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Summary record of the 2778th meeting

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68. The importance of the work of the Committee on Nationality could not be overemphasized. The Council of Europe had been involved in the issue for a great many years: the Convention adopted in the 1960s had become somewhat out of date, and a new convention had been opened for signature several years ago. A protocol to that Convention was now being drafted, an effort to which Mr. Mikulka had made a very useful contribution.

69. As a representative of the Council of Europe, it was not his place to comment on the relations between the Council and the European Union. The draft European Convention was certainly a welcome initiative, however.

70. Mr. BENÍTEZ (Secretary of the Ad Hoc Committee of Legal Advisers on Public International Law of the Council of Europe, Observer for the Council of Europe), replying to the question about the Council's work on immunities of States, said that CAHDI would be considering the outstanding issues in mid-September 2003 as a practical contribution to the preparations for the discussions at the Sixth Committee of the General Assembly. The pilot project on State immunities was in the second stage of implementation.

71. The European Convention for the Peaceful Settlement of Disputes provided a well-regulated framework for inter-State dispute settlement. As had just been pointed out, there had been an increase in the number of signatories to certain specific conventions as a result of the enlargement of the Council of Europe. CAHDI, like other steering committees and *ad hoc* committees of the Council, had been asked to review the operation of the international instruments under its responsibility. Accordingly, for the past five years it had been systematically reviewing the impact of European conventions in the field of public international law with a view to recommending to new member States of the Council whether to accede to them or not, the ultimate objective being the efficient functioning of the conventions. CAHDI had been receiving progress reports by countries that were working out bilateral agreements under the Rome Statute of the International Criminal Court, enabling it to review the situation periodically. The exercise had been extremely useful in that the legal advisers who were members of CAHDI were able to speak very frankly about their concerns.

72. The European Convention on the Suppression of Terrorism had not criminalized the act of terrorism but sought to depoliticize it for the purposes of extradition. The review committee had been asked, not to develop a new instrument, but rather to review the existing one. It had decided first of all not to change the nature of the Convention, which the introduction of a definition of terrorism would certainly have done. It had borne in mind the definition adopted by the European Union, on the understanding that that could not be incorporated at that time as it was part of a criminalizing exercise. The definition would certainly be included now as part of the development of a comprehensive convention on terrorism.

73. As for article 5 of the European Convention on the Suppression of Terrorism and possible exceptions to the obligation to extradite, the list was not exhaustive. At the request of the Parliamentary Assembly, for the purpose of highlighting the grounds for refusal to extradite, the Council of Europe had decided explicitly to enlarge the list of such grounds. As a result of the entry into force of the amending protocol, the original Convention would be open to the signature of non-member States of the Council, which were not bound by the provisions of the European Convention on Human Rights or of its Protocols. Since the list was not exhaustive, however, a State party could refuse extradition on other human rights grounds.

74. The CHAIR thanked the representatives of the Council of Europe for the very important information provided and reiterated the Commission's interest in continuing dialogue with that institution.

The meeting rose at 1.10 p.m.

2778th MEETING

Tuesday, 22 July 2003, at 10 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

Shared natural resources (A/CN.4/529, sect. G, A/CN.4/533 and Add.1[1])

[Agenda item 9]

First report of the Special Rapporteur

1. Mr. YAMADA (Special Rapporteur), introducing his first report on shared natural resources (A/CN.4/533 and Add.1), explained that it was a preliminary report that was intended to provide background on the topic and seek guidance from the Commission on the future course of the study.

2. The topic of shared natural resources had been included in the Commission's programme of work in 2002.[2]

[1] Reproduced in *Yearbook … 2003*, vol. II (Part One).

[2] *Yearbook … 2002*, vol. II (Part Two), p. 11, para. 20, and p. 100, para. 518 (*a*).

He had prepared a discussion paper[3] for consideration in informal consultations during the second part of the fifty-fourth session, in 2002. The paper had been based on the syllabus prepared by Mr. Rosenstock and included in the report of the Commission to the General Assembly on the work of its fifty-second session.[4] He had proposed to cover three kinds of natural resources under the topic: confined groundwater, oil and gas. They had the common features of being underground resources, moving across borders—and thus falling into the category of "shared" resources—and usually being non-renewable. He had excluded other resources such as minerals, which were not usually considered shared resources, and marine fauna and flora, land animals and birds, which were already subject to many global and regional arrangements and would be more appropriately dealt with in other contexts. He had also proposed adopting a step-by-step approach, first taking up groundwater and later proceeding to oil and gas after at least a preliminary stage of work on groundwater. The decision whether to adopt a separate set of rules for oil and gas could be taken at a later stage. He had proposed the timetable of work contained in paragraph 4 of his first report.

3. Members who had taken part in the informal consultations had generally supported the approach he had suggested in his discussion paper. No discussion had been held in plenary on the topic itself, aside from the adoption of the work programme contained in the report of the Commission to the General Assembly on the work of its fifty-fourth session.[5] During the debate in the Sixth Committee in 2002, very few delegations had commented on the topic. Those who had done so had generally supported its study. Two critical views had been expressed, however. According to the first, it was open to question whether the title was appropriate. The concept of "shared" resources was a matter of concern to some delegations in connection with the concept of permanent sovereignty over natural resources, and all the more so in the case of oil and gas. The title had nevertheless been officially approved by the General Assembly.[6] The second view was that the topic should be limited to the study of groundwater as a complement to the work already done on international watercourses. According to that view, expressed by the delegation of the United States, oil and gas were not ripe for consideration, and an effort to extrapolate customary law from divergent practices with respect to those resources would not be productive. Since he was taking a step-by-step approach, starting with groundwater, he saw no need to alter the work programme at the current stage.

