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Summary record of the 2779th meeting

Topic:
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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. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Matheson, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Operti 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.1¹)

[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 Commis-

sion'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 Assembly² 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.

thereof. Unfortunately, that fundamental principle could not be automatically transposed to the management of a non-renewable and finite resource: sustainable use of a non-renewable resource was precluded by its very nature. Nor could the factors relevant to equitable and reasonable utilization outlined in article 6 of the Convention be automatically applied to a non-renewable resource. For a renewable resource, adjustments could be made according to circumstances, but for a non-renewable resource, what seemed equitable at the time might cause irreparable damage later on.

7. Hence the need to draw up a list of technical criteria that took into account the actual distribution of water resources within each national jurisdiction in order to facilitate the precise allocation of quotas for exploitation. Water was a resource that was fundamental to human life, and the fundamental right to water was upheld by a body of opinion. The Global Consultation on Safe Water and Sanitation for the 1990s held in New Delhi in September 1990 had formalized the need to provide, on a sustainable basis, access to safe water in sufficient quantities and proper sanitation for all, emphasizing the “some for all rather than more for some” approach. Accordingly, in defining what constituted equitable and reasonable utilization of confined transboundary groundwater, priority must be given to meeting basic human needs.

8. The obligation to take all appropriate measures to prevent the causing of significant harm to other States, reflected in article 7 of the Convention on the Law of the Non-navigational Uses of International Watercourses, was too weak, given the vulnerability of fossil aquifers to pollution. Environmental considerations called for the adoption of strong precautionary measures to prevent the pollution of such resources. As was pointed out in chapter 18.35 of Agenda 21, adopted by the United Nations Conference on Environment and Development, a preventive approach, where appropriate, was crucial to avoiding costly subsequent measures to rehabilitate, treat and develop new water supplies.⁴

9. The general obligation to cooperate, as outlined in article 8 of the Convention, did seem applicable to the exploitation of confined transboundary groundwater. Since both fossil aquifers and hydrocarbon deposits were non-renewable natural resources, they could be covered by a similar legal regime. Water being fundamental to human life, however, some adjustments should be made to the legal regime for confined transboundary groundwater to permit the introduction of certain humanitarian criteria in the allocation of exploitation quotas.

10. Mr. ECONOMIDES said he welcomed the clear and concise report on shared natural resources. The Special Rapporteur had asked for advice, no doubt of a general nature at the present preliminary stage of work, on the approach to be taken.

11. He agreed with Ms. Escameia that a more restrictive wording should be adopted for the title and proposed “Shared natural resources: confined transboundary

groundwater”, which would correspond better to the content of the report. Oil and gas would, of course, be taken up at a later date.

12. Before seeking to regulate the areas covered by the topic, the Commission needed to develop a definition and to determine the significance for States, especially developing countries, of transboundary groundwater not connected to surface water. The Special Rapporteur had recognized the need for technical advice and had called in some very high-level hydrogeologists and legal experts, including Mr. McCaffrey, a former member of the Commission.

13. It was somewhat premature to state, as did paragraph 20 of the report, that almost all the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses were also applicable to confined transboundary groundwaters. That question should be treated separately, as Mr. Opertti Badan had suggested at the previous meeting, at least in the initial stage of the work. Analogies with other conventions could be made at a later stage. For the time being, the specific features of non-connected groundwater should be analysed.

14. One possible question now was whether the “significant harm” principle was applicable to confined transboundary groundwater. In paragraph 7 of the addendum to the report, the Special Rapporteur said it was not: a stricter standard should be applied to such water. He endorsed the views just outlined by Mr. Niehaus on that subject and concurred with the comments on the vulnerability of fossil groundwater, as opposed to surface water, in paragraph 40 of the addendum.

15. Finally, it was very important to deal with non-connected groundwater pollution straightaway. An analogy might be established with the work on transboundary harm, in which the question of prevention had been dealt with before responsibility.

