Document:-
A/CN.4/2836

Summary record of the 2836th meeting

Topic:
<multiple topics>

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

on Threats, Challenges and Change, of which Mr. Baena Soares had been a member, entitled "A more secure world: our shared responsibility"; chapter IV of the report addressed the subject of conflict between and within States.[8] It established a link between armed conflicts and the question of shared natural resources, and it referred in paragraph 93 to the role of the International Law Commission in developing rules for the use of transboundary resources such as water, oil and gas.

The meeting rose at 1 p.m.

2836th MEETING

Wednesday, 11 May 2005 at 10.15 a.m.

Chairperson: Mr. Djamchid MOMTAZ

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

Shared natural resources (*continued*) (A/CN.4/549 and Add.1, sect. B, A/CN.4/551 and Corr.1 and Add.1, A/CN.4/555 and Add.1)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Special Rapporteur to sum up the debate on his third report on shared natural resources: transboundary groundwaters (A/CN.4/551 and Corr.1 and Add.1).

2. Mr. YAMADA (Special Rapporteur) expressed his sincere gratitude to all those members who had offered valuable comments on his third report, comments which he had carefully noted and would take into account in his future work. Given the number of members who had taken the floor, it would be difficult to cover all the points raised in his summary, and he begged the Commission's indulgence if he failed to do so.

3. Some members had wondered whether the sub-topic of transboundary groundwaters was ripe for codification. He felt, however, that in recommending the topic of shared natural resources to the General Assembly in 2000 on the basis of the syllabus prepared by Mr. Rosenstock, which had focused exclusively on groundwaters and such other single geological structures as oil and gas,[1] the Commission had taken the position that the topic was in fact ready for codification. It was true that he himself had initially felt there was a scarcity of State practice and existing norms on groundwaters, and he expressed regret that his repeated statements to that effect in his successive reports might have contributed to creating an erroneous impression that there was not sufficient evidence for codification.

4. Groundwaters represented 97 per cent of the freshwater resources available on the planet. Global estimated dependency on groundwaters, which had already been more than 50 per cent for drinking water, 40 per cent for industry and 20 per cent for irrigation at the time of preparation of his first report,[2] had greatly increased and many areas of the world were currently faced with problems of over-exploitation and pollution of aquifers. Groundwater experts and administrators were making every effort to cope with that situation; however, most such cooperative efforts in Africa, the Americas and Europe had taken place since the year 2000. Furthermore, most of the books, articles and instruments relevant to groundwaters had been written since 1998. Although the titles did not necessarily mention groundwaters, the instruments in *Shared Natural Resources: Compilation of international legal instruments on groundwater resources*, distributed by the Secretariat, all contained specific references to groundwaters, and those formulated after 1998 focused principally on groundwaters. There were therefore numerous examples of State practice, arrangements and agreements which had emerged in recent years on the basis of which the Commission could pursue its work.

5. Mr. Brownlie had referred to the lectures given by Professor Richard Baxter on "Treaties and Custom" at the Hague Academy of International Law in 1970, in which Baxter had affirmed that antiquity was not necessarily a relevant criterion in determining the existence of a rule of customary international law,[3] citing the ICJ decision in the *North Sea Continental Shelf* case, according to which the passage of only a short period of time did not stand in the way of the creation of a new rule of customary law. Professor Baxter had concluded that a treaty which purported to be wholly declaratory of customary international law was an extremely rare phenomenon and none of the so-called "codification treaties" drawn up under the auspices of the Commission was of that character.[4]

6. It was therefore perfectly appropriate for the Commission to proceed towards the progressive development and codification of the law on groundwaters, in accordance with its mandate from the General Assembly. Groundwaters would be one of the major topics of discussion at the Fourth World Water Forum, to take place in Mexico in 2006. Groundwater experts and administrators had high expectations of the Commission, which must keep up with the rapid pace of developments and respond to current needs, or see its usefulness and credibility called into question.

7. The issue of the relationship of general international law to the draft instrument had also been raised; he agreed with Mr. Kolodkin that it was a rule of international law that general international law would have parallel application

[8] A/59/565 and Corr.1.

[1] See *Yearbook … 2000*, vol. II (Part Two), annex, p. 135.

[2] *Yearbook … 2003*, vol. II (Part One), document A/CN.4/533 and Add.1.

[3] Baxter, *loc. cit.* (2832nd meeting, footnote 2), pp. 41–47.

[4] *Ibid.*, p. 42.

with any instrument drafted by the Commission. He recognized, however, that there were precedents for specific references to general international law in previous instruments formulated by the Commission, such as the fifth preambular paragraph of the United Nations Convention on Jurisdictional Immunities of States and their Property, similar preambular paragraphs in the 1961 Vienna Convention on Diplomatic Relations and the 1963 Vienna Convention on Consular Relations and article 56 of the draft articles on responsibility of States for internationally wrongful acts.[5] If the Commission wished to add a similar reference stating that the rules of customary international law continued to govern matters not regulated by the present Convention, he would have no objection to such an addition.

8. There had also been comments with regard to the inclusion of the issue of sovereignty over natural resources; several members felt that the issue should be raised in an article rather than in the preamble, whereas two members thought it would be preferable not to include the issue at all. He had originally included it in the preamble, given the precedents in the 1997 Watercourses Convention, the 1985 Vienna Convention for the Protection of the Ozone Layer, the 1992 United Nations Framework Convention on Climate Change and the 1992 Convention on Biological Diversity. He had since discovered, however, that the United Nations Convention on the Law of the Sea contained a specific article (art. 193) on sovereignty. He would therefore study that matter further before taking a decision.

