

Document:-  
**A/CN.4/2905**

**Summary record of the 2905th meeting**

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

Extract from the Yearbook of the International Law Commission:-  
**2006, vol. I**

*Downloaded from the web site of the International Law Commission  
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52. The inter-American system had gone a very long way in proclaiming the right to democracy. The countries of the Americas had made signal efforts to institute democracy where it had not existed previously and to preserve it where it did exist, not always without difficulty. When democracy was under threat, OAS acted immediately, something which in the past would have been considered interference. In practice, however, it was not easy for a country in the grips of poverty to remain democratic. Democracy and development were interdependent. Hence the dilemma referred to by some OAS members: the Charter of the Organization of American States obligated States to be democratic, but it also called on them to cooperate for development. The problem was to determine to what extent a State could be obligated to cooperate for development and what sanctions could be imposed on it for not respecting that obligation. That was the question being considered by the Inter-American Juridical Committee. Even if the question was resolved through legal measures, such as the adoption of an inter-American social charter, however, the true response would, as always, be fundamentally political.

53. Mr. PELLET, referring to cooperation between the members of OAS and the International Criminal Court, asked whether the Inter-American Juridical Committee had tried to find ways of resisting the pressure brought to bear by the United States for the conclusion of bilateral agreements to enable its nationals to escape the Court's jurisdiction.

54. Mr. HUBERT (Vice-Chairperson, Inter-American Juridical Committee) said that the question had been raised, but only very discretely. Members of the Inter-American Juridical Committee were elected in their personal capacity and so—theoretically—they did not represent their countries. The Committee considered that such bilateral agreements were contrary to the development of international law and the universal will that had been the basis for the establishment of the International Criminal Court, but its position on the matter had not yet been definitively stated.

55. Mr. Sreenivasa RAO paid a tribute to the Inter-American Juridical Committee for the work it had done during a century of existence. The legal traditions of the countries of the Americas were a source of inspiration and encouragement for the countries of Africa and Asia, which were confronted with the same problems of poverty and the struggle for democracy. It was to be hoped that, together, those countries would be able to give the relationship between democracy and development a specific colour and content which would promote a more just world order.

56. Mr. HUBERT (Vice-Chairperson, Inter-American Juridical Committee) said it was gratifying to learn that the Inter-American Juridical Committee's efforts were appreciated. In an increasingly smaller world, whatever each isolated individual did affected all others and, when those effects were positive—something that was unfortunately not always the case—then that was very much to be welcomed.

57. Mr. CHEE, referring to the interdependence between democracy and development, said it must be kept in

mind that democracy was weakened by economic crises and war and that the rule of law was needed to back up democracy. Often, it was the weakest Governments that had the longest constitutional texts, whereas one of the greatest democracies in the world, Great Britain, had no written constitution at all.

58. Mr. HUBERT (Vice-Chairperson, Inter-American Juridical Committee) said it was indeed true that democracy lay not in a constitution or a set of laws, but in the constant interrelationship between a people and its leaders, who must serve the people, and not themselves. Nor was there one single model of democracy. It was not enough for a State to proclaim itself democratic and, conversely, some countries that might be considered totalitarian might argue that their populations enjoyed a certain well-being and standard of development. The basic principle was nevertheless that the people must decide and be able to change the Government if it was unsuitable.

*The meeting rose at 1.05 p.m.*

## 2905th MEETING

*Thursday, 3 August 2006, at 3 p.m.*

*Chairperson:* Mr. Guillaume PAMBOU-TCHIVOUNDA

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

### **Draft report of the International Law Commission on the work of its fifty-eighth session (*continued*)\***

#### **CHAPTER VI. *Shared natural resources (continued)*\***

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

#### **2. TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (*continued*)**

*Commentary to draft article 2 (Use of terms)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

*Paragraph (2) was adopted with a minor editing amendment suggested by Mr. Brownlie.*

\* Resumed from the 2903rd meeting.