16. Mr. KATEKA, responding to the Special Rapporteur’s request for comments on the scope of the topic, said he had already expressed his misgivings about the exclusion of shared resources such as minerals, animals and birds. There were regimes to regulate marine resources, some of which were highly migratory, and there seemed no reason not to have regimes for migratory wildlife. While he understood the Special Rapporteur’s reluctance to widen the scope of the topic, there was no reason to exclude from his background study general remarks on other shared natural resources as a way of providing additional perspective. A convention apparently existed on migratory birds, for example, and the Special Rapporteur might look into whether there were similar arrangements for other shared natural resources.

17. Paragraph 7 of the report misstated the sensitive issue of the rights of upper riparian States *vis-à-vis* lower riparian States of major river systems, giving the false impression that it was only upstream States that created environmental concerns. The remark that new uses of waters by upstream States were bound to affect in some way the historically acquired interest of the downstream States touched a raw nerve. Some river systems were still

⁴ Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992 (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: Resolutions Adopted by the Conference, resolution 1, annex II, p. 287.

governed by agreements concluded by colonial powers that favoured downstream States at the expense of those upstream. A case in point was the Nile Waters Agreement.⁵ In view of the controversy between upstream and downstream States outlined in paragraph 11 of the report, caution had to be exercised. Accordingly, it was not clear why there was a reference in that paragraph to “underdeveloped upstream States”: an *a contrario* situation could arise for downstream States.

18. The Special Rapporteur said in paragraph 20 of the report that the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses were also applicable to confined transboundary groundwaters. The principle of equitable and reasonable utilization in article 5 of that Convention was relevant, as was article 6 on the factors relevant to equitable and reasonable utilization. The requirements of addressing vital human needs and not giving priority to any State were crucial. The obligation not to cause significant harm to other watercourse States set out in article 7 of the Convention was to be found, in a different form, in the draft articles on prevention of transboundary harm.⁶ As Ms. Escarameia had pointed out at the previous meeting, the Special Rapporteurs on shared natural resources and liability should harmonize their efforts.

19. Paragraph 12 of the report indicated that groundwater constituted over 95 per cent of the earth’s freshwater, yet paragraph 21 said that the portion of freshwater available for human consumption was 1 per cent. Because of increased water usage, large populations and pollution, freshwater was becoming a scarce resource. Indeed, the Special Rapporteur said a world water crisis was imminent. That seemed incongruous, however. If only 1 per cent of the earth’s groundwater was being used, and presumably it was periodically replenished through precipitation and percolation, then 99 per cent remained untapped, and where was the crisis?

20. People in developing countries went without water, and thousands died every day, while others watered their lawns. The statistics given in the report seemed to come mainly from large waterworks and not from small-scale users. It was to be hoped that the next report would include more statistics from developing countries, which used groundwater more than did developed countries. Boreholes and wells, for example, might be worth looking into. Finally, he generally supported the Special Rapporteur’s scheme of work.

21. Mr. PAMBOU-TCHIVOUNDA said that, using a hydrogeological approach to the study of groundwater resources, the Special Rapporteur had positioned himself as a reliable guide to help the Commission cross *terra incognita* without foundering. The precautions he had taken, particularly the recruitment of expert assistance, were to be applauded.

22. The addendum to the report informed the Commission that groundwater occurred in aquifers—in other words, geological formations (para. 8); that it could move

sideways as well as up or down in response to gravity and differences in elevation and pressure (para. 9); and that certain aquifers extended over international boundaries (para. 14). That seemed to be the crux of the issue as far as establishing a legal regime was concerned. If the flow of groundwaters was to be covered by a legal regime, it would probably have to be multifaceted, for three reasons.

23. First, locating aquifers required the mobilization of major operational resources, including technical resources, which might not be available to the States concerned; if third parties had to be called in, legal problems would arise. Second, exploitation of groundwater and aquifers could be likened to an activity that was not prohibited by international law yet generated transboundary risk: What regime should be applied in such a situation? Third, such an activity might necessitate the pooling of human and technological resources, not only among the basin States but perhaps also among those external to it.

24. The structuring of all the components of the future regime would sharply highlight various elements of power, strength, time constraints and human survival, and a number of simple questions came to mind. Did groundwater fall into the territory of the State of residence of its users? Should a distinction be made, perhaps depending on the distance from the earth’s surface, between groundwater that was within a State’s jurisdiction and groundwater that was not? If so, one might be tempted to apply to underground water resources a regime comparable to the one for maritime resources—for example, the exclusive economic zone and the sea bed—although, since the seas and oceans were made of different material than dry land, an analogy would appear to be very difficult.