4. The Commission had first dealt with the problem of shared natural resources when codifying the law of the non-navigational uses of international watercourses. Although its main focus had been on surface waters, the fourth Special Rapporteur on the topic, Mr. McCaffrey, had included in his seventh report a detailed study on groundwaters, emphasizing their large quantity, their mobility and their relations with surface waters.[7] He had been in favour of including groundwater in the scope of the draft convention, but, after discussing that idea, the Commission had finally agreed to include only those groundwaters which were related to surface waters. The previous Special Rapporteur, Mr. Rosenstock, had reopened the issue of groundwater on second reading. He had contended that confined groundwater should be included in the scope of the draft convention because of the recent trend towards the adoption of an integrated approach to the management of water resources. He had been convinced that the principles and norms applicable to surface waters and related groundwaters were equally applicable to unrelated confined groundwaters. In his view, a few minor changes to the draft would have achieved the wider scope. The proposal had been the subject of extensive discussions in 1993 and 1994 that had indicated that the views of members were sharply divided. Those who had not supported the proposal had said that they did not see how "unrelated" groundwaters could be envisaged as part of a system of waters that constituted a unitary whole. In the end, the Commission had decided not to include unrelated confined groundwaters in the scope of the draft convention and had adopted draft article 2,[8] as formulated in the text adopted on first reading,[9] with one minor change. The definition of "watercourse" contained in draft article 2, subparagraph (*b*), was now article 2, subparagraph (*a*), of the Convention on the Law of the Non-navigational Uses of International Watercourses. Those members who had not accepted Mr. Rosenstock's proposal had nevertheless agreed that a separate study was warranted in view of the fact that groundwaters were of great importance in some parts of the world and that the law relating to confined groundwater was akin to that governing the exploitation of natural resources, particularly oil and gas. The Commission had also adopted at its forty-sixth session and submitted to the General Assembly a resolution on confined transboundary groundwater,[10] reproduced in paragraph 15 of the first report, in which it recognized the need for continuing efforts to draft rules pertaining to confined transboundary groundwater and commending States to be guided by the principles contained in the draft articles, where appropriate.

5. It was against that background that he proposed to cover the topic. He had the impression that Mr. Rosenstock had thought that the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses would be mostly applicable to confined transboundary groundwaters. To ascertain whether that was so or whether a new set of rules or adjustments would be required, it was necessary to find out what exactly those groundwaters were. Their uses, State practice in their management, contamination, conflicts and existing domestic and international legal norms would have to be examined. The work of Mr. Sreenivasa Rao on the topic of international liability for injurious consequences arising out of acts not prohibited by international law,

[3] ILC (LIV)/IC/SNR/WP.1.

[4] *Yearbook … 2000*, vol. II (Part Two), annex, pp. 141–142.

[5] *Yearbook … 2002*, vol. II (Part Two), para. 520, pp. 100–102.

[6] General Assembly resolution 57/21, para. 2.

[7] *Yearbook … 1991*, vol. II (Part One), document A/CN.4/436, paras. 8–58.

[8] The final text of the draft articles on the law of the non-navigational uses of international watercourses appears in *Yearbook … 1994*, vol. II (Part Two), pp. 89–135, para. 222.

[9] *Yearbook … 1991*, vol. II (Part Two), para. 59, p. 66.

[10] *Yearbook … 1994*, vol. II (Part Two), p. 135.

particularly the prevention aspect,[11] was very relevant to the study of the topic.

6. It was precisely to gain knowledge of confined transboundary groundwaters that he had prepared an addendum to his first report which was intended as a technical and reference paper. It was based on the contributions of several groundwater experts who were involved in the international efforts now being organized to manage that important resource, principally within the framework of the Internationally Shared Aquifer Resources Management Programme. In retrospect, he felt that the Commission had taken a wise decision to conduct a separate study of confined groundwaters as opposed to surface waters. He now believed that the understanding that Mr. McCaffrey and Mr. Rosenstock had had of groundwaters had not been entirely correct. Groundwaters and surface waters both originated in precipitation, but that was where their similarity ended. Ninety-nine per cent of all fresh water on earth was underground, so Mr. McCaffrey had been right to say that groundwaters were more important than surface waters. Groundwaters were the world's most commonly extracted raw material. Since hydrogeology was still a young science, little was known of the hidden treasure that was groundwater resources except that it took years to recharge them when depleted and that most, but not all (as was erroneously stated in paragraph 20 of the report), were not renewable. When groundwater was contaminated, it remained so for much longer than surface water. Another difference was that a great many human activities that took place on the surface could have adverse effects on groundwater. That might mean that the Commission must consider regulating activities other than uses in the case of groundwater.