9. It had been suggested by some members that there should be broader provisions concerning third States; currently only draft article 13, paragraph 3, which dealt with a non–aquifer State in whose territory either a recharge or discharge zone was located, mentioned third States, and did not impose any obligation on those States. He had felt that that was the most that could be done with regard to third States. It was very probable that only aquifer States would become parties to the convention; most States which had no transboundary aquifers would not become parties, in which case articles 34 to 38 of section 4 of the 1969 Vienna Convention on the Law of Treaties would apply. The Commission could create neither obligations nor rights for third States without their consent; if it wished non-aquifer States to accede to the convention, it would have to offer them incentives to do so, and he seriously doubted whether aquifer States would be prepared to offer such incentives to third States. Such an attempt might likewise have grave consequences: he wondered how the Commission could justify requiring non-aquifer States to bear some obligation for the preservation of the transboundary aquifers of other States. If the justification was that transboundary aquifers were so important for humankind, he wondered why domestic aquifers would not likewise be subject to the same criterion. If domestic aquifers were also included, then the Commission would be coming very close to asserting that those aquifers were the common heritage of mankind.

10. On draft article 7, some members favoured retaining the threshold of "significant" harm, whereas others opposed it. In response to Ms. Xue's comment on draft article 7, he noted that the article did not deal with the question of the responsibility of a State; in the case of State responsibility, an internationally wrongful act had been committed that entailed the responsibility of the State, and any damage caused by that wrongful act must be fully compensated. The activities foreseen in draft article 7, however, were not prohibited by international law and were essential for human survival. Even if such activities had some adverse effect on other States, that effect must be tolerated to a certain degree; that was why the Commission had established a threshold for such tolerance. Not to allow such a level of tolerance would be tantamount to prohibiting any utilization of aquifers. Draft article 7 referred to the typical case of international liability arising out of acts not prohibited by international law. Paragraph 1 dealt with the obligation to prevent the causing of significant harm and paragraph 3 dealt with the eventuality of significant harm being caused in spite of the fulfilment of the obligation of prevention contained in paragraph 1. Even where all appropriate measures and due diligence had been observed, transboundary harm could nevertheless occur because the risks attendant to such activities could not be entirely eliminated; nevertheless, no internationally wrongful act would have been committed.

11. The Special Rapporteur had not succeeded in dissuading the Commission from discussing the final form of the product to be adopted. He had simply wished to avoid a somewhat theological debate. He fully realized that the substance and the form of the instrument were interrelated and that the Commission would have to make a choice sooner or later.

12. As to the relationship of the current topic with possible future work on other natural resources within the broader framework of the topic of shared natural resources, he reiterated that the syllabus prepared by Mr. Rosenstock had provided the basis for the topic and that it had been generally understood that it would cover at least groundwaters, oil and gas (see paragraph 3 above). His mandate was, however, to take a step-by-step approach and to concentrate on groundwaters for the time being. He did not know whether or when the Commission would proceed to deal with oil and gas. There were, however, many similarities between groundwaters, oil and gas; many measures relating to groundwaters would have implications for oil and gas. Conversely, current State practice and norms relating to oil and gas had implications for the Commission's work on groundwaters. Due attention should be given to that matter before consideration of the draft articles on second reading was completed.

13. Turning to more specific suggestions and questions relating to various draft articles, he acknowledged that his report had shortcomings, including insufficient explanations of his reasoning. He had also deliberately used a variety of terms such as "harm", "impact" and "adverse effects", in an effort to express similar but somewhat different concepts. He would try to provide more detailed explanations in the form of commentaries, and stressed his willingness to modify his position on the basis of the wishes of the Commission.

[5] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, pp. 30 and 141, paras. 76–77.

14. Some members had expressed doubts about draft article 1, paragraph (*b*), covering "other activities". That was a new element not found in the 1997 Watercourses Convention, and in that connection he referred members to figure 3 in his first report,[6] which illustrated activities other than mere utilization of the aquifer which caused pollution; those activities included the use of agricultural chemicals, dumping of waste, municipal sewage treatment and underground storage. It was essential to regulate such activities for the proper management of aquifers and the issue was in fact being addressed by groundwater experts and administrators.

15. It had been asked whether the definition of "aquifer" in draft article 2, paragraph (*a*), needed to contain the phrase "underlain by a less permeable layer". The answer was in the affirmative: without such a layer, a geological formation could not function as a reservoir of water. He would try to include appropriate illustrations to clarify the definition. As for the need to define recharging and non-recharging aquifers in draft article 2, paragraphs (*e*) and (*f*), that would depend on whether the Commission formulated different rules for renewable and non-renewable water resources. With regard to a question on the term "contemporary" water recharge, he was not sure whether the problem related to the English term "contemporary" or to a discrepancy between the English and French texts. One example of an artificial recharge installation was to be found in the Franco–Swiss Genevese Aquifer.[7]

16. On draft article 3, concerning bilateral and regional arrangements, he noted that the most contentious point during the negotiation of the 1997 Watercourses Convention had been the treatment of existing agreements on watercourses. There did not, however, seem to be many such agreements relating to groundwaters, and he had decided not to include the relevant paragraph from the 1997 Watercourses Convention. Although it had been suggested that the term "arrangement" should be replaced by "agreement", it was his view that the former term better reflected the current state of affairs. In addition, it had been suggested that language such as "aquifer States are encouraged" [to enter into a bilateral or regional arrangement] was rather weak; his own view was that such language was in fact much stronger than the wording "may", contained in the 1997 Watercourses Convention. It had also been suggested that draft article 6, paragraph 1 (*c*) should emphasize the use of water for drinking; in his view, however, it would be more appropriate to incorporate that idea in draft article 11. He would give further thought to that proposal.

17. With regard to comments on the absence of provisions for the administrative organization of transboundary groundwaters, he noted that there was a long history of international cooperation concerning international rivers; indeed, international river commissions had been the precursors of international organizations. In the case of groundwaters, however, only the Franco–Swiss Genevese Aquifer Commission could be considered to be a fully functioning international organization. Although various cooperative organizational arrangements were emerging, they were as yet loose entities; that was why he had included draft article 8, paragraph 2, which recommended the establishment of joint mechanisms or commissions.