25. It was clear that the regime governing shared natural resources must involve above all the permanent sovereignty of States over the resources on their territory. However, the concept of sharing—the crux of the matter—was not *a priori* a norm. It was a norm that had to be developed, and this could only be done with the consent of the States concerned. Such consent must be based on a conception of the interests at stake arising from a fundamental change in the thinking of the international community. For the time being, those were but a few simple comments on what was a very complex and interesting subject. He looked forward to the second report.

26. Mr. MATHESON commended the Special Rapporteur on his first report, which provided useful background information on the consideration of the topic and the technical aspects of confined groundwaters. It was an important subject to which the Commission should make a contribution, not only with respect to the development of international law, but also for the sake of the health and welfare of large numbers of people in countries that depended on groundwater resources. The Special Rapporteur had been prudent in emphasizing the need for further study of the relevant technical and legal aspects before taking any final decision on how the Commission should proceed. It was proposed to complete the second report on confined groundwaters by 2004, but the Special Rapporteur should take whatever time was required, including to seek State views and technical input, on the basis of which the Commission could prepare its contribution. On

⁵ Concluded between the United Kingdom and Egypt in Cairo on 7 May 1929 (League of Nations, *Treaty Series*, vol. XCIII, no. 2103, p. 43).

⁶ See 2778th meeting, footnote 11.

the other hand, it was not clear whether the Commission could make a comparable contribution in regard to oil and gas. The debate thus far had highlighted concerns about the suitability of the topic, and it was apparent that the problems relating to confined groundwaters were quite different from those relating to oil and gas, both in technical and in legal terms. Much work had already been done by the Commission on confined groundwaters in connection with the non-navigational uses of international watercourses, and the issue presented immediate and serious concerns for human health and welfare, which was not the case for oil and gas. There was no reason to assume that States could not resolve issues concerning oil and gas through normal diplomatic and legal processes. While it was premature to decide what the ultimate scope of the shared natural resources topic would be, it was clear that confined groundwaters must take priority. The Special Rapporteur had proposed 2005 as the date for a third report, on oil and gas, but it would seem wiser to complete the report on confined groundwaters beforehand. He looked forward to the second report on confined groundwater and was confident that it would provide an excellent basis for the Commission's work.

27. Mr. OPERTTI BADAN said that, in the light of comments made so far, he had two basic concerns. First, the Commission should adhere for the time being to the subject of the specific resource of confined groundwaters; other aspects of shared natural resources such as animal migration would merely complicate matters. Second, it should not lose sight of the original proposal to include in the study of shared natural resources the three resources: water, oil and gas. Presumably, the rationale behind such a proposal was that those resources had some common features, for one the fact that they were all underground. To be sure, a legal regime governing oil and gas already existed, and in some cases was being developed. The way in which countries coordinated the exploitation and utilization of natural gas was a case in point. However, it must be remembered that the criterion on which the oil and gas regimes had been established was sovereignty, and he would strongly object to the issue of water being dealt with in a different way simply because the legal regime was being established at a later date, or on the humanitarian grounds of the necessity and usefulness of the resource to mankind. If that line of argument were followed, no one could deny the usefulness to mankind of oil and gas, albeit chiefly for commercial purposes. He therefore urged the Special Rapporteur to be very prudent in his handling of what was an enormously sensitive matter. The Commission's objective was to establish a legal regime based on cooperation for the preservation and utilization of confined groundwaters and not to turn it into a resource of mankind as a whole. Moreover, the law of the sea could not serve as a basis for discussion, since it did not cover territorial sovereignties for the purposes of regulation. He hoped that, in the second report, the Special Rapporteur would not depart from the approach adopted in the first report, which took into account the three natural resources of water, oil and gas, given the need for a legal regime for those resources based on similar criteria.

