Consequently, her views and those of the members who might have intended to speak on the topic, but who had not done so, had not been taken into account. That was quite unfortunate and she hoped that, in future, the members of the Commission would have a little more time to react before decisions were taken.

Responsibility of international organizations (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) (concluded)*

[Agenda item 3]

REPORT OF THE DRAFTING COMMITTEE (concluded)**

2. The CHAIRPERSON invited the Chairperson of the Drafting Committee to introduce the second part of the Committee's report, as contained in document A/CN.4/L.725/Add.1.

3. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) said that, at its 2978th meeting on 15 July 2008, the Commission had heard the oral report of the Working Group on responsibility of international organizations and had referred draft articles 52 to 57, paragraph 1, to the Drafting Committee, together with the recommendations of the Working Group. The Drafting Committee had held two meetings on 15 and 16 July 2008. It had completed the consideration of all the draft articles referred to it and had adopted an additional draft article on countermeasures by a member of an international organization, as recommended by the Working Group.

4. Part Three of the draft articles on responsibility of international organizations, which was based on Part Three of the draft articles on responsibility of States for internationally wrongful acts,³⁰⁰ was entitled "The implementation of the international responsibility of an international organization". Draft articles 46 to 53, which had been adopted by the Commission during the first part of the current session, formed chapter I of Part Three dealing with the invocation of the responsibility of an international organization. Chapter II, entitled "Countermeasures", was composed of draft articles 54 to 60.

5. Draft article 54 [52], entitled "Object and limits of countermeasures", had been the focus of extensive discussion in the Working Group, which had recommended that paragraphs 4 and 5, as proposed by the Special Rapporteur, should be reformulated and placed in a separate draft article. Paragraphs 1 to 3 had not given rise to substantial discussions in the Drafting Committee. In paragraph 1, the words "an injured" had been added between "State" and "international organization" so that the words "an injured State or an injured international organization"

did not have to be repeated in subsequent provisions. Apart from that change, paragraphs 1 to 3, which corresponded in substance to article 49 of the draft articles on State responsibility, had been adopted as proposed in the Special Rapporteur's sixth report (A/CN.4/597).

6. In contrast, the Drafting Committee had engaged in a substantial discussion on draft article 54, paragraph 4. That new paragraph, which had been proposed by the Special Rapporteur, followed the conclusion reached by the Working Group that the draft articles should reflect the fact that countermeasures should be taken in a manner respecting the specificity of the targeted organization. Some members of the Drafting Committee had requested the deletion of the words "as far as possible", which left open the possibility that countermeasures could impede the functioning of the organization. Others had been of the opinion that countermeasures would necessarily affect, at least partially, the exercise by the organization of its functions. According to that opinion, there was no justification for granting the responsible organization a minimum guarantee against countermeasures taken by the injured State or organization.

7. As the Special Rapporteur had put it, draft article 54, paragraph 4, was not intended to apply the principle of proportionality, which was embodied in another provision. The concern at stake was to preserve the functions usefully exercised by an international organization, especially those performed in the collective interest of the international community. On the suggestion of one of its members, the Drafting Committee had decided to retain the phrase "as far as possible" and to use the words "limit their effects on" rather than a stronger term. The commentary would make it clear that countermeasures should not hamper the basic functions of the organization.

8. Draft article 55 [52 *bis*], entitled "Countermeasures by members of an international organization", was a new draft article proposed by the Special Rapporteur, following the recommendation of the Working Group that the specific relationship between a responsible organization and one of its injured members taking countermeasures should be addressed in a separate provision. While it had left the task of drafting that provision to the Drafting Committee, the Working Group had indicated that it should state in substance that an injured member of a responsible organization could not take countermeasures against that organization so long as the rules of the organization provided some reasonable means for ensuring compliance with its obligations under Part Two of the draft articles.

9. The Drafting Committee had first considered how that new draft article should be related to the other provisions in chapter II of Part Three. Some members viewed it as unnecessary to indicate that the provision stated an additional rule specific to the situation of injured members. However, given the decision to devote a separate provision to that particular case, it had been considered preferable to add the words "In addition to the other conditions set out in the present Chapter" at the beginning of the sentence.