Paragraphs (3) to (6)

*Paragraphs (3) to (6) were adopted.*

Paragraph (7)

1. Mr. GAJA said that, in the penultimate sentence, the statement that “[a]n absolute criterion for negligibility does not exist since it would depend on the size of aquifers” did not follow logically, because the criterion could be expressed in the form of a percentage, so that size would be immaterial. More troubling were the references to the population relying on such aquifers and to alternative sources of waters. Those criteria were relevant to problems of utilization, but should not be addressed when defining the term “recharging aquifer”. He suggested deleting the last two sentences.

*Paragraph (7), as amended, was adopted.*

Paragraph (8)

2. Mr. BROWNLIE drew attention to a grammatical error in the English version.

3. After a procedural discussion in which Mr. YAMADA (Special Rapporteur), Ms. ESCARAMEIA, Mr. KATEKA, Mr. CANDIOTI, Mr. GAJA, Mr. MANSFIELD, Mr. DAOUDI and Mr. MIKULKA (Secretary to the Commission) took part, the CHAIRPERSON reminded members that all corrections of a purely linguistic or technical nature should be submitted in writing to the Secretariat.

*Paragraph (8) was adopted.*

Paragraph (9)

*Paragraph (9), as amended by document A/CN.4/L.694/Add.1/Corr.1, was adopted.*

*The commentary to draft article 2, as amended, was adopted.*

*Commentary to draft article 3 (Sovereignty of aquifer States)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

4. Mr. GAJA said that the text of the first sentence would be clearer if the words “this subject” were replaced by “the sovereignty of States over natural resources located within their territory”.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

5. Mr. PELLET said he had a problem with the fourth sentence, which read “However, this sovereignty is not absolute”. Sovereignty, by its very nature, was never absolute. The words “the rights relating to” or “the rights stemming from” should be inserted before “this sovereignty”, or the sentence amended to read “the exercise of the rights stemming from this sovereignty is not discretionary”.

6. Mr. BROWNLIE agreed with Mr. Pellet. While it was a truism that the articles would have to be interpreted and applied against the background of general international law, that was the point which must be made. There was no need to go into the question of whether sovereignty was or was not absolute, and he therefore suggested deleting the entire sentence.

*Paragraph (3), as amended, was adopted.*

*The commentary to draft article 3, as amended, was adopted.*

*Commentary to draft article 4 (Equitable and reasonable utilization)*

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

7. Mr. GAJA said he was unhappy with the wording of the last sentence. It seemed strange to imply that depletion was a benefit. Perhaps it would be sufficient for the sentence to read: “A controlled and planned depletion could be considered.”

8. Mr. MANSFIELD suggested the formulation: “In some circumstances, a controlled and planned depletion could be considered.”

9. Mr. PELLET said that the words “over a specific period of time”, in the fourth sentence, should read “over a long period of time”. On a more fundamental point, he noted that the last sentence of paragraph (2) of the commentary to article 7 stated that “the general principle of ‘sustainable development’ ... should be distinguished from the concept of ‘sustainable utilization’ which might be alluded to in the context of draft article 4”. However, the commentary to article 4 made no reference to sustainable utilization. Thus, a sentence should be inserted at the end of paragraph (5) of the commentary to article 4 to explain the idea of sustainable utilization, so as to make the reference in paragraph (2) of the commentary to article 7 more meaningful.

10. Mr. GAJA pointed out that paragraph (4) of the commentary to article 4 already contained references to sustainable utilization. The intended reference was to paragraph (4), not to paragraph (5).

11. Ms. ESCARAMEIA asked for clarification of the relation between the words “specific period”, in the fourth sentence, and “specified period”, in the fifth. The answer to her question might have a bearing on Mr. Pellet’s proposal to amend the words “specific period” to “long period”.

12. Mr. YAMADA (Special Rapporteur) said that, in the case of aquifers, a more appropriate concept than “sustainability” was “maximization of long-term benefits”. Those benefits could be maximized for a specific period of time, but not indefinitely. On that understanding, he could go along with Mr. Pellet’s proposal to change the phrase “over a specific period of time” to “over a long period of time”.