28. Mr. RODRÍGUEZ CEDEÑO thanked the Special Rapporteur for his technically detailed but clear report on a very difficult and important subject in legal, political,

technical and socio-economic terms, on account of the problems of water access, use and pollution, above all for developing countries. In view of the complex nature of the topic and the current progress of the debate, it was likely that the work programme for the quinquennium outlined in paragraph 4 would need to be revised. He agreed that, for the time being, the study should focus exclusively on confined groundwater, defined by the Special Rapporteur as waters that in general were not connected to a body of surface water; that aspect having been deferred, the non-navigational uses of international watercourses had been considered. The very different characteristics of other geological structures such as oil and gas as well as flora and fauna subject to transboundary movements would certainly complicate the study, not least the establishment of rules governing the protection, efficient management and equitable use of such resources. The Commission should therefore first complete its study on confined groundwaters before embarking on a study of oil and gas to see whether there were any similarities that might help in establishing common rules.

29. Aside from a detailed analysis of the different confined groundwater systems, such as the Guaraní aquifer referred to at a previous meeting by Mr. Opertti Badan, the Commission must also consider doctrine, State practice, international agreements and domestic legislation relating to the protection and management of such systems. The study must be comprehensive and well-balanced and cover the rational use of confined groundwaters, the interests of States and the protection of the environment.

30. He had no wish to prejudge the outcome of the study, but an overall objective should be decided on without further delay. He would suggest the establishment of rules for the protection and better utilization of confined groundwaters, along the lines, but not necessarily strictly adhering to, the Convention on the Law of the Non-navigational Uses of International Watercourses and the articles already adopted on prevention of transboundary damage, as well as the principles and norms applicable to objective responsibility or liability. The principles governing the permanent sovereignty of States over natural resources enshrined in General Assembly resolution 1803 (XVII) of 14 December 1962 should also be taken into account. The States with such resources on their territories would also have to adopt appropriate national legislation and to negotiate and conclude relevant agreements. In addition, it was important to define a mechanism for settlement of disputes, based on Article 33 of the Charter of the United Nations, although State practice showed that such disputes had been few in number and had generally been resolved through practical means.

31. Mr. MOMTAZ thanked the Special Rapporteur for his report, which provided a good introduction to hydrogeology and established a framework for a legislative regime governing the invisible resource of transboundary confined groundwaters. In that connection, he welcomed the fact that the Special Rapporteur had drawn on the advice of high-level experts. His comments would focus on two issues: the scope of the study, and possible links between the topic under study and the Convention on the Law of the Non-navigational Uses of International Watercourses.

32. He endorsed the work programme proposed in the report and the decision to treat confined groundwaters separately from other underground resources such as oil and gas. That gradual approach would expedite the progress of the Commission's work. Both those categories of resources should be governed by the principle of permanent sovereignty, but there were a number of differences between them. For instance, confined groundwaters were vulnerable to agriculture and industrial activities, whereas the same could not be said of oil and gas. States on whose territory water resources were located must adopt measures to avoid their contamination. Moreover, the work being carried out by the Study Group on International Liability was of relevance to the subject of transboundary confined groundwaters. Such risks were not involved for oil and gas, as the principles governing the management of relevant transboundary structures were already well established. The exclusion of solid minerals from the study was justified, since they were static deposits and did not present particular sharing problems for States. He understood the concerns expressed by Mr. Kateka concerning animal migration but considered that they could be dealt with under bilateral or multilateral agreements such as the Convention on the Protection of Migratory Birds.⁷

33. He welcomed the background information provided in the report on the Convention on the Law of the Non-navigational Uses of International Watercourses, which was designed to manage the resource shared among States on the territory through which it flowed. According to the provisions relating to equitable and reasonable State utilization of and participation in international water resources, water flowing through a river basin was not considered a resource subject to permanent sovereignty. While the principle had always been upheld by upstream States, which had never claimed sovereignty or exclusive right over those resources, it was not true of confined groundwaters, to which the principles of permanent sovereignty applied. Mr. Opertti Badan was therefore fully justified in insisting that the rules to be established with respect to confined groundwaters should be identical to those relating to oil and gas. He also shared his concerns about the possibility in both cases of any reference to the resource as part of the shared heritage of mankind. For those very reasons the Commission had decided that confined groundwaters should not come under the scope of the draft of the Convention, nor, as a result, had the General Assembly followed up the Commission's compromise-based recommendation, included in its 1994 resolution on confined transboundary groundwater, that States should be guided by the principles enshrined therein in the case of confined transboundary groundwaters.⁸ He therefore questioned the statement in paragraph 20 of the report to the effect that it was obvious that almost all of the principles embodied in the Convention were also applicable to confined transboundary groundwaters. However, he fully endorsed the statement in paragraph 24, stressing the need for an inventory of the resources worldwide and a breakdown of their different regional characteristics so as to formulate rules regulating confined transboundary groundwaters. The addendum to the report clearly showed that problems