* Resumed from the 2978th meeting.

** Resumed from the 2971st meeting.

³⁰⁰ See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, para. 76.

10. The Drafting Committee had then had an exchange of views on the reference to “reasonable means” for ensuring compliance by the organization with its obligations. It had been emphasized that there should be reasonable prospects for compliance at the time when countermeasures were envisaged. Once the means available in the given circumstances had been tried unsuccessfully—i.e. when it could be legitimately assessed that there was no more reasonable prospect for compliance—countermeasures could be resorted to. That would be reflected in the commentary.

11. Lastly, some members had indicated that, in all likelihood, the rules of the organization would not expressly address the issue dealt with in draft article 55. Accordingly, instead of envisaging the case that the rules would “provide” reasonable means, the Drafting Committee had decided to refer to reasonable means “available in accordance with the rules of the organization”, those being understood in the broad sense retained in draft article 4, paragraph 4.

12. Draft article 56 [53], entitled “Obligations not affected by countermeasures”, corresponded in substance to article 50 of the draft articles on State responsibility, with the replacement of the reference, in paragraph 2 (b), to diplomatic or consular agents by a reference to agents of the responsible international organization. The Drafting Committee had decided to use the words “any inviolability of agents” in order better to reflect the fact that only certain agents benefited from a measure of inviolability.

13. Draft article 57 [54], entitled “Proportionality”, replicated article 51 of the draft articles on State responsibility. The Special Rapporteur had recalled that the text of the provision, closely modelled on the relevant statement of the ICJ in its judgment on the *Gabčíkovo–Nagymaros Project*, linked proportionality to the injury rather than to the measures required to ensure compliance. One member questioned whether the functions of the responsible organization should not be taken into account in that regard. It had, however, been felt that the issue was sufficiently addressed in draft article 54, paragraph 4, whereas proportionality related to the rights of the injured State or organization and the injury it had suffered. Accordingly, no change had been made to the text of the provision.

14. With regard to draft article 58 [55], entitled “Conditions relating to resort to countermeasures”, the Drafting Committee had considered whether the phrase “or any other body” should be added after “a court or tribunal” in paragraph 3 (b), as had been suggested in plenary. In the opinion of one member of the Drafting Committee, the issue had been taken care of by draft article 55 in respect of injured members of a responsible organization; however, an organ other than a court or tribunal might have the authority to make binding decisions on non-members of the organization. Other members of the Drafting Committee had nevertheless argued that paragraph 3, as reinforced by paragraph 4, placed a clear emphasis on judicial mechanisms and litigation, which should not be broadened. It had also been felt necessary to preserve the consistency with

the articles on State responsibility, to which the suggested extension should equally apply if it was now adopted. Accordingly, the text of draft article 58 had not been modified and the commentary would explore further the relationship between that provision and draft article 55.

15. Draft article 59 [56], entitled “Termination of countermeasures”, had been adopted unchanged by the Drafting Committee without giving rise to any discussion.

16. Draft article 60 [57], entitled “Measures taken by an entity other than an injured State or international organization”, corresponded in substance to paragraph 1 of article 57 introduced in the sixth report of the Special Rapporteur, with the substitution of the usual wording “is without prejudice” for “does not prejudice” and an updated reference to article 52, paragraphs 1 to 3.

17. A few issues of substance had also been raised in respect of that provision. The suggestion made in plenary that “lawful measures” should be replaced by “countermeasures” had not been retained, as it had been considered preferable to keep the purposely ambiguous wording adopted in article 54 of the draft articles on State responsibility. The Drafting Committee had also considered whether it was necessary to provide for the possibility for non-injured international organizations to react against a responsible organization. It had concluded that the use of a “without prejudice” clause made it sufficiently clear that the question of the existence of such an entitlement had been left open by the Commission.

18. Draft article 53, entitled “Scope of this Part”, had already been adopted by the Commission on the understanding that the Drafting Committee would revert to it once a decision had been taken on the inclusion of provisions dealing with countermeasures. The Drafting Committee had considered the issue and concluded that the location, title and text of draft article 53 could remain unchanged.

19. He hoped that the plenary Commission would be in a position to take note of the draft articles submitted, with a view to their provisional adoption, together with the commentaries, at its next session.

