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Summary record of the 2797th meeting

Topic:
Shared natural resources

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or diplomatic protection, strictly speaking. If non-national crew members were not included in the protection, they would be left to their fate. Thus, for humanitarian reasons, crew members must be protected under article 27.

46. Mr. BROWNLIE said that the text should not appear to say that the consular protection procedures under article 292 of the United Nations Convention on the Law of the Sea were of the same kind as diplomatic protection, because that was not the case. The Commission could not base itself on practice, which was uncertain. For example, Ms. Xue had said that China was interested in protecting crew members on ships of non-Chinese nationality, which contradicted the idea that States were not interested in exercising diplomatic protection in such a case. For reasons associated with the strategic importance of their merchant marine, the United Kingdom and the United States had granted their protection to crew members, regardless of their nationality, although that historical situation was no longer of great importance. As to human rights, it seemed to him that they would be better protected through better legal certainty. To that end, there should be a rule of priority: the State of nationality of the individual crew members should have the first option of exercising its protection and, if it did not do so, then action could be taken by the State of nationality of the ship.

47. Ms. XUE said that ships could not be regarded as being part of the territory of the flag State and that the notion of protection by the flag State was based, not on the principle of territoriality, but on that of the jurisdictional control of the flag State. She also doubted that it could be asserted, as the Special Rapporteur had done, that the flag State would necessarily be more active than the States of nationality of the crew members of a ship. It was not a question of the size or influence of the State or whether it had a good human rights record, and the Commission should closely examine actual maritime practice.

48. Mr. ECONOMIDES said that although consular protection and the protection of crew members under the law of the sea were realities, the question was whether the Commission should go further and extend diplomatic protection to non-national members of crews; that would be progressive development. He noted that even if the flag State usually had little interest in the protection of crew members of another nationality, the situation could change and it was not for the Commission to rule out that possibility in advance.

49. Mr. MOMTAZ stressed that if the flag State did not want to protect the crew members, it was not because there were no legal rules, but because there was no effective link between the ship and the flag State; adopting article 27 would not solve that problem.

50. The CHAIRPERSON, noting that views were very divided, suggested holding an indicative vote on whether article 27 should be referred to the Drafting Committee.

51. Mr. DUGARD (Special Rapporteur) pointed out that normal practice in the Commission was for the Special Rapporteur to report on the number of speakers who had spoken in favour of the provision and those who had spo-

ken against and that the Commission held an indicative vote only if there was a division of opinion.

52. Mr. BROWNLIE said that he had himself changed his mind during the discussion and other members had perhaps done so, too.

53. Mr. PELLET said that he, too, had changed his mind, in that he would like the draft articles to contain a provision on the protection of ships' crews, but not as it was currently formulated in article 27. He asked whether the Drafting Committee would have the leeway to say that the protection of the crew members of a ship did not constitute a case of diplomatic protection.

54. The CHAIRPERSON proposed first holding an indicative vote on whether to refer article 27 to the Drafting Committee. If the proposal was voted down, he would hold a second vote on whether the Drafting Committee should consider drafting a provision on the link between diplomatic protection and the protection of ships' crews, which could take the form that the Drafting Committee deemed appropriate.

55. Mr. ECONOMIDES said that, at the procedural level, it was preferable to have only one vote on the referral of article 27 to the Drafting Committee, but giving the latter considerable leeway in drawing up the provision.

56. Mr. PELLET, stressing that the main thrust should be decided in plenary, said that he supported the Chairperson's proposal.

57. The CHAIRPERSON invited the Commission to vote by show of hands on whether article 27 should be referred to the Drafting Committee.

The proposal that article 27 should be referred to the Drafting Committee was rejected by 15 votes to 12.

58. The CHAIRPERSON proposed that the Drafting Committee should be requested to consider preparing a provision on the link between the protection of crew members by the flag State and diplomatic protection, and to report on its conclusions in plenary. He invited the Commission to vote on that proposal by show of hands.

The proposal that the Drafting Committee should consider preparing a provision on the link between the protection of crew members by the flag State and diplomatic protection was adopted by 16 votes to 4, with 5 abstentions.

The meeting rose at 1 p.m.

2797th MEETING

Wednesday, 12 May 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso,

Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Yamada.

**Shared natural resources¹ (A/CN.4/537,
sect. F, A/CN.4/539 and Add.1²)**

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR

1. The CHAIRPERSON invited the Special Rapporteur to introduce his second report on shared natural resources: transboundary groundwaters (A/CN.4/539 and Add.1).

2. Mr. YAMADA (Special Rapporteur), introducing his second report, said that for technical reasons it had not been possible, as initially envisaged in paragraph 6 of the report, to include in the addendum thereto a review of existing treaties and world groundwater maps. He hoped to share those and other materials with the Commission in an informal setting. He also drew attention to a corrigendum: in the footnote to the selected bibliography on law of transboundary groundwaters, credit should be given to Raya Stephan of UNESCO, rather than to Kerstin Mechlem of FAO.