relating to confined groundwaters differed greatly from one region to the next. It would therefore probably be necessary to establish general rules, taking into account the specific characteristics of each region.

34. Mr. KAMTO commended the Special Rapporteur's wisdom in drawing on expert advice, thus enabling the Commission to reach some understanding in a field that was generally unfamiliar to lawyers. As to the title of the topic, it would be premature to seek precision or finality. Not only had the existing title been approved by the General Assembly, but experience showed that a fully appropriate title could be established only once the whole process was completed.

35. Parts of the addendum, particularly paragraphs 7 to 9, were difficult to understand, but the problem might well lie in the French translation. He was grateful for the inclusion of the terminology list in annex I, although he hoped that in the future it could be expanded to include such expressions as "hydraulic gradients", which appeared in paragraph 9 of the addendum to the report.

36. Paragraph 9 of the addendum also contained the telling statement that groundwater moved through aquifers very slowly, with flow velocities measured in metres per year. Over decades or centuries, however, those metres built up, and a given aquifer might become a shared resource. He therefore agreed with Mr. Momtaz's suggestion that the Commission should identify the various aquifers that should be regarded as shared, so as to establish a basis for further research.

37. Such research should not be confined to practice on protecting the quality of aquifers but should be extended to practice—if any existed—on exploiting them. Thought should be given to whether the principles governing surface waters could equally apply to groundwaters. Another important question was whether the criteria for sharing a resource would be based on the needs of States, on proportionality or on fairness. In that context, he commended the Special Rapporteur's decision to consider water separately from oil and gas for the time being, as long as that approach did not become an obstacle to a more comprehensive consideration of the matter: the three were inextricably connected. Common principles must be found and a distinction must be drawn between exploitation regimes and protection regimes, which could vary according to the resource in question.

38. Mr. BROWNLIE expressed concern that the metaphor "shared resource" was too simple, as though groundwater undercutting a boundary, for example, could be regarded as a single geological structure like oil or natural gas. It was clear from the addendum that the nature of aquifers was extremely varied, so the metaphor of sharing, with which the international community was familiar in the context of oil or gas, hardly applied. He had in mind, for example, the fascinating case study in the addendum concerning the Nubian Sandstone Aquifer System, which covered an enormous area. Situations of that kind would need to be governed by sophisticated concepts of legal interests; "sharing" was too simple. It was difficult to believe that, if some event occurred in the Libyan area, the "share" of Sudan would immediately be diminished. Yet, at the same time, those two States were obviously con-

⁷ Signed in Washington, D.C., on 16 August 1916 (United States, 39 Stat. 1702, *Treaty Series*, no. 628).

⁸ See 2778th meeting, footnote 10.

cerned States in relation to the aquifer and, in hydrological and possibly other terms, had an interest in the welfare and integrity of the aquifer as a whole. He urged the Commission to have no truck with facile analogies with oil and natural gas.

39. Mr. KEMICHA said the report afforded an excellent basis for discussion. There was one potential difficulty, however—the title could give rise to confusion. It was not clear whether the word “shared” meant that the resource in question was exploited jointly with another State or that it would be shared in future. The question would become crucial when the Commission moved on to consider the question of oil and natural gas. Indeed, he wondered whether, in view of the specificity of legal regimes governing the exploitation of oil and gas, it was appropriate for the latter to form part of the study at all.

40. Mr. GALICKI said that, although preliminary, the report was extremely valuable, especially since it contained scientific and technical information that would be crucial in shaping the Commission’s understanding of the legal problems that might arise. He shared the doubts of some members of the Commission concerning the title of the topic, for it seemed both too wide and insufficiently precise. The terms “shared” and “natural resources” required much more consideration.