13. Mr. PELLET suggested that, in the light of the Special Rapporteur's explanation, the sentence should be reworded to read: "... over a long period of time, it being understood that utilization can be only for a specified period". Such a formulation would also meet Ms. Escameia's concern, in that it provided a link between the two sentences.

14. Mr. MANSFIELD said that, as explained earlier in the text, the problem was that, in many cases, even if there was a recharge level, it might be insufficient for an aquifer to be maintained indefinitely. In those circumstances, it would be necessary to try to maximize the long-term benefits. He therefore suggested that the sentence should be reformulated to read: "... over a long period of time, in circumstances where recharge levels are such that the resource cannot be maintained indefinitely".

15. The CHAIRPERSON said that a reference to recharge levels might be out of place in the commentary to a draft article relating to equitable and reasonable utilization.

16. Following a discussion in which Mr. MANSFIELD and Mr. CHEE took part, Mr. YAMADA (Special Rapporteur) proposed the formulation "over a long period of time, it being understood that utilization cannot be maintained indefinitely".

*Paragraph (5), as amended, was adopted.*

Paragraph (6)

*Paragraph (6) was adopted.*

Paragraph (7)

17. Mr. PELLET said that the words "to be" should be deleted from the phrase "to be formulated in later draft articles", and that the draft articles in question should be specified in a footnote.

*Paragraph (7), as amended, was adopted.*

*The commentary to draft article 4, as amended, was adopted.*

*Commentary to draft article 5* (Factors relevant to equitable and reasonable utilization)

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

18. Mr. KATEKA said that, as a non-scientist, he found the technical language in paragraph (2) and other paragraphs of the commentary difficult to understand. He therefore wondered whether the wording could be simplified for the benefit of the layperson. Perhaps the technical terms could be explained in a footnote.

19. Mr. YAMADA (Special Rapporteur) said that the success of the draft articles depended on cooperation between lawyers and scientists. He appreciated that

the parts of the commentary aimed at scientists and administrators were difficult for lawyers to understand. In response to comments from Mr. DAOUDI, Mr. PELLET, Mr. Sreenivasa RAO and Mr. MANSFIELD, he said he would do his best, with the Secretariat's assistance, to produce a glossary of technical terms in the form of a separate document.

*On that understanding, paragraph (2) was adopted.*

Paragraphs (3) and (4)

*Paragraphs (3) and (4) were adopted.*

Paragraphs (5) and (6)

20. Mr. GAJA said that the first few words of the fourth sentence of paragraph (5) ("There was also a strong request that") and the whole of paragraph (6) were concerned solely with the history of the Commission's discussions of the topic. They thus had no place in the commentary and should be deleted.

*Paragraph (5), as amended, was adopted.*

*Paragraph (6) was deleted.*

*The commentary to draft article 5, as amended, was adopted.*

*Commentary to draft article 6* (Obligation not to cause significant harm to other aquifer States)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

Paragraph (5)

21. Mr. GAJA said that the first sentence of the paragraph dealt with the history of the text, which should have no place in the commentary.

22. Mr. YAMADA (Special Rapporteur) explained that his original proposal to the Working Group had included the limiting qualifier "in their territories". The Working Group had, however, taken the view that there might be some very rare cases in which a State might engage in an activity outside its territory on the basis of an agreement with another State. The limiting phrase "in their territories" had therefore been deleted. The main purpose of paragraph 2 was to cover activities undertaken within the aquifer State. The meaning might be clarified by the insertion in the last sentence of paragraph (5) of the word "mainly" before "intended".