18. Many members had suggested the inclusion of a provision on settlement of disputes similar to article 33 of the 1997 Watercourses Convention. While he had no objection to that proposal, he had not replicated that article because he considered it to be simply an ornament with no practical utility, since it did not provide for compulsory jurisdiction. Any dispute would be more properly settled in the context of the bilateral and regional arrangements which governed the relations between the parties to the dispute. In his view, the only important provision of article 33 was the requirement for mandatory submission of the dispute to impartial fact-finding, contained in its paragraph 3; accordingly, he had included that concept in draft article 17, paragraph 2, on resolution of a disagreement on the effect of planned activities.

19. Many members had said that part IV, on activities affecting other States, was too simple in comparison with part III, on planned measures, of the 1997 Watercourses Convention. He simply did not believe that evidence existed of customary rules for such detailed procedural provisions concerning groundwaters; however, he was ready to consider any improvements which might be suggested.

20. Many members had also argued for and against the inclusion of the precautionary principle. While some legally binding instruments incorporated that principle, he did not believe that such provisions were declaratory of customary international law or constitutive of new customary international law. In any event, the precautionary principle or approach was an abstract concept and the Commission would have to define which measures must be implemented for the management of aquifers in accordance with that concept. He would continue to seek an appropriate formulation and would appreciate any guidance provided by the Commission.

21. It seemed to be the general view that a working group on the issue of transboundary groundwaters should be established. He hoped that such a group could meet towards the end of the first part of the current session and again early in the second part of the session. He would try to produce a working paper for the working group and would contact members to ascertain their counter-proposals for draft articles.

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

[Agenda item 8]

First report of the Special Rapporteur (*continued*)

22. Mr. BROWNLIE (Special Rapporteur) said he had the impression that at the previous meeting Mr. Gaja had implied, albeit perhaps unintentionally, that his presentation of existing State practice was inadequate. He wished

[6] See footnote 2 above.

[7] The replenishing station is provided for in article 3 of the Convention on the Protection, Utilisation, Recharge and Monitoring of the Franco–Swiss Genevese Aquifer, see *Yearbook … 2004*, vol. II (Part One), second report of the Special Rapporteur, document A/CN.4/539 and Add.1, annex IV, sect. C, pp. 271–272; para. 13.

to point out that his report had been prepared, not "early", as alleged, but during the time available to him having regard to his other professional commitments. He had personally and thoroughly researched current State practice, using his own extensive international law collection accumulated over 50 years of practice, as well as the resources of All Souls College, Oxford. Paragraphs 66 to 107 of his report contained numerous, well-documented references to State practice on practically every page. It was to be hoped that such professionally damaging statements would not be made in the future.

23. That being said, he was grateful to Mr. Gaja and other members of the Commission for their comments on matters of law, to which he would respond, as was appropriate, in his concluding statement.

24. Mr. GAJA said he regretted any misunderstanding that might have been caused by his comments. His reference to the early submission of the Special Rapporteur's report had been intended as a compliment, and he had certainly not meant to imply that the Special Rapporteur had not adequately researched the topic of existing State practice. Mr. Brownlie had been working on the question for many years, he had prompted the Commission to take up the topic, and it was perfectly natural that he had been appointed Special Rapporteur. He had simply wished to give it as his view that the Special Rapporteur could have entered into a fuller discussion of the correspondence between existing State practice and the proposed draft articles. He hoped that the apparent misconception about his comments would not mar what he regarded as a very pleasant and fruitful working relationship with the Special Rapporteur that extended back over many years.

25. Mr. ECONOMIDES said that, given the complex and sensitive nature of the topic of the effects of armed conflicts on treaties, the Commission should begin with a general discussion on how it should approach the subject, on the principles on which it should base its decisions and on an appropriate structure. The Commission should take every opportunity to undertake useful and constructive work on behalf of States and the international community at large, and the topic under consideration provided just such an opportunity, giving it a chance to argue the case against armed conflicts and for the continuing applicability of international treaties.

26. He agreed with the conclusion drawn in the memorandum by the Secretariat (A/CN.4/550 and Corr.1–2) that there were advantages to trying to make treaties resistant to armed conflict (para. 163). He felt that the Special Rapporteur had paid insufficient attention in his report to the Charter of the United Nations, Article 2 of which required all Members to settle their international disputes by peaceful means and to refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. The principle of the prohibition of the threat or use of force was the cornerstone of United Nations efforts to maintain international peace and security, and must not be ignored in the draft text.

27. The text should take as its starting point the objective fact that acts of aggression were illegal: in particular, the aggressor State should not be placed on an equal footing with a State exercising its right of individual or collective self-defence. In that connection, he believed that the text should draw on articles 7 and 9 of resolution II/1985 of the Institute of International Law on the effects of armed conflicts on treaties.[8] The Institute had wisely drawn a distinction between a State acting in self-defence and an aggressor State, stipulating that: "A State exercising its rights of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty incompatible with the exercise of that right, subject to any consequences resulting from a later determination by the Security Council of that State as an aggressor" (art. 7). The last phrase of that article, from "subject to any consequences" onwards, could be deleted, however, as the Security Council should know at any given time whether a State had committed an act of aggression. Indeed, under Article 51 of the Charter, self-defence was a temporary measure available until the Security Council had "taken measures necessary to maintain international peace and security", and the Security Council was expressly given responsibility for taking "at any time such action as it [deemed] necessary in order to maintain or restore international peace and security".

28. In article 9 of its resolution II/1985, the Institute of International Law stipulated that: "A State committing aggression within the meaning of the Charter of the United Nations and resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or suspend the operation of a treaty if the effect would be to benefit that State." The last phrase of that article, from "if the effect" onwards, should be either reworded or deleted in the text to be produced by the Commission.

29. The draft should be constructed on the basis of those two provisions, which, unfortunately, the Special Rapporteur had not seen fit to include.