7. The Commission was supposed to be dealing with groundwater not covered by the Convention on the Law of the Non-navigational Uses of International Watercourses. He had decided to use the phrase "confined transboundary groundwater" for the time being, as that was the terminology used by the Commission in its 1994 resolution. The word "confined" was used to mean "unrelated" to surface waters. While that concept was perfectly understandable in the abstract, it was quite difficult to know in practice which aquifers were related to surface waters. One must also note that hydrogeologists used the term "confined" in the sense of a pressurized aquifer. For them, a shallow aquifer was not confined, whereas a fossil or deep underground aquifer was confined. The Commission might have to find terminology that could be readily understood by groundwater experts and administrators. The definition of the scope also called for more detailed study. Even though it might be difficult for members to comment on the report because of its preliminary nature, he would greatly appreciate their providing him with guidance for pursuing his study.

8. Mr. MANSFIELD thanked the Special Rapporteur for his first report, which he had found very informative. He supported the decision to proceed along the lines suggested in paragraph 4 of the report, including the timetable contained therein. The only reservation he had in that regard was that, as the Special Rapporteur himself suggested at the end of paragraph 5, the study on groundwater might take longer than initially envisaged.

9. In reading the addendum to the first report, he had come to the recognition that the subject was much more complicated than it seemed. He had little doubt, however, that the subject of confined groundwater resources was of the greatest importance, not just for States that shared such resources, but more generally for the international community as a whole because of the long-term implications for international peace and security. He supported the Special Rapporteur's view that it was important to understand exactly what was and what was not covered by the phrase "groundwater resources" before trying to develop legal norms that could be understood and implemented by experts and managers. He had found it interesting, for example, that the definition of the word "confined" given by the Commission in the past, namely, as meaning groundwater that was "unrelated" to surface water, differed from the definition used by hydrogeologists, who considered a "confined aquifer" to be an aquifer stored under pressure. The terminological clarifications provided by the Special Rapporteur in the addendum to the report justified his careful approach of gathering the necessary technical information and expert assistance before proceeding to define the scope of the subject and proposing a number of approaches to it.

10. It might well be the case, as was suggested in paragraph 20 of the first report, that almost all the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses would prove to be applicable to confined transboundary groundwater, but that did not mean that the Commission should not first gain a full understanding of the differences between such groundwaters and other types of water bodies. The Special Rapporteur had pointed out at least two such differences: the fact that confined transboundary groundwaters were generally not renewable in the same way as surface waters and the fact that it was not just the use of groundwaters that needed regulating, but also any activities that might adversely affect their quality. The addendum to the report, however, suggested that it might prove necessary to make further distinctions within the category of confined transboundary groundwater and that special standards might be appropriate in the case of fossil aquifers, for example.

11. The truly appalling statistics quoted by the Special Rapporteur in paragraph 21 of the report, especially the number of infants who died every day as a result of unsafe water in developing countries, showed that the world was moving towards a water crisis, which both enhanced the importance of transboundary water resources and increased the potential for harm as a result of the mismanagement or pollution of such resources. The Special Rapporteur's preliminary analysis of shared aquifers under pressure from cross-border pumping or pollution in the addendum indicated that there might be significant differences between the factors that needed to be taken into account in different areas, which would tend to confirm that, as was stated in paragraph 24 of the report, the Commission needed, in order to formulate rules regulating confined transboundary groundwater, an inventory of such

[11] For the text of the draft preamble and 19 draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session, see *Yearbook … 2001*, vol. II (Part Two), pp. 146–148, para. 97.

resources worldwide and some analysis of their different regional characteristics. It was obviously difficult and, in any case, premature to make any firm recommendations about the standards that the Commission should seek to develop. Two general points could be made, however. First, the information contained in the addendum clearly showed that, owing to their vulnerability, groundwaters should be regulated by stricter international standards of use and pollution prevention than those applying to surface waters. Second, the situation was likely to have no legal solution as such. The "solution" would involve, rather, a complex mix of political, social and economic considerations and processes, the success of which would largely depend on the depth and breadth of understanding by peoples and their leaders of the vulnerability of such resources and the interrelationship between all actions taken in respect of them. The Commission's role was therefore not to create some prescriptive set of rules, but to endeavour to construct a regime to encourage States to recognize their interdependence with regard to groundwater and to work together to identify ways in which they could obtain the appropriate assistance and techniques for resolving any disagreements that might arise as they worked through the complex process of managing and using such resources.

12. Mr. OPERTTI BADAN said he agreed with the Special Rapporteur that the Commission had been right to decide that transboundary groundwater should be the subject of a separate regime. The topic should be considered as being a subject in its own right, in terms both of regulation and of principles. He greatly doubted that the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses could apply to groundwater. He was also doubtful about the title, which raised the question of who the parties to the shared resources were, as well as the question whether the topic included oil and gas or was restricted to water resources. It was all the more important to settle the problem of terminology since hydrogeology, as a science, was barely 50 years old.

13. At the end of the report, the Special Rapporteur recommended that the Commission should study the socio-economic importance of groundwater, State practice with regard to use and management, contamination and measures to prevent it, cases of conflicts and, last, domestic legislation and international agreements on managing such resources. Existing international agreements, however, related only to management and contained no binding provisions that would affect the ownership or exploitation of such resources. It might therefore be wiser to avoid an excessively all-embracing, universalist approach that failed to take sufficient account of the basic sources found in regional practice.