23. After a drafting discussion in which Mr. GAJA, Mr. CANDIOTI, Mr. MELESCANU, Mr. Sreenivasa RAO, Mr. PELLET and Ms. ESCAMEIA took part, Mr. MANSFIELD proposed that the first sentence of paragraph (5) should be deleted and that the remainder of the paragraph should read, "This draft article is mainly intended to cover activities undertaken in a State's own territory. The scenario where an aquifer State would cause harm to another State through an aquifer by engaging in activities outside its territory is considered unlikely, but is not excluded."

*Paragraph (5), as amended, was adopted.*



Paragraph (6)

*Paragraph (6) was adopted.*

*The commentary to draft article 6, as amended, was adopted.*

*Commentary to draft article 7 (General obligation to cooperate)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

24. Mr. PELLET said that, at the end of the paragraph, the reader was directed to draft article 4; yet, in paragraph (4) of the commentary to draft article 4, it was stated that sustainable utilization did not apply to aquifers. The inconsistency between the two paragraphs would need to be cleared up.

25. Mr. YAMADA (Special Rapporteur) said that the reference to sustainable development in paragraph (2) had the aim of ensuring that there was no confusion in the reader's mind between the concepts of "sustainable development" and "sustainable utilization", the latter of which might be alluded to in the context of draft article 4.

26. Mr. PELLET said there was no need to refer to the context of draft article 4. If a reference were needed, it should be to the 1997 Watercourses Convention and should take the form of a footnote.

27. Mr. YAMADA (Special Rapporteur) proposed the deletion of the phrase "which might be alluded to in the context of draft article 4" and the addition of a footnote referring the reader to paragraph (4) of the commentary to article 4.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

*Paragraph (3) was adopted.*

Paragraph (4)

28. Mr. MOMTAZ asked on what basis the assertion had been made that, in a few years, the commissions for delineation and monitoring would become responsible for transboundary aquifer management. Was it really certain that those commissions would carry out those duties? He also noted that all the "water commissions" mentioned in the first sentence were in fact "river commissions".

29. Mr. YAMADA (Special Rapporteur) said that the assertion was based on information provided by experts engaged in groundwaters management in Europe. The usual course of events was that, as a first stage, river commissions were set up. Thereafter, close cooperation at that level would lead to the establishment of bilateral cross-border commissions, which usually commenced their work with exchanges of information and monitoring activities, which ultimately developed cooperation on management.

30. Mr. PELLET said that the source of an assertion with such serious implications for the future should be identified in a footnote, as should the source of the affirmation that comparable regional organizations would soon play a role in promoting the establishment of similar joint mechanisms.

31. Mr. KATEKA proposed that the phrase "in a few years" should be replaced with "in the future".

32. Mr. CANDIOTI asked whether "delineation" was the correct term. "Demarcation" seemed more appropriate.

33. Mr. YAMADA (Special Rapporteur) said he had taken the term from the European Union Water Framework Directive.

34. Ms. ESCARAMEIA said that the descriptor "river" applied only to the commissions mentioned in the first sentence of paragraph (4), and that some of the commissions referred to elsewhere in the paragraph were concerned with the management of waters other than rivers.

35. Mr. CANDIOTI proposed amending the words "existing water commissions", in the third sentence, to read "existing commissions".

36. Mr. ECONOMIDES pointed out that the term "river commissions" was appropriate only when the watercourses in question were navigable. In all other cases, the correct term was "water management".

*Paragraph (4), as amended, was adopted.*

*The commentary to draft article 7, as amended, was adopted.*

*Commentary to draft article 8 (Regular exchange of data and information)*

Paragraphs (1) to (7)

*Paragraphs (1) to (7) were adopted.*

*The commentary to draft article 8 was adopted.*

*Commentary to draft article 9 (Protection and preservation of ecosystems)*

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

Paragraph (4)

37. Mr. GAJA said that the first sentence should be amended to read: "The obligation of States to the taking of 'all appropriate measures' is limited to the protection of relevant ecosystems."

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted.*

*The commentary to draft article 9, as amended, was adopted.*

*Commentary to draft article 10 (Recharge and discharge zones)*

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

38. Mr. GAJA said that the paragraph should end after the fourth sentence in order to eliminate the long account of the history of the formulation of paragraph 2.