30. Draft article 4, as proposed by the Special Rapporteur, made the intention of the parties to a treaty at the time it was concluded the prime criterion for terminating or suspending the treaty in cases of armed conflict. On that question he endorsed the comments made by Mr. Gaja at the previous meeting. Although that criterion had been given priority between the two world wars—for instance, in the work of Professor Constantin Eustathiades, an eminent Greek expert on the law of war and a former member of the Commission—it had lost most of its significance since the entry into force of the Charter of the United Nations, except in certain types of treaty such as those relating to international humanitarian law, and was no longer to be found in international treaties.

31. One of the first provisions to be discussed by the Commission should be the one currently contained in draft article 3 (*b*), according to which the outbreak of an armed conflict did not *ipso facto* terminate or suspend the operation of treaties as between one or more parties to the armed conflict and a third State. It should also be

[8] See 2834th meeting, footnote 7.

stipulated that the outbreak of an armed conflict did not *ipso facto* terminate treaties as between the parties to the armed conflict. However, the suspension of the operation of treaties as between the parties to an armed conflict should be dealt with separately, on the basis of the two articles from resolution II/1985 of the Institute of International Law to which he had already referred (para. 27 above).

32. It was also imperative that the draft should expressly stipulate that all treaties specifically related to armed conflict and international humanitarian law in the broad sense of those terms must be applicable, for humanitarian reasons, to the armed conflicts covered by the draft. The same applied to military agreements (*pacta bellica*) concluded in the course of the conflict.

33. The draft should include a provision similar to the one provided by the Special Rapporteur in draft article 7, listing all the treaties that could not be suspended by a State exercising its right of self-defence. As a minimum, the following types of treaties should be included in such a list: treaties establishing or regulating a permanent regime or status; treaties for the protection of human rights; treaties relating to diplomatic and consular immunity; treaties relating to the protection of the environment; law-making treaties; and treaties relating to the settlement of disputes. A provision should also be included to ensure that the suspension of the operation of those treaties was lifted as soon as possible after the end of a conflict.

34. Lastly, the Commission should consider including in the draft a provision similar to article 8 of the resolution of the Institute of International Law, which read:

> A State complying with a resolution by the Security Council of the United Nations concerning action with respect to threats to the peace, breaches of the peace or acts of aggression shall either terminate or suspend the operation of a treaty which would be incompatible with such resolution.

Such a provision would strengthen the United Nations system of collective security.

35. Mr. PELLET said it was unfortunate that the very useful memorandum by the Secretariat (A/CN.4/550 and Corr.1–2) concentrated largely on the English-language literature on practice and doctrine in relation to the effects of armed conflict on treaties; in this respect, he was grateful to the Special Rapporteur for taking a rather broader view of the literature. Unusually for a first report, the report before the Commission was hardly a "preliminary" report in that it presented a complete set of draft articles. The advantage of presenting the report in that way was that it would stimulate discussion and enable members and States to see at the outset what the Special Rapporteur had in mind. The disadvantage was that readers found themselves confined to a single perspective, often without access to the facts that would allow them to make a considered judgement of their own, although the Special Rapporteur did provide some background information in his commentary to some of the draft articles, particularly draft article 4. In the circumstances, he thought it would be premature to enter into detailed discussions on the individual draft articles, each of which, except for draft article 5, raised important problems. For that reason, he did not think it would be appropriate to consider referring the draft articles to the Drafting Committee at the current stage. Moreover, as the Special Rapporteur himself acknowledged in paragraph 13 of the report, the draft articles could be expected to attract comment from Governments and elicit information on State practice, which would enable the Commission to pursue its mission of clarifying the law.

36. He wished to make five general remarks. The first was that, in reading the report, he had often felt frustrated at the recurring claim that a point was "obvious" when he would personally have appreciated more information to allow him to draw his own conclusions. For example, paragraph 5 presented four very different rationales for the legal regime. The first of those rationales, according to which war by its very nature entailed the annulment of all treaties, could be dismissed out of hand, as it simply did not reflect reality. Of the other three rationales, only the third found favour with the Special Rapporteur: that of the intention of the parties at the time they concluded the treaty. That was also the only rationale whose validity was defended in the commentary to draft article 4 (paras. 29–35). The remaining two rationales were summarily dismissed because "the thinking [was] relatively unsophisticated and incoherent" and "the generalizations involved [tended] to be pre-legal and full of ambiguity" (para. 6). However, he personally found nothing absurd about the test of "compatibility with the purposes of the war or the state of hostilities" (para. 5 (*b*)). Indeed, that criterion was reflected in a number of the draft articles proposed by the Special Rapporteur. Moreover, he was strongly inclined to agree with Mr. Economides that the principle of the prohibition of the use of armed force, which had been rejected out of hand without really being discussed by the Special Rapporteur, could play a very important role in the draft text.

37. He was similarly surprised by the categorical rejection, in paragraph 40 of the report, of what the Special Rapporteur called the "extrajuridical thesis". Nor was he sure that the Special Rapporteur had correctly interpreted what he himself had written on that subject. It was obvious that war was not, in itself, a juridical phenomenon, in that it was not deliberately intended to produce legal effects, but it was equally obvious that it did produce such effects. That was the difference between a juridical act, which was intended to have legal effects, and a juridical event, which was an event that produced unintended legal effects. Unlike the Special Rapporteur, he saw no "major contradictions" in that distinction, and the very purpose of dealing with the topic seemed to him to be to determine the legal effects on treaties in force of events that took the form of armed conflicts and were by their very nature extrajuridical.

38. Nor could he see why it should be "evident" that the principle of intention would determine all the legal incidents of a treaty (para. 48). Of course, intention, or perhaps rather consent to be bound, was the basic principle governing the law of treaties—the principle of *pacta sunt servanda*, as referred to in article 26 of the 1969 Vienna Convention (para. 47). However, the grounds for the invalidity of treaties set out in articles 46 to 53 of the 1969 Vienna Convention were not all related

to consent or intention. Moreover, it was at least possible to draw an analogy between armed conflicts and the "supervening impossibility of performance" of a treaty (1969 Vienna Convention, art. 61) or a "fundamental change of circumstances" (art. 62). Although the Secretariat had addressed that central issue in its memorandum, the Special Rapporteur had taken no position on it in his report.