41. Similarly, the Special Rapporteur’s decision to deal with three kinds of natural resources—confined transboundary groundwaters, oil and natural gas—might also be regarded as both too narrow and too wide a choice. There were numerous other natural resources of a transboundary nature; yet, at the same time, the three chosen by the Special Rapporteur presented a very broad scope. Oil and gas had characteristics extremely different from those of groundwaters and might require different legal regulations. He would be inclined to favour restricting the topic to groundwaters, although he did not exclude the possibility of extending consideration at a later stage to other shared natural resources, such as oil and gas.

42. Limiting the scope of the topic would not, however, mean that other serious difficulties would be avoided. The very concept of “confined transboundary groundwaters” was problematic, especially in the light of the Convention on the Law of the Non-navigational Uses of International Watercourses, article 2 of which grouped surface waters and groundwaters together as “constituting by virtue of their physical relationship a unitary whole”. Moreover, the Special Rapporteur’s choice, after examining a variety of terms used in practice, of the phrase “confined transboundary groundwaters” did not diminish the difficulties arising from the need to define the term precisely from both a hydrogeological and a legal standpoint. There seemed to be differences even between various kinds of groundwaters. Further consultation with hydrogeologists might, as suggested by the Special Rapporteur, be useful.

43. As the Special Rapporteur had also stated, almost all the principles embodied in the Convention applied also to confined transboundary groundwaters. One of the Commission’s most important tasks should therefore be to identify the legal similarities and differences between groundwaters and other international watercourses, which

would enable it to draft specific rules dealing exclusively with confined transboundary groundwaters.

44. He agreed with the suggestion that, in order to formulate rules, the Commission should have an inventory of confined transboundary groundwaters worldwide and a breakdown of the different regional characteristics of such resources. As wide a knowledge as possible of the State practice with regard to the use and management of confined groundwaters, and of existing domestic legislation and international agreements, was also desirable. The serious and time-consuming nature of such tasks was yet another reason to limit the scope of the topic.

45. Ms. XUE, after commending the report, said that the very concept of shared natural resources was likely to trigger controversy, especially at a time when environmental law was developing at increasing speed. All parts of nature were interconnected but, as well as being the common heritage, natural resources were also subject to the concepts of sovereignty and security. It was therefore understandable that States tended to adopt a prudent attitude. She supported the Special Rapporteur’s approach of concentrating on just three areas—groundwater, oil and natural gas—since they shared the characteristic of flowing. At the same time, the situation of other natural resources should be borne in mind, so that the scientific and technical situation was thoroughly understood, as well as the related human activities and the impact on resources. Meanwhile, the decision to focus first on groundwater was very wise. Data on hydrogeology would be crucial, and she looked forward to hearing a hydrogeological report at a future meeting, which would place the Commission’s work on a scientific footing.

46. The heated discussion which had arisen in the Commission a few years ago as to whether confined groundwater came within the scope of the law on the non-navigational uses of international watercourses had been caused by the vague definition of the natural connection between underground water and surface water and by the lack of scientific data on the impact that one country’s use of groundwater had on the use of the same body of water by another State. Another moot point had been whether groundwater should be governed by domestic or international water law. Although the Commission’s decision to exclude confined groundwater from the Convention on the Law of the Non-navigational Uses of International Watercourses had been dictated by the principle of States’ sovereignty over their domestic resources, according to the last of the four criteria mentioned in paragraph 6 of the addendum, groundwater did fall within the scope of the Convention if the body of water in question was international in nature.

47. Since then, the Commission had adopted the stance that groundwater was a shared natural resource. She agreed with Mr. Brownlie about the need for a scientific basis in order to delimit the scope of the topic and for an explanation of why the Commission took the view that groundwater was a shared resource. One good reason for studying the issue might be that sharing had led to a variety of interrelated actions by States, which called for regulation under international law. Nevertheless the impact of groundwater use had to be precisely quantified and must not rest on general assumptions; hence more research was

needed. The Special Rapporteur should therefore pursue his investigation of the subject because, regardless of the final form taken by the Commission's study, it would enhance countries' knowledge about the depletion of natural resources and would contribute to a better understanding of the current situation in that respect.