39. Mr. CANDIOTI said that, in the second sentence, the words “could be located in an aquifer State” should be amended to read “could be located in a State”.

40. Mr. ECONOMIDES said that if Mr. Candiotti’s amendment were adopted, the second and third sentences would then appear to be identical in meaning.

41. Ms. XUE, speaking as a member of the Commission, said that, while paragraph (3) did indeed touch on the history of the Commission’s debate, it also enabled the reader to understand the rationale behind the Commission’s decision to include an obligation on all States in whose territory a recharge or discharge zone was located to cooperate with the aquifer States to protect the aquifer or aquifer system. She was therefore in favour of retaining the last four sentences.

42. Mr. CANDIOTI agreed with Ms. Xue as to the usefulness of outlining the Commission’s thinking in the commentary to draft articles adopted on first reading.

43. Mr. GAJA said that the point had already been made in paragraph (4) of the general commentary. There was no need to repeat the argument or to say that the obligation had not been mentioned in the Special Rapporteur’s original proposal and that the Commission had subsequently inserted it.

44. Ms. ESCARAMEIA agreed with Ms. Xue and Mr. Candiotti that the last four sentences ought not to be deleted. The Commission had debated the matter at great length and had taken a fundamental decision in including the obligation in question. At the stage of a first reading, she could see no reason why it should not be possible to refer to the history of the text and to divergences of opinion with regard to it. The commentary ought to reflect the differing views and the fact that no consensus had been reached.

45. Mr. CANDIOTI said that although it was true that the idea was already reflected in paragraph (4) of the general commentary, it was usefully fleshed out in the paragraph now under discussion. The explanation that the obligation to cooperate was opposable only to third States that might become parties to a future convention, but not to third States in general, was an important point and should be retained. While he would not go against a decision to delete that wording, he thought that such explanations were useful in a text adopted on first reading.

46. Mr. GAJA, responding to Ms. Escarameia’s comments, said he was not suggesting that divergences of views should not be mentioned. There had been no

divergence of views, however—in fact, there had been consensus in the Working Group. Anyone wishing to learn the history of the Commission’s deliberations could do so by consulting the summary records. Moreover, a convention on transboundary aquifers was only one possible outcome of the Commission’s work. The draft articles might instead be regarded as reflecting what might one day be regarded as general international law, in which case it would be unnecessary to explain why they were binding even on States that did not become parties to such a convention. If the Commission wished to retain much of the text, it could perhaps consider deleting the reference to the Special Rapporteur’s original formulation.

47. Mr. YAMADA (Special Rapporteur) said the issue revolved around the Commission’s policy for drafting commentaries to texts adopted on first reading. Commentaries to texts adopted on second reading primarily explained the content, but in the case of a first reading, the purpose was also to solicit observations and comments from Governments. Nevertheless, in view of the point raised by Mr. Gaja, he could agree to delete the reference to his original proposal.

48. The CHAIRPERSON, speaking as a member of the Commission, suggested a simplified version of the lengthy general explanation which, as he understood it, was aimed at facilitating protection of the aquifer system.

49. Mr. VALENCIA-OSPINA said that another alternative would be simply to delete the phrase “as originally formulated by the Special Rapporteur”.

50. Ms. XUE (Special Rapporteur) said that while she was sympathetic to Mr. Gaja’s concerns, she felt that the final three sentences of the paragraph contained substantive elements that should be conveyed to the reader. Having heard all the viewpoints expressed, she wished to propose deleting the portion of the text beginning with the words “it is necessary”, in the fourth sentence, and ending with the word “Accordingly”, at the start of the penultimate sentence. The fourth sentence would thus read: “Considering the importance of the recharge and discharge mechanism for the proper function of aquifers, it was decided to include an obligation on all States in whose territory a recharge or discharge zone is located to cooperate with aquifer States to protect the aquifer.” The final sentence would remain unchanged.