39. One must also raise the question, as did the memorandum by the Secretariat, how circumstances precluding wrongfulness, particularly *force majeure* (A/CN.4/550, paras. 127–135), were related to the topic under consideration. The law of responsibility and the law of treaties were two distinct sets of rules whose complex interrelationship had been highlighted, *inter alia*, by the "*Rainbow Warrior*" arbitration and the ICJ judgment in the *Gabčíkovo–Nagymaros Project* case. The existence of the two sets of rules was perhaps the reason why the Special Rapporteur, in paragraph 10 of his report, indicated that the approach taken in the law of treaties was the only one suited to the topic. A detailed explanation of that point in the report would not, however, have been superfluous. Even if one posited, on academic, theoretical grounds, a separation between the two sets of rules, that must not prevent the Commission from investigating the relationship between the topic and the law of responsibility, at the very least as a means of shedding some useful light on the subject.

40. His final cause for perplexity in relation to the report derived from paragraph 50, which indicated that the distinction between relations between the parties to an armed conflict and relations with, or between, third States was "obviously" significant, but only within the framework of the criterion of intention. In the absence of any explanation, he had to admit to not really understanding the reasoning behind that affirmation. It seemed to him that the distinction between parties to a conflict and third parties was important in terms both of the nature of the treaty and of the nature of the conflict.

41. Lest his position should be misconstrued, he stressed that he was not fundamentally hostile to the criterion of intention, but the other theories should not be discarded out of hand without being given serious consideration. Intention was not the sole criterion, and the Special Rapporteur himself seemed fundamentally to take that view, since draft article 7 was based not on the intention of the parties but on the object and purpose of the various types of treaties cited.

42. That led to his second general remark, concerning the criterion of intention, which was so central to the draft. He had no strong feelings as to whether it should indeed be central, but he firmly believed that no criterion should be applied to the exclusion of all others. He was troubled by the way the criterion of intention was used in the draft. In paragraph 47 of the report, the Special Rapporteur stated that the principle of intention promoted legal security. That was by no means obvious, for two reasons. First, it was far from easy to determine the intention of the parties to a treaty. Secondly, the reason for that difficulty was that in general, the parties had no intention at all: they simply did not envisage the possibility that armed conflict might break out, whether among themselves, among third parties, or in one of their territories, in the case of a domestic conflict.

43. It might of course happen that States had some idea that armed conflict was a possibility. That was obviously the case with treaties expressly applicable in case of an armed conflict, mentioned in draft article 7, paragraph 2 (*a*), and with the treaties mentioned in draft article 5, paragraph 1. Aside from the situations described in those two provisions, however, States did not generally have any intentions whatsoever regarding the possible effects on their treaty relations of an outbreak of armed conflict. In most cases, they concluded treaties on the assumption that they would remain at peace. Accordingly, their intentions were less relevant than the object and purpose of the treaty they had concluded. One might consider that the object and purpose of the treaty reflected their implicit intentions, but that was a fairly artificial intellectual construct and it would be more comprehensible and clearer to say plainly that in the absence of express intention, it was the object and purpose of the treaty that constituted the general guidance.

44. In draft article 4, paragraph 2, and draft article 9, paragraph 2, the Special Rapporteur suggested that for the purpose of determining the susceptibility of a treaty to termination or suspension in case of an armed conflict, or to resumption if it had already been suspended, the intention of the parties to a treaty should be determined in accordance with articles 31 and 32 of the 1969 Vienna Convention on interpretation of treaties, on the one hand, and with the nature and extent of the armed conflict, on the other hand. Those were two very different criteria, however, and the second, namely, the nature and extent of the armed conflict, had nothing to do with the intention of the parties. It seemed strange to use articles 31 and 32 of the 1969 Vienna Convention to determine the intention of parties to a treaty. On the contrary, in the case of article 31 it was the intention of the parties as reflected in the object and purpose of the treaty, and in the case of article 32 the *travaux préparatoires*, that made it possible to interpret the treaty. Referring to articles 31 and 32 amounted to circular reasoning: in order to determine the intention of the parties, one must base oneself on the intention of the parties.

45. His third general remark was on the scope of the draft articles, but went beyond consideration of draft article 1, entitled "Scope", which merely reproduced the title of the topic and gave no clear indication as to what the scope might actually be. The first problem was whether the draft applied solely to treaties that had already entered into force, or also to those signed but not yet in force. If the latter was the case, then a distinction should be made between contracting States within the meaning of article 2, paragraph 1 (*f*), of the 1969 Vienna Convention, and those that were not contracting States. Those issues should be dealt with in the draft.

46. A related problem was whether the draft covered capacity to conclude a treaty. Draft article 5, paragraph 2, seemed to indicate that that was the case, even if the indication was given in a very strange place: he could not see how paragraph 2 followed from or related to paragraph 1.

The issue of whether war had an impact on the capacity of States to conclude treaties should be covered in the draft.

47. Another problem relating to the scope concerned the very definition of armed conflict. In principle he favoured a broad definition, like the one proposed in draft article 2 (*b*). It should be expressly stated, however, that the draft articles covered both domestic and international conflicts, a view that the Special Rapporteur—who had noted that the distinction between the two was not always clear-cut—seemed to share, even though he had not incorporated such wording in the draft. Furthermore, he himself was not sure that the effects of domestic and international armed conflicts were necessarily the same in all cases, and he regretted the apparent absence of any subsequent reference to the distinction.

48. In paragraph 16, the Special Rapporteur stated that the definition of armed conflict included blockade, even in the absence of armed actions. It was difficult to reconcile that approach with the express mention made of armed operations in draft article 2 (*b*). That mention seemed, moreover, to leave some ambiguity as to whether situations infinitely more important in the contemporary world than blockade were covered by the draft. He was thinking in particular of the Arab–Israeli conflict. States, and not solely those that were directly involved, needed to know whether the draft articles applied to armed conflicts of that type.