3. At the outset, he recalled that some members of the International Law Commission and delegations in the Sixth Committee had voiced apprehension that the words “shared resources” might refer to a shared heritage of mankind or to the notion of shared ownership. During the consideration of paragraph 4 of General Assembly resolution 58/77 of 9 December 2003, entitled “Report of the International Law Commission on the work of its fifty-fifth session”, several delegations had even attempted, without success, to have the title of the topic altered by deleting the word “shared”. In view of that concern, expressed both in the Commission and in the Sixth Committee, he would focus on the subtopic of “transboundary groundwaters” without using the word “shared”.

4. In his second report, he presented several draft articles. Any draft article must be amply substantiated by existing international treaties, customary rules and State practice; as research was not yet sufficiently advanced for that to be possible, he was not requesting that any of the draft articles should be forwarded to the Drafting Committee at the current stage.

5. In 2003, he had noted that the Convention on the Law of the Non-navigational Uses of International Watercourses was the treaty most relevant to the current subtopic and that almost all the principles embodied therein would also be applicable to groundwaters. That statement had met with criticism both in the Commission and in the

Sixth Committee. While he accepted that criticism and recognized the need to adjust those principles, he continued to believe that the Convention offered the basis on which a regime for groundwaters could be built.

6. In paragraph 8 of the second report, he laid down a general framework for formulating draft articles which more or less reflected that of the Convention on the Law of the Non-navigational Uses of International Watercourses. Paragraph 9 also took into account the draft articles on prevention of transboundary harm from hazardous activities, adopted by the Commission at its fifty-third session, in 2001.³

7. The second report contained draft articles for Part I (Introduction) and Part II (General principles). The draft articles for all the remaining parts would be presented in 2005.

8. Turning to the introduction of the report, he said that he continued to employ the commonly used term “groundwater” in the main body of his second report, but had decided to use the more precise scientific term “aquifer” in the draft articles themselves.

9. Paragraph 10 of the report contained his proposal on the scope of the Convention, in the form of draft article 1. In 2003, he had proceeded on the assumption that the Commission would consider only those transboundary groundwaters not covered by the Convention. In the past, the Commission had designated such groundwaters as “confined transboundary groundwaters”. It had used the word “confined” to indicate that they were “unrelated”, “not connected” or “not linked” to the surface waters. However, it turned out that the use of the word “confined” raised serious problems.

10. Firstly, groundwater experts employed the term in an entirely different sense. For hydrogeologists, “confined” meant a hydraulic state where waters were stored under pressure. Groundwater was not an underground lake, but was more like a waterlogged sponge. As it was located underground, it was under great pressure, so that when a well was drilled and the drill struck groundwater, the water spurted out. It would be advisable not to use the word “confined”, so as to avoid possible confusion among lawyers and groundwater experts, as the latter would be involved in the implementation of the proposed convention.

11. Another important reason for dropping the notion of “confined” or “unrelated” from the scope of the proposed convention was that the assumption that the Commission was to address only groundwaters not covered by the Convention on the Law of the Non-navigational Uses of International Watercourses was incorrect. He cited as an example the Nubian Sandstone aquifer system, a huge aquifer system located beneath the territories of Chad, Egypt, the Libyan Arab Jamahiriya and the Sudan. The system was connected with the River Nile south of Khartoum. Thus, the Convention applied to that entire aquifer system. In reality, however, the connection with the

¹ For a summary of the Commission’s work on the subject, see *Yearbook ... 2003*, vol. II (Part Two), chap. IX, pp. 93–95.

² Reproduced in *Yearbook ... 2004*, vol. II (Part One).

³ *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 146 *et seq.*, para. 97.

Nile was negligible: the aquifer system currently received practically no recharge. It had all the characteristics of groundwaters and not those of surface waters. A similar situation obtained for the Guarani aquifer in the Southern Cone of South America. The case studies of those two aquifer systems were included in the addendum. In his view, the Commission's project should cover those two important aquifers, and he had therefore decided to delete the limiting factor of "unrelated to the surface waters" from the scope of the convention. That action would lead to parallel application of the proposed convention and of the Convention on the Law of the Non-navigational Uses of International Watercourses to the same system in many instances, but that should not cause any problem. If it did, the Commission could draft an article on priority application.

12. He also proposed to regulate activities other than uses of transboundary groundwaters, in order to protect groundwaters from pollution caused by surface activities such as industry, agriculture and forestation.

13. Draft article 2 (paragraph 16 of the report) contained definitions of the terms "aquifer" and "aquifer system". Article 1 of the Convention on the Law of the Non-navigational Uses of International Watercourses referred to uses of both "international watercourses" and "their waters", because uses of a river system, such as the transportation of logs and water sports, differed from uses of waters, such as power generation, irrigation and drinking. There was no need to follow that example in the present draft articles, as the term "aquifer" covered both the rock formation and the waters contained in it.