*Paragraph (3), as amended, was adopted.*

*The commentary to draft article 10, as amended, was adopted.*

*Draft article 11 (Prevention, reduction and control of pollution)*

51. Mr. PELLET said that while he was aware that the text of the article itself was not under discussion, he wished to draw attention to a major problem with the French and also, apparently, the Spanish language version. The expression “a precautionary approach”, in the English text of draft article 11, was rendered as “*une approche de précaution*” in the text of the draft article as reproduced in Section C, paragraph 1 of document A/CN.4/L.694/Add.1 (page 6 of the French version) but as “*une attitude prudente*” in the text of the draft article

as reproduced in section C, paragraph 2 (page 42 of the French version). That was an inexcusable discrepancy. Comparably serious problems of translation had arisen on a number of occasions during the current session, to the extent that it was no longer possible for the Commission to take it for granted that its documentation had been properly translated. He wished to lodge the strongest possible formal protest at that state of affairs, which led to confusion in the plenary and totally undermined the credibility of the Commission's work.

52. The CHAIRPERSON said that the article's wording in paragraph 2, "Text of the draft articles with commentaries thereto", would be aligned with that in paragraph 1, "Text of the draft articles", in all language versions in which it was necessary.

*Commentary to draft article 11* (Prevention, reduction and control of pollution)

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

53. Mr. KATEKA pointed out that the ninth sentence, which read "This practice indicates general willingness to tolerate even significant pollution harm, provided that an aquifer State of pollution origin is making its best efforts to reduce the pollution to a mutually acceptable level", gave the impression that the Commission was condoning or encouraging pollution. It should be deleted.

*Paragraph (2), as amended, was adopted.*

Paragraphs (3) to (5)

*Paragraphs (3) to (5) were adopted.*

Paragraph (6)

54. Ms. ESCARAMEIA said that the fifth sentence implied that all members of the Commission thought "it would be better to avoid conceptual and difficult discussions concerning the expression 'precautionary principle'". Some, however, had wanted an article on the precautionary principle to be included, even though the Commission had ultimately decided against it. She therefore proposed that the words "The majority of members of the Commission considered that" should be inserted at the beginning of the sentence, before "it would be better".

*Paragraph (6), as amended, was adopted.*

*The commentary to draft article 11, as amended, was adopted.*

*Commentary to draft article 12* (Monitoring)

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

55. Mr. KATEKA proposed that the year of adoption of each of the instruments cited should be inserted.

*Paragraph (3), as amended, was adopted.*

Paragraphs (4) to (9)

*Paragraphs (4) to (9) were adopted.*

*The commentary to draft article 12, as amended, was adopted.*

*Commentary to draft article 13* (Management)

Paragraph (1)

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

Paragraphs (2) to (6)

*Paragraphs (2) to (6) were adopted.*

*The commentary to draft article 13, as amended, was adopted.*

*Commentary to draft article 14* (Planned activities)

Paragraph (1)

56. Mr. PELLET said that the final sentence involved a *non-sequitur*, which could be eliminated by inserting the words "whether or not an aquifer State" at the end of the penultimate sentence.

*Paragraph (1), as amended, was adopted.*

Paragraphs (2) to (7)

*Paragraphs (2) to (7) were adopted.*

Paragraph (8)

57. The CHAIRPERSON drew attention to a new text proposed in document A/CN.4/L.694/Add.1/Corr.1 as a replacement for the final three sentences of the paragraph.

58. Mr. GAJA said the new text suggested that draft article 6, which concerned an obligation of prevention, did not cover activities that "may" have harmful effects. Yet the obligation of prevention related also to activities that might entail risk. He therefore proposed that, instead of adopting the amendment, which placed an unacceptable interpretation on article 6, the Commission should simply delete the final three sentences of paragraph (8).

59. Ms. ESCARAMEIA said that the second sentence of paragraph (8) should be retained, because it explained that the threshold of "significant adverse effect" was lower than that of "significant harm". Only the last two sentences should be deleted.