49. The final problem with regard to the scope was the absence of answers to a number of very fundamental questions. Draft article 10, entitled "Legality of the conduct of the parties", indicated that the incidence—for which the French translation, "la conséquence", should be plural, not singular—of the termination or suspension of a treaty "shall not be affected by the legality of the conduct of the parties to the armed conflict according either to the principles of general international law"—presumably both *jus in bello* and *jus ad bellum*—"or the provisions of the Charter of the United Nations". It was hard, in the year 2005, not to ask whether the legality of the conduct of the parties did not play a role, and most probably a fundamental role, in the fate of the treaties concerned. It was precisely because of the thorny nature of the problem that, in 1963, the Commission had decided not to take the topic up.[9] The draft would be much more useful and interesting if it dealt with such thorny issues. In that respect he fully concurred with Mr. Economides: in 2005, one could hardly behave as if the law of war had undergone absolutely no changes. The issue of legality of conduct should be one of the key elements of the draft and must not simply be swept under the carpet by the use of a "without prejudice" clause in draft article 11. In any event it would be useful to know what States had to say about those questions, and an express request to that effect should be included in chapter III of the Commission's report, in which it listed specific issues on which comments would be of particular interest to it.

50. Another omission concerned treaties concluded by international organizations. Integration treaties, whether for the European Union or MERCOSUR, could not be entirely ignored.

51. His fourth general remark was that the draft failed to distinguish sufficiently between a variety of situations whose legal effects were very different. It would, for example, have been useful to make a distinction between international armed conflicts and domestic ones; between States parties to an international armed conflict and third—more specifically, neutral—States; between States that were parties to a treaty and those that were not but were parties to the conflict; between States parties and contracting States that had not ratified the treaty; between situations when a treaty was terminated owing to an armed conflict and those when its application was simply suspended; between the effects of an armed conflict on the provisions of a treaty that had already been executed, or were being executed, and those that had not been executed; and between the effects of an armed conflict on substantive provisions, on the one hand, and on final clauses or procedural provisions, on the other.

52. His final general remark was that treaties tended to be regarded in the draft as an integral whole. A more nuanced approach should be taken. From the memorandum of the Secretariat, especially paragraphs 153 *et seq.*, one could see that, especially in the case of complex treaties, not all the provisions were subjected to the same effects in the event of armed conflict. In a single treaty, some provisions might be suspended, while others were irremediably terminated and others again continued to be applied in full. He was thinking, *mutatis mutandis*, of the 1980 ICJ judgment in the *United States Diplomatic and Consular Staff in Tehran* case, in which the Court had clearly stressed the special character of the dispute settlement clauses in the event of a substantial breach of the treaty. That obviously raised the delicate issue of the separability of treaty provisions, but it was an issue central to the topic and one mentioned in the Secretariat memorandum (paras. 153–157).

53. One might go further: was the fundamental issue that of the effects of armed conflict on a treaty as a whole, on its distinct provisions, or on the obligations and rights flowing from the treaty? Article 63 of the 1969 Vienna Convention, entitled "Severance of diplomatic or consular relations", stipulated that severance "does not affect the legal relations established […] by the treaty". It was noteworthy that it was the "legal relations" that were not affected, not the treaty itself or its provisions. While he was not familiar with the genesis of that provision, he was quite sure that every word in it had been carefully weighed. The Commission would therefore do well to think carefully about the effects of armed conflicts on treaties: was it the treaty itself, its provisions individually and separately or, as he suspected was the case, the obligations flowing from the treaty that were affected? In some cases an armed conflict might suspend the obligations imposed by the treaty. Articles 57 and 65 of the 1969 Vienna Convention set forth procedures for the suspension of a treaty, procedures that were hardly compatible with armed conflict situations. The problem did not arise if one acknowledged that it was not the treaty or its provisions whose application was suspended, but rather the obligations arising from those provisions or, to

[9] See *Yearbook ... 1963*, vol. II, document A/5509, p. 189, para. 14.

use the language of article 63 of the 1969 Vienna Convention, the legal relations established between the parties to a treaty. If the issue was indeed the effects on obligations arising from a treaty, that seemed to shed a special light on the topic, which could then no longer be envisaged solely from the standpoint of the law of treaties: a substantial element of the law of responsibility was also involved. That issue needed to be given serious consideration.

54. In concluding, he thanked the Special Rapporteur for having submitted a thought-provoking report which, nevertheless, left some important issues in the dark. The problems that the Special Rapporteur had raised, and some that he had not, must now be discussed thoroughly. Judging from paragraph 13 of the report, that was the objective that the Special Rapporteur had set himself. In any event, problems of principle stood in the way of adopting a package of draft articles at the present stage.

55. Mr. DUGARD congratulated the Special Rapporteur on his first report. It was an admirable achievement to have submitted a complete set of draft articles, thereby enabling the Commission to have a full picture right from the outset, rather than having to wait for new articles to be submitted each year. The report was thoroughly researched and clearly presented, and he agreed with the general approach adopted, in particular with regard to the use of force.