48. While oil, natural gas and groundwater all had one common feature, namely that they flowed, their geological structure diverged. Once again, the Commission's study should be based on scientific evidence, and so consideration of oil and natural gas should be deferred.

49. Mr. YAMADA (Special Rapporteur), summing up the discussion, said that, in future reports he would take account of all the comments made in the course of the debate and endeavour to provide more scientific data.

50. Concern had been expressed about the term "shared", on the grounds that it was unclear by whom the natural resources in question were shared, and, in that connection, several members had emphasized the concept of permanent sovereignty. He understood the notion of "shared" to refer not to ownership but to responsibility for resource management. It was to be hoped that that controversy could be overcome by defining the scope of the topic in physical terms. While some members had contended that wildlife was also a shared natural resource, he, like a number of others, would prefer to concentrate on groundwater, which might become a subtopic, because he did not feel qualified to deal with the subject of migratory animals and birds. He therefore agreed with Mr. Galicki that the final decision regarding scope should be postponed.

51. He concurred with the view that groundwater involved political, social and economic factors and that legal solutions were not a panacea. For that reason, it might be a good idea to formulate certain principles and then to focus on cooperation regimes, including dispute settlement. He accepted criticism of the statement in paragraph 20 of the report that almost all the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses were also applicable to confined transboundary groundwaters, because more had to be known about groundwater before it could be said with any certainty that those principles did apply.

52. Several references had been made to the great vulnerability of groundwater and to the need for stricter thresholds of transboundary harm. That area did indeed require serious consideration. It would be inadvisable to adopt a universal approach, for regional regimes might be more effective. If rules were formulated, they should resemble the articles of the Convention on the Law of the Non-navigational Uses of International Watercourses, which recognized the important role played by regional efforts.

53. In response to the question whether groundwater discharging into a spring was covered by the Convention, he drew attention to the four conditions set out in paragraph 6 of the addendum to his report and said that, in his opinion, if a spring did not satisfy those criteria, the groundwater discharging into it would not come within the purview of the Convention either.

54. The query regarding the meaning of the phrase "normally flow into a common terminus" in article 2 of the Convention was hard to answer. Usually a common terminus was an ocean. The word "normally" had, however, been included in the text at the very last minute, despite the Special Rapporteur's objections, and even the scientific community experienced difficulty with that definition. For that reason, it would be necessary to reconsider the definition of the groundwater to be dealt with in the study in hand.

The fragmentation of international law: difficulties arising from the diversification and expansion of international law (concluded)* (A/CN.4/529, sect. F, A/CN.4/L.644⁹)

[Agenda item 8]

REPORT OF THE STUDY GROUP

55. Mr. KOSKENNIEMI (Chair of the Study Group on the Fragmentation of International Law), presenting the Study Group's report (A/CN.4/L.644), said that the Study Group's discussions of the *lex specialis* rule and "self-contained regimes" had taken as their point of departure the previous year's report¹⁰ and the debate in the Sixth Committee (A/CN.4/529, sect. F). The current report confirmed that the Study Group's approach to fragmentation would be substantive and not institutional. An analytical distinction ought to be drawn between the different patterns of interpretation or apparent conflict. It had been decided that such differences should be treated separately, because they raised many questions relating to fragmentation. The report did not pass judgement on the merits of the cases referred to in paragraph 9 and did not imply that the interpretations placed on them were the only ones possible.

56. It was envisaged that guidelines might emerge from the Study Group's consideration of the different aspects of the topic which had been chosen by the Commission itself and endorsed by the Sixth Committee. The Study Group had been of the opinion that *lex specialis* could be understood in a variety of ways, but that there was no need to take a stand on them and that the Chair's study would try to encompass most of them. In discussing self-contained regimes, it had been emphasized that general law would intervene in a number of ways in the operation of those regimes. Finally, the necessity of dealing with regional laws in the study had been acknowledged.

57. Mr. MELESCANU said that the open-minded and flexible approach evident in the report was essential at such an early stage of work. The Romanian branch of ILA would be collaborating in the consideration of the application of successive treaties relating to the same subject matter. The fragmentation of international law was not a theoretical question, but the very real consequence of globalization and the diversification of public international

* Resumed from the 2769th meeting.