20. The CHAIRPERSON said that, if he heard no objection, he would take it that the members of the Commission wished to take note of the report of the Drafting Committee on responsibility of international organizations, as contained in document A/CN.4/L.725/Add.1.

It was so decided.

21. The CHAIRPERSON, noting that, in its report, the Drafting Committee proposed that chapter I of Part Three, the draft articles of which had been adopted at the beginning of the current session, should be entitled “Invocation of the responsibility of an international organization”, said that, if he heard no objection, he would take it that the members of the Commission wished to adopt the title proposed by the Committee.

It was so decided.

Expulsion of aliens (*concluded*)^{*}
(A/CN.4/588, sect. C, A/CN.4/594)

[Agenda item 6]

ORAL REPORT OF THE DRAFTING COMMITTEE

22. The CHAIRPERSON invited the Chairperson of the Drafting Committee to introduce the Committee's progress report.

23. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) recalled that, at the preceding session, the Commission had referred draft articles 1 and 2 (proposed by the Special Rapporteur in his second report³⁰¹) and draft articles 3 to 7 (contained in the Special Rapporteur's third report³⁰²) to the Drafting Committee. At that session, the Drafting Committee had provisionally worked out draft article 1, entitled "Scope", and draft article 2, entitled "Use of terms".³⁰³

24. Discussions had begun on a new draft article which sought to exclude from the application of the draft articles those aliens whose departure from the territory of a State might be governed by special rules of international law. At the preceding session, the Drafting Committee had also begun discussing draft article 3, entitled "Right of expulsion".

25. The Drafting Committee had held two meetings on the topic on 16 and 17 July 2008. Following the practice adopted in 2007, it had decided that draft articles provisionally worked out thus far would remain in the Drafting Committee until it had completed its work on a few more draft articles.

26. With regard to draft article 3 (Right of expulsion), the Drafting Committee had had before it two alternative texts proposed by the Special Rapporteur, the first composed of two paragraphs, and the second, more concise. The Committee had opted for the second version without departing substantively from the text proposed by the Special Rapporteur.

27. Secondly, the Drafting Committee had considered the above-mentioned new article and the three alternative texts to which the preceding year's discussion had given rise. It had decided to agree provisionally on the text which excluded from the scope of the draft articles diplomatic or consular officials and other officials of a foreign State. In the course of the discussion, the Committee had decided that agents of an international organization should also be included in that category and it had adopted the text with that amendment. It had also decided to make that new text the second paragraph of draft article 1 ("Scope") already adopted instead of creating a new separate article.

28. Thirdly, the Drafting Committee had started discussing draft article 5 on non-expulsion of refugees, which raised complex questions as it referred indirectly

to the 1951 Convention relating to the Status of Refugees. A fruitful debate had taken place on the possible relationship between the article and the Convention (and the 1967 Protocol relating to the Status of Refugees), but it had been inconclusive owing to a lack of time. It had been agreed that the Special Rapporteur would submit a new version of the text that would take account of the various points raised during the discussion.

29. The CHAIRPERSON proposed that the Commission should take note of the progress report by the Drafting Committee on the topic of "Expulsion of aliens".

It was so decided.

**Draft report of the Commission on
the work of its sixtieth session**

30. Ms. ESCARAMEIA (Rapporteur) said that some changes had been made to the report. Whenever possible, the Commission's work had been presented in a more structured way: introduction by the Special Rapporteur, summary of debates and conclusion.

31. In accordance with the wish expressed in paragraph 372 of the report on the preceding session, an attempt had been made at the current session to ensure that chapters II and III of the Commission's report were more user-friendly. Chapter II thus dealt with the main issues discussed. With regard to chapter III, she requested the Special Rapporteurs to state the reasons for the questions they wished to ask States so that States might understand why those questions were being asked.

Mr. Vargas-Carreño (Chairperson) took the Chair.

CHAPTER IV. Shared natural resources (A/CN.4/L.731 and Add.1–2)

32. The CHAIRPERSON invited the members of the Commission to consider chapter IV of the draft report on shared natural resources.