14. Article 2, subparagraph (*d*), of the Convention on the Law of the Non-navigational Uses of International Watercourses, which acted as a point of reference, recognized the role of regional economic integration organizations. The provision lent legal support to the transfer to such organizations of competence in various areas, including the legal aspects, at the regional level, of prospecting and using groundwater.

15. The world water crisis mentioned in paragraph 21 of the report raised the question of whose responsibility it should be to establish the institutional, legal and technical framework required to ensure the good management and maintenance of water resources. In the case of oil and gas, the responsibility belonged to the State in whose territory the resources were found, and there was no reason why the same should not be true of groundwater, which the water crisis made increasingly valuable. The guiding principles and standards that the Commission would formulate for worldwide application would have to be restricted to rules relating to cooperation on all natural resources, either for marketing purposes or for planning by the States in the subsoil of which the resources were located. Otherwise, the regional approach should be adopted, taking as a model, perhaps, the mechanism set up as part of a joint project between the World Bank and the States Parties to MERCOSUR, which covered an area of 1.2 million km^2 containing 160 million km^3 of water and 15 million beneficiaries. The project document contained seven main points, including the need to improve understanding of the scientific and technical aspects of aquifers and to establish a common management framework combining the public and private sectors. The project did not involve any kind of permanent institutional elements, but its operational components were to be found in the management and administration mechanism that the implementation of the project would involve.

16. Ms. ESCARAMEIA said that she wished to highlight the link between the subject of shared natural resources and that of liability; the link should be institutionalized, at least to the extent that the two Special Rapporteurs should both participate in the meetings of any working groups that might be set up on each of their subjects.

17. With regard to the title, the use of the word "shared" was less of a problem than the excessively broad nature of the current title. It might be preferable to add, in brackets, at the end of the title, the words "groundwater, oil and gas". That would indicate the natural resources involved and would guarantee that the three resources were covered by the same regime. The scope of the subject would also be determined by the definition given to the expression "confined groundwater". The Commission's definition not only differed from that adopted by hydrogeologists but also lacked clarity in itself. In the resolution in which the Commission had recommended for adoption by the General Assembly various principles to be applied to transboundary groundwater, confined groundwater had been defined as "groundwater not related to an international watercourse".[12] The resolution had not been adopted, whereas article 2 of the Convention on the Law of the Non-navigational Uses of International Watercourses, which had, spoke of "ground waters constituting … a unitary whole and normally flowing into a common terminus". The question thus arose as to whether confined groundwaters, in the sense of the topic under consideration, included those that flowed into a lake or a spring or whether lakes and springs came under the Convention. There was also the question of confined groundwaters that were fed, sometimes on a massive scale, by rainwater. There was an obvious need to clarify the relationship be-

[12] See footnote 10 above.

tween the definition to be adopted by the Commission and that contained in article 2 of the Convention.

18. In the addendum, the Special Rapporteur described the differences between groundwaters and surface waters, concluding that the former required periodic assessment and monitoring on a more constant and accurate basis than the latter, particularly since they were subject to depletion and contamination. They therefore required standards that were not only stricter than those applying to surface waters, but also stricter than general standards of liability, such as standards of significant harm or standards of prevention. It might therefore be dangerous to take the Convention on the Law of the Non-navigational Uses of International Watercourses as a model. It would, however, be possible to draw up some general principles which would be of a peremptory nature, but would by no means preclude the existence—or even the priority status—of regional arrangements.

19. Mr. KATEKA said he doubted that it was wise to limit the scope of the topic to groundwater, gas and oil. In paragraph 4 of the report, the Special Rapporteur excluded from the scope of the study such shared natural resources as mineral deposits, marine living resources or birds and land animals, on the grounds that they were dealt with more appropriately elsewhere. He wondered, however, what regime governed the massive migrations of animals between Tanzania and Kenya, which could be counted in millions, and which, if not regulated, could lead to complications that could ultimately jeopardize international peace and security.

20. Mr. CHEE, referring to Ms. Escarameia's comments on dispute settlement, said that, to his knowledge, there were very few cases dealing with that topic, since inter-State disputes concerning water resources were most often settled by negotiation. More generally, the criterion applied to shared resources was equitable utilization. Account was also taken of the precautionary principle, the aim of which was to prevent the contamination of the resources in question. Disputes could also follow the diversion of a watercourse by an upstream State.

Cooperation with other bodies (*concluded*)

[Agenda item 11]

Statement by the Observer for the Asian-African Legal Consultative Organization

21. Mr. KAMIL (Secretary-General of the Asian-African Legal Consultative Organization, hereafter AALCO) said that, at its forty-second session, held in Seoul from 16 to 20 June 2003, AALCO had considered an agenda item entitled "Report on the matters related to the work of the International Law Commission at its fifty-fourth session", all items on the agenda of the Commission being of immense interest to member States of AALCO and to AALCO itself. During the deliberations on the Commission's work, many representatives had made elaborate comments on the general thrust of such work on various topics and had presented their country positions on individual draft articles.