*Paragraph (8), as amended, was adopted.*

*The commentary to draft article 14, as amended, was adopted.*

*Commentary to draft article 15* (Scientific and technical cooperation with developing States)

Paragraphs (1) to (7)

*Paragraphs (1) to (7) were adopted.*



Paragraph (8)

*Paragraph (8) was adopted with an editing amendment to the English version.*

*The commentary to draft article 15 was adopted.*

*The meeting rose at 6.05 p.m.*

## 2906th MEETING

*Friday, 4 August 2006, at 10.15 a.m.*

**Chairperson:** Mr. Guillaume PAMBOU-TCHIVOUNDA

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

### Draft report of the Commission on the work of its fifty-eighth session (*continued*)

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

1. The CHAIRPERSON invited the members of the Commission to resume consideration of chapter VI, section C, of the draft report on shared natural resources. The text of the provisions had already been adopted; the Commission had only to concern itself with the commentaries thereto.

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

##### 2. **TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (*concluded*)**

*Commentary to article 16* (Emergency situations)

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

Paragraph (3)

2. Mr. PELLET drew attention to an error in the last sentence: the correct reference was to subparagraphs (a) and (b) of article 16, paragraph 2, not paragraph 3.

3. The CHAIRPERSON requested the Secretariat to correct that error.

*Paragraph (3) was adopted subject to that correction.*

Paragraphs (4) to (8)

*Paragraphs (4) to (8) were adopted.*

Paragraph (9)

4. Mr. PELLET said that he found the fifth sentence, which read “In the case of watercourses, the States could meet such requirement without derogation from the obligations as the recharge of the water to the watercourses would be likely to be sufficient”, to be unclear. Was the recharge truly sufficient to meet requirements or in order for the aquifer to be self-sustaining?

5. Mr. YAMADA (Special Rapporteur) said that the sentence referred to satisfying the “need of their population for drinking water” mentioned in the previous sentence.

*Paragraph (9) was adopted.*

*Commentary to article 17* (Protection in time of armed conflict)

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraphs (2) and (3)

6. Mr. PELLET said that the last sentence of paragraph (2) gave the impression that, if an important matter was not involved, the law of armed conflict would not apply. It also showed that the provision, to which he had always been opposed, was superfluous. It would be better to delete most of the sentence, leaving only: “The article’s function is, in any event, merely to serve as a reminder to all the States of the applicability of the law of armed conflict to transboundary aquifers.”

7. Mr. MOMTAZ said that the sentence conveyed the idea that the provisions of international humanitarian law relating to the protection of property in time of armed conflict were treaty-based. Such had been the conclusion of the ICJ in its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*. Among other things, the Court had found that article 54 of Protocol I additional to the Geneva Conventions of 1949, as referred to in paragraph (3) of the commentary, had a basis in treaty and not in custom. The Commission thus had to decide whether it wanted to follow the Court’s line of reasoning. He thought it would be better to retain only the end of the problematic sentence, as Mr. Pellet had suggested. The “Martens clause”, set out in the preamble of the Hague Convention 1907 (IV) respecting the Laws and Customs of War on Land and mentioned in paragraph (3), related only to civilians and combatants, whereas draft article 17 referred to aquifers as military objectives. The last sentence of paragraph (3) also said that “The same general principle”, namely, the “Martens clause”, was expressed in paragraph 2 of draft article 5; that was not true, since the paragraph referred to the necessity of taking account of vital human needs. The best approach would be to delete all references to the “Martens clause” and draft article 5.

8. Mr. YAMADA (Special Rapporteur) said that draft article 17 was identical to article 29 of the 1997 Watercourses Convention. It had therefore seemed logical for its commentary to be identical to the commentary to article 29,<sup>367</sup> which contained the problematic wording

<sup>367</sup> *Yearbook ... 1994*, vol. II (Part Two), p. 131.