A. Introduction (A/CN.4/L.731)

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraph 4

33. Mr. PELLET suggested that, in the French text, the words "*quant au fond*" should be replaced by the words "*au fond*".

34. Mr. GAJA proposed that the end of the last sentence should be amended to read: "(b) deciding at a later stage whether a convention should be adopted on the topic".

Paragraph 4, as amended, was adopted.

Paragraph 5

Paragraph 5 was adopted.

* Resumed from the 2984th meeting.

³⁰¹ Yearbook ... 2006, vol. II (Part One), document A/CN.4/573.

³⁰² Yearbook ... 2007, vol. II (Part One), document A/CN.4/581.

³⁰³ Yearbook ... 2007, vol. II (Part Two), paras. 188 and 258.

Paragraph 6

35. Mr. GAJA proposed that the words “on the relation to other conventions and international agreements” should be added in the English text and that the words “the draft articles becoming a convention” in both versions should be replaced by the words “the adoption of a convention”.

Paragraph 6, as amended, was adopted.

Paragraph 7

36. Mr. GAJA proposed that the beginning of the first sentence should be deleted and that it should start with the words “The matters raised”.

Paragraph 7, as amended, was adopted.

Paragraph 8

Paragraph 8 was adopted.

Paragraph 9

37. Mr. GAJA proposed that the words “confined groundwaters” should be followed by the words “and in any event did not include the discharge zone”.

Paragraph 9, as amended, was adopted.

Paragraphs 10 to 14

Paragraphs 10 to 14 were adopted.

Paragraph 15

38. Mr. VALENCIA-OSPINA said that the “recommendation” in question was nowhere to be found, but if its purpose was to refer to the Special Rapporteur’s proposal for the convening of a conference, he would recall that, although article 23 of the Statute of the International Law Commission provided that “The Commission may recommend to the General Assembly: ...*(d)* To convoke a conference to conclude a convention”, it did not provide that the Commission could recommend that the General Assembly itself should adopt a convention.

39. Mr. YAMADA (Special Rapporteur) said that he had held consultations in that regard and had thus been able to improve the draft text. Section C, “Recommendation of the Commission to the General Assembly”, would read:

“At its 2989th meeting, on 4 August 2008, the Commission decided, in accordance with article 23 of its Statute, to recommend to the General Assembly:

“(a) to take note of the draft articles on the law of transboundary aquifers in a resolution, and to annex these articles to the resolution;

“(b) to recommend to States to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers on the basis of the principles enunciated in these articles;

“(c) to also consider, at a later stage and in view of the importance of the topic, the possibility of convening

a conference to consider the draft articles on the law of transboundary aquifers for the purpose of concluding a convention on the topic.”

40. It would be for the General Assembly to decide how the draft articles would be considered, but, in any event, a conference would be necessary if a convention was to be adopted.

41. After exchange of views in which Mr. SABOIA, Mr. PELLET, Ms. XUE, Mr. YAMADA (Special Rapporteur), Mr. WISNUMURTI and Ms. ESCARAMEIA took part, the CHAIRPERSON proposed that the Commission should postpone the discussion of section C in order to hold consultations and reach a consensus. He therefore suggested that paragraph 15 should be adopted provisionally.

It was so decided.

Section B, as amended, was adopted.

E. Draft articles on the law of transboundary aquifers (A/CN.4/L.731/Add.2)

General commentary

Paragraph (1)

42. After a discussion in which Mr. PELLET and Ms. ESCARAMEIA took part, it was decided that the end of the second sentence should be amended to read: “migratory birds and some other animals”.

Paragraph (1), as amended, was adopted.

Paragraph (2)

43. Mr. GAJA proposed that the beginning of the last sentence should be amended to read: “Some supported the adoption of a legally binding instrument”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

44. Mr. GAJA proposed that the end of the fourth sentence should be amended to read: “deciding at a later stage on the possibility of examining the draft articles with a view to adopting a convention”.

45. He also proposed that, in the last sentence, the words “first step” should be replaced by the words “second step”. This would take the General Assembly some time.

46. Mr. McRAE said that, if the Commission adopted Mr. Gaja’s second proposal, it would have to delete the words “the formulation of which would become necessary only when the second step would be initiated”, which would become meaningless.