22. Most representatives had been in favour of the codification of the topic of diplomatic protection by the Commission. One had stressed that it could advance the promotion of human rights. With regard to scope, one delegation had supported the Special Rapporteur's conclusion that the draft articles[13] should be confined to issues relating to the nationality of claims and the exhaustion of local remedies, while, for another, the Commission's work should be limited to precedents and practice. As to the extension of the draft articles to other specific situations, representatives had been against including provisions in the draft articles on the diplomatic protection of crew members and passengers on ships because it was already covered by articles 94 and 292 of the United Nations Convention on the Law of the Sea. One representative had stated that, as there was no nationality link involved, the issue of the protection exercised by international organizations in respect of their officials did not fall within the domain of diplomatic protection. It had also been considered that the question of a State exercising diplomatic protection on behalf of the inhabitants of a territory other than its own which it occupied, administered, or controlled should not be included in the draft articles, as such an occupation of territory was illegitimate under international law. As to the possibility of the exercise of diplomatic protection by an international organization administering a territory, such situations were temporary in nature and should be considered instead in connection with the topic of the responsibility of international organizations.

23. It had been pointed out that the Calvo clause[14] was simply a contractual device and that no individual could waive the protection of his or her State of nationality, since the right to exercise diplomatic protection belonged to the State. As the Calvo clause had increasingly been losing its practical usefulness in the global economy, there was no reason to deal with it in the draft articles.

24. Most representatives had welcomed the general thrust of draft article 3 and recalled that diplomatic protection was a discretionary right of a State. As it was becoming increasingly possible for individuals to submit their claims directly to different forums, concern for their interests should not be such that it became obligatory for the State of nationality to espouse their claims. On the individual draft articles, one representative had felt that they reflected the rules of customary international law, namely, that diplomatic protection was a right of a State and depended on a nationality link between the individual and the State concerned. Another representative had welcomed the commentary to draft article 7, which stated that the term "refugee" was not limited to refugees as defined in the Convention relating to the Status of Refugees and its Protocol relating to the Status of Refugees, but also covered persons who did not strictly conform to that definition, thereby leaving the scope of the definition open for further expansion. Diplomatic protection through "peaceful settlement", as stipulated in draft article 1, had also been welcomed. Diplomatic protection should not be abused to justify the use of force against a State, and, according to one representative, exceptional cases of diplomatic protection must be sanctioned by the

[13] See 2756th meeting, footnote 3.

[14] See 2757th meeting, footnote 5.

Security Council under Chapter VII of the Charter of the United Nations. There had been general support for the rule of continuous nationality in draft article 4. Delegations had welcomed the formulation of draft article 12 on the exhaustion of local remedies, presented by the Special Rapporteur in his second report.[15] With regard to draft articles 12 and 13,[16] it had been felt that, since the principle of exhaustion of local remedies was part of customary international law and played an essential role in the implementation of diplomatic protection, it must be stated as clearly and unambiguously as possible. Second, to ask whether an available remedy was effective or not would raise questions about the standards of justice employed in the State concerned. As long as those remedies were in conformity with the principles of natural justice, variations in standards should not allow for their effectiveness to be called into question. Third, greater caution was required when dealing with exceptions to the exhaustion of local remedies rule, as any tilt in the balance would undermine the domestic jurisdiction of the State where the alien was located.

25. Representatives who had commented on draft article 14 relating to the futility of local remedies, presented by the Special Rapporteur in his third report,[17] had stated their preference for the third option proposed by the Special Rapporteur. According to one delegation, subparagraphs (*e*) (Undue delay) and (*f*) (Denial of justice) should be considered along with the question of the futility of local remedies. As to draft article 15 on the burden of proof,[18] it had been felt that, as a principle of evidence, it came under the rules of procedure and need not be elaborated on in a separate article. With respect to implied waiver, caution had been called for, as it was difficult to devise any objective criteria in that regard.

26. The Commission had sought the views of States on the issue of the diplomatic protection of shareholders. In that connection, the representative of the Republic of Korea had supported the basic rule laid down by ICJ in the *Barcelona Traction* case that diplomatic protection on behalf of a company should primarily be exercised by the State of nationality of the company. He had said that his country did not wish to grant a right of diplomatic protection to the State of nationality of the majority of shareholders, as that could result in the discriminatory treatment of small shareholders and it would be difficult to establish a quantitative standard for such a distinction. It would also be difficult to recognize that the State of nationality of the majority of shareholders in a company had a “secondary” right to exercise diplomatic protection if the State where the company had been set up had failed to do so.

27. As far as reservations to treaties[19] were concerned, delegations had considered the guidelines as useful and practical recommendations for States to bear in mind when formulating, modifying and withdrawing their reservations to treaties. According to one delegation, the guidelines should be assessed in the light of their compatibility with the 1969 Vienna Convention. Furthermore, they would be more useful if they were accompanied by model clauses. One representative had suggested that the Commission should shorten some of its commentaries since lengthy commentaries on non-controversial matters might give the impression that the law regarding reservations to treaties was less clear or more complex than it really was. As to late reservations, one representative had stated that, in order to ensure stability and predictability in treaty relations, such reservations should be avoided as far as possible; they were permissible only if none of the contracting parties objected to them.