⁹ Reproduced in *Yearbook ... 2003*, vol. II (Part Two), chap. X, sect. C.

¹⁰ See 2769th meeting, footnote 8.

law. The Study Group's aim should be to produce guidelines for States; it should not become embroiled in theoretical debates that would be of no practical use.

58. Mr. MANSFIELD said that the New Zealand branch of ILA and the Law School of Victoria University of Wellington would be assisting him with his part of the study.

59. The CHAIR suggested that the Commission should take note of the report of the Study Group on the Fragmentation of International Law.

It was so decided.

The meeting rose at 1 p.m.

2780th MEETING

Friday, 25 July 2003, at 10 a.m.

Chair: Mr. Enrique CANDIOTI

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, 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. Sreenivasa Rao, Mr. Rodríguez Cedeño, Ms. Xue, Mr. Yamada.

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

[Agenda item 2]

1. The CHAIR said that the Commission would proceed to the official closure of the International Law Seminar and that, to that end, the meeting would be suspended.

The meeting was suspended at 10.05 a.m. and resumed at 10.30 a.m.

Reservations to treaties¹ (*continued*) (A/CN.4/529, sect. B, A/CN.4/535 and Add.1,² A/CN.4/L.630 and Corr.2)**

[Agenda item 4]

EIGHTH REPORT OF THE SPECIAL RAPPORTEUR

2. Mr. PELLET (Special Rapporteur), introducing his eighth report on reservations to treaties (A/CN.4/535 and Add.1), said that the report began by outlining reactions to his seventh report,³ presented at the previous session, and describing new developments relating to reservations that had taken place over the past year. With regard to the first point, the Commission should be informed that, in addition to the information contained in the report, the draft guidelines appearing in the seventh report had been examined during the first part of the session by the Drafting Committee, which had improved them before their adoption by the Commission. He had drafted the corresponding commentaries, which the Commission would consider when it adopted its report on the current session, in accordance with the usual practice. Moreover, with the exception of draft guideline 2.1.8 [2.1.7 *bis*] on the procedure in case of manifestly [impermissible] reservations, the Sixth Committee had given a good reception to the draft guidelines adopted at the preceding session. Some of the comments made on that occasion had been interesting, but they could be taken into account only when the Commission had considered the draft Guide to Practice on second reading. It should be recalled, meanwhile, that draft guideline 2.5.X, on the withdrawal of reservations held to be impermissible by a body monitoring the implementation of a treaty, had been withdrawn until the consequences of the impermissibility of a reservation had been considered. The reactions to the text and to its withdrawal were contained in paragraph 12 of the report, but it did not seem that any particularly enlightening conclusions could be drawn.

3. With regard to the second point, the most interesting new element was a document dated 13 March 2003, entitled "Preliminary opinion of the Committee on the Elimination of Racial Discrimination on the issue of reservations to treaties on human rights",⁴ whose totally undogmatic approach contrasted strikingly with that of General Comment No. 24 of the Human Rights Committee.⁵ Rather than adopting a combative attitude towards States and ordaining that a given reservation was impermissible, the Committee on the Elimination of Racial Discrimination endeavoured to set up a dialogue with them so as to encourage as complete an implementation of the International Convention on the Elimination of All Forms of Racial Discrimination as possible. That was also the position of the Committee on the Elimination of Discrimination against Women,⁶ as was stated in paragraph 21 of the report. It was also the main lesson that he had drawn from the meeting between members of the Commission and members of the Committee against Torture and the Committee on Economic, Social and Cultural Rights during the first part of the session. Similar meetings with members of the Human Rights Committee and the Sub-Commission on the Promotion and Protection of Human Rights were to take place during the second part. The introductory sec-

* Resumed from the 2770th meeting.

** Resumed from the 2760th meeting.

¹ For the text of the draft guidelines provisionally adopted so far by the Commission, see *Yearbook ... 2002*, vol. II (Part Two), para. 102, pp. 24–28.

² Reproduced in *Yearbook ... 2003*, vol. II (Part One).

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

⁴ CERD/C/62/Misc.20/Rev.3.

⁵ *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, vol. I, annex V, p. 119.

⁶ See CEDAW/C/2001/II/4.