47. Ms. ESCARAMEIA (Rapporteur) said that she would like the words “first step” to be replaced by the words “this step” because it was not certain that the “first step” Mr. Gaja was referring to would be all that short. The General Assembly might rapidly take note of the draft articles, but it would probably need more time to recommend that States should take appropriate action.

48. Mr. VALENCIA-OSPINA, supported by Mr. PELLET, said that, since the recommendation to be made to the General Assembly still had not been decided on, the adoption of paragraph (3) should be postponed.

49. The CHAIRPERSON said he took it that the Commission wished to leave the consideration of paragraph (3) pending.

It was so decided.

Paragraph (4)

50. Mr. PELLET said that the French text of the beginning of the second sentence read very badly. He proposed that it should be amended to read: “*Pour être efficaces, certains projets d'article devraient imposer des obligations aux États qui ne partagent pas l'aquifère transfrontière considéré*”.

51. Mr. HASSOUNA said that he agreed with Mr. Pellet's proposal and noted that the wording of that sentence in English should also be amended because it left something to be desired.

52. Mr. McRAE said that he did not understand Mr. Pellet's proposal for the replacement of the words “*auraient à imposer*” by the words “*devraient imposer*” because that would prejudge the Commission's response to the question whether the draft articles should be structured in such a way as to distinguish between obligations that would apply to all States generally, obligations of aquifer States *vis-à-vis* other aquifer States and obligations of aquifer States *vis-à-vis* non-aquifer States.

53. Ms. ESCARAMEIA (Rapporteur), agreeing with the comment by Mr. McRae, said that, as it stood, the beginning of the second sentence better reflected the Commission's position on the question.

54. Mr. GAJA said that he also agreed with the comment by Mr. McRae and proposed that the second sentence should end with the words “aquifer States” and that the following sentence should be added before the third sentence: “Moreover, in some other instances, the obligation would be applicable to all States”.

Paragraph (4), as amended, was adopted.

Paragraph (5)

55. Mr. PELLET said that, in the fourth sentence of the French text, the word “*joue*” should be replaced by the words “*a joué*” because UNESCO was no longer the coordinating agency on global water problems.

Paragraph (5), as amended, was adopted.

Paragraph (6)

56. Mr. PELLET proposed that the words “mainly with regard to” should be added after the words “on first reading” so that a list could be drawn up of some of the important points on which changes had been made.

57. The CHAIRPERSON said that Mr. Pellet's request did not reflect the Commission's usual practice.

58. Ms. ESCARAMEIA (Rapporteur) said she agreed with Mr. Pellet that it would be useful to indicate which changes had been made on second reading and appealed to the Special Rapporteur to provide his support in that regard.

59. Mr. KOLODKIN said that the Commission would be creating a precedent if it adopted Mr. Pellet's proposal.

60. Mr. CANDIOTI said that Mr. Pellet's interesting proposal to make the report more readable and enable States better to understand the changes made between the first and second readings should be adopted.

61. Mr. VALENCIA-OSPINA said that, if the Commission created a precedent, it would affect only the articles adopted on second reading.

62. Mr. YAMADA (Special Rapporteur) said that he had no objection in principle to Mr. Pellet's proposal, but drawing up a list of the changes to the draft articles made on second reading would give rise to problems because minor changes would have to be distinguished from major changes. That might also make the Commission's task much more difficult when it came to consider large numbers of draft articles.

63. Ms. XUE said that she had no objection to the idea of making the report more readable by including a list of the changes to the draft articles adopted on first reading.³⁰⁴ However, such a solution would create a precedent that would make the Secretariat's task particularly complicated. The changes made could simply be indicated and the reader could be invited to refer to the paragraphs in which the changes had been indicated. Paragraph (6) should be retained as it stood.

64. Mr. PELLET said that, as it stood, paragraph (6) departed from practice because the Commission did not usually point out in its general commentaries that changes had been made to a text adopted on first reading; that was unnecessary because it was a statement of the obvious. Paragraph (6) would be useful only if a precedent was created and the Commission decided to draw the reader's attention to the main points on which changes had been made on second reading.