28. On individual draft guidelines, one delegation had considered that guidelines 2.1.1, 2.1.2, 2.1.5 and 2.1.7 were acceptable, while for another delegation interpretive declarations, whether simple or conditional, needed to be formulated in writing, something which had not been stipulated in guideline 2.4.1. With regard to the role of the depositary in the light of draft guideline 2.1.8 [2.1.7 *bis*], many delegations had felt strongly that the depositary should play a strictly procedural role, in accordance with the relevant provisions of the 1969 and 1986 Vienna Conventions. Many delegations had considered that draft guideline 2.1.8 [2.1.7 *bis*] went beyond the 1969 Vienna Convention: if the depositary were to intervene on the question of the compatibility of a reservation with the object and purpose of the treaty, as the guideline in question proposed, it might prompt the State to react, but that would not help to solve the problem. It was unlikely that a more active role of the depositary would lead to the withdrawal of the reservation.

29. Since the Commission had sought the views of States on draft guideline 2.1.6 [2.1.6, 2.1.8], which provided for the communication of a reservation by electronic mail and its subsequent confirmation in writing, one delegation had stressed that reservations were generally made at the time of ratification or accession and were thus communicated at the same time as the instrument of ratification or accession. The question of the communication of reservations by electronic mail or facsimile did not therefore seem to arise. The representative of the Republic of Korea had stated that such forms of communication were not normal practice in his country, but had acknowledged that under certain circumstances they might be useful.

30. In response to the Commission’s request for clarification on draft guideline 2.5.X pertaining to withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty, presented by the Special Rapporteur in his seventh report,[20] two delegations had made comments. Asserting that the withdrawal of reservations was a sovereign prerogative of the State, one delegation had said that recent developments where some monitoring bodies were assigned the role of assessing reservations to a treaty were exceptional and should thus not be covered by the guidelines. According to the representative of the Republic of Korea, the expression “body monitoring the implementation of the treaty” required clarification, since the competence of monitoring bodies to pronounce on the validity of a reservation depended on the powers assigned to them by the treaty in question.

[15] *Yearbook … 2001*, vol. II (Part One), document A/CN.4/514.

[16] *Ibid*.

[17] *Yearbook … 2002*, vol. II (Part One), document A/CN.4/523 and Add.1.

[18] *Ibid*.

[19] See 2760th meeting, footnote 4.

[20] *Yearbook … 2002*, vol. II (Part One), document A/CN.4/526 and Add.1–3.

Otherwise, only the States or international organizations that were parties to those treaties had that power.

31. Referring to unilateral acts of States, some delegations had underlined that it was possible to codify and progressively develop the law in that area and that it would be useful for States to know the risk they ran in formulating such acts. For others, the topic involved progressive development rather than codification. One delegation had pointed out that unilateral acts could have extraterritorial effects and negatively affect international peace and security, thereby warranting further examination of the topic. As to methodology, one delegation had said that it would be useful to study each type of act, such as promise, recognition, waiver or protest, before drawing up general rules. According to another delegation, the Special Rapporteur should first study unilateral acts which, on the basis of international practice, gave rise to obligations. On the classification of unilateral acts, one representative had stressed the need to use the "legal effects" criterion. Consequently, there would be two major categories of acts, those whereby a State undertook obligations and others whereby a State reaffirmed a right. One representative had contested the Special Rapporteur's proposal that, by analogy with the expression *pacta sunt servanda*, which formed the basis of treaty relations, the binding nature of unilateral acts could be based on a new expression, *acta sunt servanda*; that analogy was unacceptable, as there was no basis for it in international law.

32. In connection with the question of international liability for injurious consequences arising out of acts not prohibited by international law, most representatives had referred to the close links between prevention and liability and had welcomed the Commission's decision to begin work on the latter. One delegation had underscored the fact that it was not easy to codify and progressively develop rules in that area because the existing treaty regimes had been developed primarily at the regional and sectoral levels and involved profound interests of States parties. The Special Rapporteur's decision to refer to "allocation of loss" in the title of the topic had been deemed constructive, as, in the final analysis, the allocation of loss concerned the relationship between economic development and environmental protection. As to the scope of the Commission's work, one representative had stressed that it should be the same as for the work on prevention, while, for another, the Commission should draw up general rules so as to ensure that States had enough options to handle each case on the basis of its specific circumstances. That would reflect the general principle of the peaceful settlement of international disputes.

33. On allocation of loss, delegations had taken the view that it was not the State but the operator who benefited from the activity and should bear the primary responsibility in that regard. As for the role of the State under the liability regime, international jurisprudence would need to be carefully studied. In particular, it had been felt that liability regimes established under sectoral conventions could provide some guidance.

34. AALCO member States had generally welcomed the inclusion of other new topics in the Commission's work programme. With a view to keeping the Commission informed about the law and State practice of Asian and African States, AALCO had adopted a resolution at its forty-second session committing its member States to respond to the Commission's request for comments.