56. He had two suggestions to make on the draft as a whole. The first had to do with the relevance of municipal court decisions. Such decisions were a source of international law, albeit a subsidiary one. In some branches of international law they were of little assistance, whereas in others they were very important, for example for the development of customary international law in respect of restrictive immunity for acts *jure gestionis* in the field of sovereign immunity. The Special Rapporteur took the view that the law governing the effect of armed conflicts on treaties fell within the category of international law which was not influenced by municipal court decisions. In paragraphs 20, 44 and 105 of the report he stressed that he did not find such decisions to be of much assistance, that they were a problematic source and that they generally depended on the explicit guidance of the executive. He disagreed with that approach. Municipal courts had frequently considered the effect of armed conflicts on treaties. It was true that those decisions were not consistent, but the development of the law relating to the restrictive approach to sovereign immunity showed the same inconsistency, as did other forms of State practice, in particular Government statements. Whereas countries such as the United Kingdom and the former Soviet Union had resisted the changes in other municipal court jurisdictions and had preferred to retain the absolute approach, other jurisdictions had taken the restrictive approach. In his opinion, municipal court decisions provided helpful evidence of State practice—of the intention of parties in respect of certain kinds of treaty and the effect of the nature of a treaty on that treaty's survival. The importance of such decisions was borne out by the Secretariat memorandum (A/CN.4/550 and Corr.1–2), which referred to a number of cases, such as the *Techt* v. *Hughes* and *Clark* v. *Allen* cases in the United States (para. 11) and also cited decisions on extradition treaties, such as those in the *Gallina* v. *Fraser* (footnote 233) and *Argento* v. *Horn et al.* (footnote 9) cases, which had recently been followed by the South African courts. The memorandum also contained references to Italian, Greek and a host of other municipal court decisions. Indeed, the Special Rapporteur himself referred to municipal court decisions, citing Whiteman's *Digest of International Law* at great length (paragraph 78 of the report) and *Masinimport* v. *Scottish Mechanical Light Industries Ltd.* (para. 105). He urged the Special Rapporteur to reconsider his view that municipal court decisions were of little assistance.

57. His second suggestion related to the need to include some reference to the nature of a treaty. The Special Rapporteur regarded the intention of the parties as the key to the question of which treaties were to survive an armed conflict; he did, however, cite a number of authors who argued that the nature of the treaty should be considered. In paragraph 33 of the report, for example, Lord McNair was quoted as saying that "the nature of the treaty is clearly the best evidence of the intention of the parties"; a similar point was made by Fitzmaurice (para. 34). The Special Rapporteur also cited Hurst (para. 32), according to whom "[t]he cases that present difficulties are where the treaty provides no clear indication of the intentions of the parties, and where that intention must be presumed from the nature of the treaty or from the concomitant circumstances". It was therefore strange that the Special Rapporteur declined to include a reference to the nature of the treaty in his draft. In Mr. Dugard's own view, articles 4 and 9 should refer not only to the nature of the armed conflict, but also to the nature of the treaty as evidence of the intention of the parties. That would be more helpful than a reference to articles 31 and 32 of the 1969 Vienna Convention, and in that connection he associated himself with the comments made by Mr. Gaja and Mr. Pellet.

58. It was odd that the Special Rapporteur did, in fact, stress in draft article 7, paragraph 1, that the object and purpose of the treaty must be taken into account. Was that not much the same as stressing the importance of the nature of the treaty? After all, the object and purpose of the treaty were part of the nature of the treaty. It would therefore be more appropriate to refer to the nature of the treaty. In paragraph 62, the Special Rapporteur seemed to accept that position, because he wrote that "a major aspect of the treatment in the literature is the indication of categories of treaties in order to identify types of treaty which are in principle not susceptible to suspension or termination in case of armed conflict". The Special Rapporteur's position was therefore ambivalent. It was worth noting that article 3 of resolution II/1985 of the Institute of International Law also referred to the "nature or purpose" of the treaty.

59. On the articles themselves, his first comment related to article 2 (*b*) and the definition which the Special Rapporteur had taken from the Institute of International Law. There was now a widely accepted definition of armed conflict which was not that of the Institute, and he referred in that connection to the decision in the *Tadić* case of the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia, in which the Court had found that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence

between governmental authorities and organized armed groups or between such groups within a State" (para. 70 of the decision). While that definition took no account of the treaty element considered in the Institute of International Law's definition, it was now the definition of armed conflict most frequently cited, particularly in international criminal law, and the Commission could not ignore it.

60. He was pleased that the Special Rapporteur had drawn attention to the problem of military occupation unaccompanied by protracted armed violence or armed operations. As Mr. Pellet had rightly pointed out, that was an important question in the context of the Middle East. However, he would not have expected the Special Rapporteur to go into the complexities of the Middle East conflict, an approach that would certainly lead to additional difficulties.

61. With regard to article 3, he had no objection to using the word "necessarily", but hoped that it was not used simply to avoid the Latin term "*ipso facto*". The Commission should not be hostile in principle to Latin expressions.

62. Article 4 should include a reference to the nature of the treaty in a new subparagraph 2 (*c*); the reference to the Vienna Convention on the Law of Treaties in subparagraph 2 (*a*) should perhaps be deleted.

63. On draft article 7, the long list of types of treaty which the Special Rapporteur had provided simply confirmed his own view that account should be taken of the nature of the treaty. The Secretariat memorandum had referred to a number of additional types of treaty, for example extradition agreements, and there was a host of municipal court decisions on the subject. Other categories should also be included; for instance, in its resolution II/1985 the Institute of International Law had referred to treaties establishing international organizations (art. 6). It was not clear from the report whether that category was covered by the Special Rapporteur's reference to multilateral treaties.

64. His comments on article 4 applied equally to draft article 9. He had no difficulties with draft articles 10 to 14. On article 11, the Commission should perhaps in due course pay greater attention to the effect of Security Council resolutions and of Article 103 of the Charter of the United Nations on treaties, even if that went beyond the scope of its current mandate.

65. He was not quite sure how to interpret paragraph 13 of the report. He did not think that the Special Rapporteur was suggesting that the Commission should approve all the draft articles as they stood and forward them to States for comments: the Commission had a responsibility to consider the articles before they were transmitted to States, and the response of States was not always very helpful, particularly if the Commission had not itself digested the principles. In his view, the Commission should at least consider referring some of the draft articles, perhaps articles 1 to 3, to the Drafting Committee at the present session. The Special Rapporteur could then reconsider the other provisions, with or without the benefit of a working group.

66. Mr. PELLET, referring to the Arab–Israeli conflict, said he had emphatically not proposed that the Commission should examine that issue in detail. He had simply argued that the draft should indicate whether or not it was applicable in such a case. In his view, the Special Rapporteur was too cautious and abstract with regard to that conflict. Special rapporteurs should not be afraid to address specific situations in their reports.