65. Mr. SABOIA said that he had no objection in principle to Mr. Pellet's proposal, which would make the report more readable, but he nevertheless agreed with the Special Rapporteur and Ms. Xue that, if it was to be adopted, Special Rapporteurs would have to distinguish between minor and major changes, and that would give rise to great problems. He therefore proposed that paragraph (6) should either be kept as it stood or deleted.

66. Mr. VALENCIA-OSPINA proposed that, in order to meet the concerns expressed by the members of the Commission, the words “most of which are explained in the corresponding commentaries” should be added at the end of paragraph (6). That would enable the Commission to point out that changes had been made to the draft articles adopted on first reading without actually creating a precedent.

³⁰⁴ *Yearbook ... 2006*, vol. II (Part Two), chap. VI, sect. C, p. 91.

67. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt the proposal by Mr. Valencia-Ospina.

It was so decided.

Paragraph (6), as amended, was adopted.

Commentary to the draft preamble

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

The commentary to the draft preamble was adopted.

PART ONE. INTRODUCTION

Commentary to draft article 1 (Scope)

Paragraph (1)

68. Mr. GAJA proposed that, in the second sentence, the word “perfectly” should be replaced by the word “generally” and that the word “commonly” should be deleted. In the last sentence, the word “an” should be deleted twice and the words “used together” should be replaced by the words “referred to jointly”.

69. Mr. PELLET proposed that the words “, as defined in article 2,” should be added after the words “the technical term ‘aquifer’ ” in the second sentence.

70. The CHAIRPERSON said he took it that the Commission wished to adopt the proposals by Mr. Gaja and Mr. Pellet.

Paragraph (1), as amended, was adopted.

Paragraph (2)

71. Mr. PELLET said that the fourth sentence of the French text was clumsy and practically incomprehensible as it now stood. He therefore proposed that the words “*possèdent plus de caractéristiques des eaux de surface que des eaux souterraines*” should be replaced by the words “*s’apparentent davantage à des eaux de surface qu’à des eaux souterraines*”. In the same sentence, the word “*également*” should be added after the word “*régies*”.

Paragraph (2), as amended, was adopted.

Paragraph (3)

72. Mr. PELLET said that there was no reason to begin the third sentence with the words “*Dans la version anglaise*” because the comment also applied to the French text. He therefore proposed that those words should be deleted, that the words in inverted commas should be replaced by their French equivalents—“*utilisation*” and “*usages*”—and that the words “*retenu dans la version française*” should be deleted in the last sentence.

It was so decided.

73. Mr. GAJA proposed that the words “must be covered” be replaced by the words “are covered”.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

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

Commentary to draft article 2 (Use of terms)

Paragraph (1)

74. Mr. PELLET proposed that the eighth sentence should be deleted, but, if it was not, he would suggest that the words “as they were a geological formation” should be added at the end, since paragraph (2) contained a lengthy explanation which suggested that the content of that sentence was not self-evident.

75. Mr. CANDIOTI said that the sentence should be retained because it was one of the few changes adopted on second reading.

76. Mr. PELLET proposed that a footnote reading “See paragraph (2) below” should be added to explain that the term was defined in paragraph (2).

77. Ms. ESCARAMEIA (Rapporteur) said that a definition of the term “geological formation” was already given after the sentence Mr. Pellet was proposing to amend.

78. Mr. VALENCIA-OSPINA proposed that half of Mr. Pellet’s proposal should be retained, namely, the addition at the end of the sentence of the words “as they were a geological formation”.

79. He was surprised that the term “‘confined’ ” was used because it did not appear in article 2 (Use of terms).

80. Mr. YAMADA (Special Rapporteur), replying to Mr. Valencia-Ospina’s comment, proposed that the last two sentences should be moved to a footnote.

81. Mr. GAJA said that the problem could also be solved by replacing the words “are termed as ‘confined’ groundwaters” in the last sentence by the words “are called ‘confined’ groundwaters”.

Paragraph (1), as amended by Mr. Pellet and Mr. Gaja, was adopted.

The meeting rose at 1 p.m.

2990th MEETING

Monday, 4 August 2008, at 3.05 p.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Caflich, Mr. Candiotti, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.