35. In 2002, he had mentioned that, owing to the lack of time, it was becoming more difficult for AALCO to discuss, during its annual sessions, important legal aspects of topics studied by the Commission. In that connection, he had proposed considering the feasibility of the Commission and AALCO jointly organizing a seminar on one of the topics recently included in the Commission's work programme. The Commission had approved that idea, and it had been agreed that the seminar might take place at the meeting of legal advisers of AALCO member States, usually held in New York during the regular session of the United Nations General Assembly. However, the proposal had not materialized in 2002. The idea had been considered during the last session of AALCO, which had stated categorically in a resolution adopted on the subject that it was in favour of such a seminar. He wished to hear the Commission's views and suggestions in that regard.

36. At its forty-second session, AALCO had considered not only the Commission's work, but also jurisdictional immunities of States and their property; the International Criminal Court; the deportation of Palestinians and other Israeli practices, among them the massive immigration and settlement of Jews in all occupied territories in violation of international law, particularly the Geneva Convention relative to the Protection of Civilian Persons in Time of War; the follow-up to the United Nations Conference on Environment and Development, held in Rio de Janeiro, Brazil, from 3 to 14 June 1992; cooperation in measures against trafficking in women and children; drawing up of an effective international legal instrument against corruption; human rights and Islam; and WTO as a framework agreement and code of conduct for world trade. During the session, AALCO had also organized a special one-day joint meeting with ICRC on "The relevance of international humanitarian law in today's armed conflicts".

37. Pursuant to AALCO's efforts in the past few years to rationalize its work programme, the Seoul session had been the first time it had focused its deliberations on a set of priority agenda items, which would be identified for each annual session. A full report on the forty-second session would be submitted to the Commission at the earliest possible opportunity.

38. As far as future cooperation between AALCO and the Commission was concerned, the AALCO secretariat would continue to prepare notes and comments on the substantive items considered by the Commission so as to assist the representatives of member States of AALCO in the Sixth Committee when they debated the Commission's report on the work of its fifty-fifth session. An item entitled "Report on the work of the International Law Commission at its fifty-fifth session" would thereafter be included in the agenda of AALCO's forty-third session.

39. On behalf of AALCO, he invited the members of the Commission to participate in the forty-third session of AALCO, which would be held in Indonesia in 2004.

40. Mr. KATEKA, welcoming the fact that, at its forty-second session, AALCO had spent a great deal of time on

the Commission's work, said it was nevertheless regrettable that the members of AALCO had not had before them the results of the first part of the Commission's session, and he therefore trusted that they would be able to consider them in the near future. He also thanked AALCO for encouraging its members to express opinions on matters dealt with by the Commission.

41. It would be interesting for the Commission to have more information about the items on the agenda of AALCO's sessions.

42. AALCO's rationalization of its work was a welcome step. It was to be hoped that it would not follow the example of the United Nations General Assembly, whose credibility was undermined because its agenda contained some items that had been the same for many years. Since AALCO was a legal body, its work should focus on legal matters, although the latter might have a political or economic dimension.

43. Ms. XUE thanked AALCO for its interest in the Commission's work and trusted that the dialogue between the two bodies would continue in future. AALCO's work and efficiency had improved, and the organization was looking into the latest developments in international law. Clearly, the international legal order could not progress effectively without the participation of African and Asian States.

44. Speaking as the representative of the Asian Group, she requested the Secretary-General of AALCO to provide more information on the positions adopted by AALCO's members on the problems now being encountered by international law.

45. Mr. GALICKI said that AALCO was certainly the only regional body that showed so much interest in the Commission's work, and he welcomed that interest. It was important and instructive for the Commission to hear the opinion of African and Asian lawyers, and he therefore hoped that cooperation between the two bodies would continue. In that connection, he agreed with the idea of holding joint meetings, such as the planned seminar. A meeting with the legal advisers of the AALCO member States during the session of the United Nations General Assembly in New York was bound to be enriching.

46. Mr. AL-MARRI said that he wished to know what role AALCO played with regard to human rights in the African and Asian region, where much remained to be done in that field.

47. Ms. ESCARAMEIA said that she would like to receive the report on AALCO's debates on the Commission's work. Like Mr. Galicki, she was agreeably surprised by the interest AALCO had shown in that work and hoped that the results of the first part of the Commission's session would quickly be forwarded to it.

48. She supported the idea of arranging a joint AALCO/Commission seminar, but she also wished to know whether the only people who could attend would be the members of the Commission, particularly the Special Rapporteurs, who would be in New York at that time.

49. With regard to the other items discussed at AALCO's forty-second session, she asked for more details on human rights and Islam and on the International Criminal Court. The latter point was vital, primarily because, compared to the number of African States, few Asian countries had acceded to the Rome Statute of the International Criminal Court.

50. Mr. MOMTAZ said that he was impressed by the thematic review of the Commission's work, which did not duplicate the one by the United Nations Secretariat. Experience had often shown that States which had no opportunity in the Sixth Committee to state their opinions on matters of interest to them did so at AALCO sessions, where they felt freer to express their views.

51. He requested details of AALCO's efforts to encourage its members, which represented more than one quarter of the member States of the international community, to reply to the questionnaires prepared by Special Rapporteurs on the various topics considered by the Commission.