67. As to paragraph 13, the mere fact that the draft was not referred to the Drafting Committee did not mean that States could not comment on it. In the first place, all relevant ministries received copies of the Special Rapporteurs' reports; secondly, it was common practice for the report of the Commission to reproduce the articles discussed in footnotes.

68. Mr. PAMBOU-TCHIVOUNDA said he was wholly dissatisfied with the report on the effects of armed conflicts on treaties, which could have provided the Special Rapporteur with an opportunity to elaborate on the law of treaties, as regulated in the 1969 and 1986 Vienna Conventions. The definition of a treaty was already established, and he was not certain that it was needed in the current draft. Draft article 4, with its references to articles 31 and 32 of the 1969 Vienna Convention, was also well established, though it probably had a place in the draft, because the Special Rapporteur had based his argument on the notion of the intention of the parties. He wondered, however, whether the provisions on the interpretation of treaties were the best way of tackling the question. Article 6 left open questions concerning the regime of nullity, and, indeed, concerning the very purpose of the draft.

69. With regard to the method, the basic issues did not clearly emerge from the report, so that it was not apparent why the Commission had chosen to take up the topic, or whether it had been right to do so. The whole subject had been diluted by the Special Rapporteur's failure properly to develop his approach to the topic.

70. The very notion of "effects" had not been explained, although it was the key to the subject, regardless of whether a restrictive or a broad approach was taken. Since recourse to war was prohibited by international law—unless one agreed with the line taken in article 10, which he did not—except in the cases of authorization by the Security Council and self-defence, the question was whether the violation of said prohibition by a State which resorted to war entailed consequences—as distinct from "effects"—for that State, by virtue of its breach of an obligation under general international law. In that context, the subject should have established a link with the law of State responsibility, not just with the law of treaties. The notion of "effect" could then have been clarified by linking it with the notion of "consequence".

71. Even if the Commission focused solely on the effects dealt with by the Special Rapporteur, namely, the suspension or termination of a treaty, there was every reason to ask what consequences such suspension or termination might have either for the parties themselves, owing to their commitments under the treaty, or *vis-à-vis* third, neutral, parties. All those questions were left open in the report. It would have been useful for the Commission to

have received more information on those matters. He was dismayed not to have found replies to those preliminary considerations in the report, which failed to provide either a method, an approach, a definition of the subject or a discussion of the issues.

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

[Agenda item 1]

72. The CHAIRPERSON said that if he heard no objection he would take it that the Commission wished to establish a Working Group on Transboundary Groundwaters.

It was so decided.

73. The CHAIRPERSON invited members who wished to participate in the Working Group to inform the Special Rapporteur on the topic of their interest.

74. He announced that it had also been proposed to hold a joint meeting of the Commission and the European Society of International Law on 27 May 2005 at 3 p.m., on the subject of the responsibility of international organizations. More than 100 members of the Society, including its president, Judge Simma, proposed to attend. Preliminary arrangements had already been made for that important event. If he heard no objection he would take it that the Commission agreed to the holding of that meeting.

It was so agreed.

The meeting rose at 12.45 p.m.

2837th MEETING

Thursday, 12 May 2005, at 10 a.m.

Chairperson: Mr. Djamchid MOMTAZ

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

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

[Agenda item 8]

First report of the Special Rapporteur (*continued*)

1. Mr. KOSKENNIEMI commended the Special Rapporteur for preparing a comprehensive set of draft articles which gave an overview of the topic and placed the articles in the public domain so as to elicit practical comments from Governments.

2. Like Mr. Gaja, he had initially been surprised at the peremptory tone of some of the Special Rapporteur's statements. In the introduction, after introducing four theories without explaining where they came from, the Special Rapporteur declared, in paragraph 6, that they were not of great assistance. Later, in paragraph 20, he said that the decisions of municipal courts were "not of much value". In paragraph 64, he spoke of "the available material, which is substantial", but gave no further details. However, the most striking statement was the one in paragraph 16, where he said: "There can be no doubt that the work of the Commission will be much delayed if a high level of sophistication is sought." The Special Rapporteur was clearly relying on his readers' willingness to take him on faith. He had undoubtedly rendered a great service to the Commission by submitting such a clear and forceful draft, but the Commission needed to decide if it was fully acceptable before sending it to the Drafting Committee.

3. It was unfortunate that whenever it approached a new topic the Commission did not give greater consideration to the overall direction of its work. It might ask, for example, what alternative solutions there were to the question of the effects of armed conflicts on treaties, what the repercussions of such alternatives might be in specific situations, such as the Israeli–Palestinian conflict, and what issues were at stake. All those points deserved to be discussed; otherwise the work of codification was in danger of being reduced to the drafting of a collective work on the law of treaties. That comment was not a criticism of the Special Rapporteur but was directed at the Commission's general methods of work.

4. The main problem was that an armed conflict was such a major, overwhelming event that when one occurred, the fate of treaties was of secondary importance. It was unlikely that those willing to breach the prohibition of the use of force would be impressed by a few rules on treaties. Moreover, against a background of death and destruction, formalism was out of place. The Commission needed to be both realistic and very sensitive if it expected compliance with the rules under consideration.

5. He had initially thought, like most members who had spoken before him, that the concept of "intention" was as general as the concepts of "reasonableness" or "equity", and that it was not a very useful one for jurists whose task was to determine what would become of a given treaty. On reflection, however, he thought that the reference to the fiction of intention actually made it possible, by introducing some flexibility, to take the context of a given situation into account and, consequently, to preserve the realism and effectiveness that had been mentioned.

6. According to draft article 4, paragraph 2 (*b*), draft article 5 and draft article 7, paragraph 1, intention was to be determined on the basis of the nature of the armed conflict, the express provisions of the treaty, and the object and purpose of the treaty. A list of examples of treaties that should remain in force was given in draft article 7, paragraph 2. That was the most important provision, as it provided the basis for any hypothesis about intention.

* Resumed from the 2834th meeting.