52. Mr. DAOUDI, noting that AALCO covered two continents with different legal civilizations, asked whether the work of that organization reflected an interest in the development of certain aspects of international law at a time when the principles and foundations of international law were being threatened. He wished to know whether a common position that reflected the opinions of those countries on the content of the rules of international law was taking shape on specific questions and what contribution to AALCO's work was being made by African and Asian legal commissions or committees.

53. Mr. RODRÍGUEZ CEDEÑO said that the statement by the Secretary-General of AALCO reflected that organization's interest in the Commission's work. The exchanges of views between the Commission and AALCO were very important and of great use to both bodies in their respective areas of endeavour.

54. Mr. KAMIL (Secretary-General of AALCO), replying to Mr. Kateka, said that, although Mr. Chee, who had represented the Commission at AALCO's forty-second session, had given an overview of the first part of the Commission's session, he was looking forward with interest to the full report on its work which would be drafted at the end of the second part of the session.

55. As to Mr. Kateka's fear that AALCO's agenda might resemble that of the United Nations General Assembly, which included too many irrelevant items, he said that AALCO made sure that the questions discussed at its sessions were topical and reflected member States' interests and concerns. AALCO had also rationalized its work: whereas there had been 15 items on the agenda the previous year, that number had been halved at the forty-second session.

56. While it was true that many Asian countries had not yet ratified the Statute of the International Criminal Court, AALCO was an advisory body and could only urge its members to accede to that instrument.

57. As far as human rights were concerned, two years earlier, his organization had signed an agreement with Mary Robinson, the then United Nations High Commissioner for Human Rights, which had been aimed at establishing closer cooperation between AALCO and OHCHR.

Moreover, at its forty-first session, held in Abuja in 2002, AALCO had held a special meeting on human rights and action to combat terrorism. Cooperation in the field of migrants' and workers' rights was continuing with IOM. One week earlier, AALCO had signed an agreement with ICRC which was designed to strengthen AALCO's work relating to international humanitarian law. The AALCO member States were therefore aware of human rights issues, a matter with which he dealt personally.

58. The planned seminar would be held after, and not during, the meeting of the legal advisers of the AALCO member States in New York. That seminar, in which the current members of the Commission would participate, would cover a topic to be chosen by the Commission. Its purpose would be to help the representatives of the AALCO member States to acquire more in-depth knowledge of the topic chosen. The topic should therefore be important both for the Commission and for the AALCO member States.

59. The CHAIR thanked the Secretary-General of AALCO for his statement and said that the topic chosen for the seminar should probably be one of the questions dealt with by one or more of the Special Rapporteurs who would be present in New York at that time.

The meeting rose at 1.10 p.m.

2779th MEETING

Wednesday, 23 July 2003, at 10 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

Shared natural resources (*concluded*) (A/CN.4/529, sect. G, A/CN.4/533 and Add.1[1])

[Agenda item 9]

First report of the Special Rapporteur (*concluded*)

1. Mr. NIEHAUS said the Special Rapporteur's excellent report was a good starting point for the Commission's work on a topic of major importance in the field of international law. Everyone was aware that access to safe drinking water was a serious problem for developing countries that threatened to grow much worse in the years ahead. The decision to deal with confined transboundary groundwater separately was a wise one, given the great variety of other types of groundwater listed in paragraph 19 of the report.

2. The objections raised to the title of the topic were unfounded, since it had already been officially approved by the General Assembly[2] and expressed with great clarity the focus of the study: the fact that certain natural resources were under the jurisdiction of, or shared by, two or more States. Study of the legal regime for shared natural resources was appropriate in that equitable exploitation and management of such resources required the active cooperation of the States that had jurisdiction over them and entailed considerations relating to their rational and sustainable use.

3. Not only were shared natural resources physically located within the jurisdiction of two or more States, but their exploitation in the territory of one State inevitably affected the use that the other State or States might make of them. Resources that were capable of moving through or being located in more than one jurisdiction, such as hydrological resources and hydrocarbons, were of particular interest. The report concentrated on groundwater, leaving hydrocarbons to one side, but a general report covering both oil and gas in addition to groundwater would have given a better overview of the subject. The question of what principles were applicable to all three resources and how they differed remained unanswered, and it was to be hoped that that gap would be filled in future reports.

4. When the Commission had adopted the draft articles on the law of the non-navigational uses of international watercourses,[3] it had expressed the view that the principles contained in the draft could be applied to confined transboundary groundwater. Unfortunately, the General Assembly had not endorsed that view, nor had the conditions governing the application of principles designed to regulate the use of surface water to the regulation of groundwater use been specified.

5. As the Special Rapporteur pointed out in paragraph 20 of the report, surface water resources were renewable, while groundwater resources usually were not, and they accordingly represented different challenges. One might also ask whether the principles incorporated in the Convention on the Law of the Non-navigational Uses of International Watercourses were applicable to fossil aquifers and which principles of international environmental law could be applied to the exploitation, distribution and conservation of a resource that was non-renewable or only slowly renewable.

6. Article 5 of the Convention laid down the principle of the equitable and reasonable utilization of water resources, and of the equitable and reasonable participation in the use, development and protection of such resources, with a view to attaining optimal and sustainable utilization

[1] Reproduced in *Yearbook … 2003*, vol. II (Part One).

[2] See 2778th meeting, footnote 6.

[3] *Ibid.*, footnote 8.