14. In many cases, two or more aquifers had hydraulic consistency between them. Two aquifers that were hydrologically linked must be treated as a single system. Therefore, a definition was needed for "aquifer system", and he proposed regulating aquifer systems throughout the proposed convention. In addition to the five aquifer models (Cases 1 to 5) illustrated in the Special Rapporteur's report, there might also be a Case 3 *bis*, in which a domestic aquifer was hydrologically connected to a domestic river of State B. In paragraph 2 of the addendum, he had written that Case 3 would be covered both by the Convention on the Law of the Non-navigational Uses of International Watercourses and by the proposed convention. On reflection, however, he was not so sure. If the hydrological link was the connection to the surface waters that the drafters of the Convention had had in mind, and if the Convention applied to that case, then article 7 of the Convention, on the obligation not to cause harm, would alleviate some of the problem. However, if it was not, then the Convention did not apply, and article 2 as currently drafted did not make those aquifers transboundary aquifers. He had not yet found a solution to dealing with such aquifers. Lastly, on Case 5, the definitions of "aquifer" and "aquifer system" left recharge and discharge areas outside aquifers. However, those areas should also be regulated for proper management of aquifers. He planned to formulate draft articles to regulate those areas, possibly in Part IV of the proposed convention.

15. Turning to Part II (General principles), he said he was not yet ready to submit a draft article on the principles

governing the uses of transboundary aquifer systems. The two basic principles embodied in the corresponding provision of the Convention on the Law of the Non-navigational Uses of International Watercourses, namely article 5, were "equitable utilization" and "reasonable utilization". In his view, the principle of equitable utilization was valid when the resource in question was "shared" in the true sense of the word. Waters of an international river were such a resource: any riparian State could use them as they passed through its territory. Clearly, extraction of waters from an aquifer system in one State would lower the water level of the system and thus affect the capacity of a neighbouring State to exploit the same system. However, given the strong resistance to the notion of "shared resources" in the case of groundwaters, he was not certain whether the principle of equitable utilization was politically acceptable.

16. The other principle, "reasonable utilization", meant the sustainable use of the resource. That principle was valid if the resource in question was renewable. In the case of groundwaters, deep aquifers and aquifers in arid zones were not renewable, and the concept of sustainable use was not relevant. It might be up to the parties concerned to decide whether they wanted to use up the resource over a shorter or longer period of time. It was not clear whether any objective criteria were applicable.

17. Draft article 4 (paragraph 24 of the report) concerned another key principle, one which in his view was well established in the field of international liability: the obligation not to cause harm to other aquifer States. Paragraph 1 of the article related to the use of aquifer systems, and paragraph 2 to activities other than uses.

18. In the debate in the Commission and in the Sixth Committee, the opinion had been expressed that a lower threshold than "significant" harm was required owing to the fragile nature of groundwaters, but, as he saw it, the concept of "significant harm" was flexible and relative. The harm caused to an aquifer by just one kilogram of pollutant might be just as great as that caused when one ton of pollutant was released into a river. The concept of significant harm was sufficient to safeguard the viability of aquifers. Preservation of the aquifer was an idea which was dear to many groundwater experts, but he was not sure whether it was appropriate to place it in article 4 as a State obligation. He might move that provision to Part IV of the draft articles. Some members of the Commission and delegations of the Sixth Committee had also advocated including an article on liability. While he recognized the importance of that subject, he preferred to leave consideration of that issue to the Special Rapporteur on the topic of international liability, Mr. Sreenivasa Rao.

19. Draft article 5 (paragraph 29 of the report) contained a proposal on a general obligation for aquifer system States to cooperate. The text was self-explanatory. Draft article 6 (para. 31) concerned regular exchange of data and information, a prerequisite for effective cooperation among aquifer system States. Paragraph 2 of that article stressed the need, given the insufficiency of scientific findings on aquifer systems, for aquifer system States to coordinate efforts to produce comparable data.

20. Draft article 7 (paragraph 33 of the report) related to the relationship between different kinds of uses of aquifer systems and followed the precedent of article 10 of the Convention on the Law of the Non-navigational Uses of International Watercourses. Paragraph 2 of article 7 contained a reference to “vital human needs”. It had been the understanding of the Working Group of the Whole during the elaboration of the Convention that, in determining vital human needs, special attention was to be paid to providing sufficient water to sustain human life, including both drinking water and water required for the production of food in order to prevent starvation.
21. That concluded the introduction of his second report. He looked forward to members’ comments and suggestions.
22. Mr. OPERTTI BADAN said that the topic had technical and political as well as legal dimensions. As a natural resource, water should be used rationally, consistent with its nature and its location. With regard to groundwater, he agreed with the Special Rapporteur on the need for further scientific studies, international and regional cooperation, and agreements between States and between States and international organizations. Every State had a primary responsibility for the way it used water. In his view, that responsibility preceded State responsibility at the international level, because it was a State’s responsibility to protect its territory and population.
23. Thus, the rules of conduct to be observed must be adopted by States, by agreement between States, and with international assistance and cooperation, with particular emphasis on regional arrangements. That was the approach adopted by the countries of MERCOSUR—Argentina, Brazil, Paraguay and Uruguay—in dealing with the four countries’ shared aquifer system, the Guarani aquifer. In that context, he noted that the information concerning the Guarani aquifer contained in paragraphs 9 to 11 of the addendum to the report needed updating, as much scientific and legislative progress had been made since 2001.
24. Article 2 (*d*) of the Convention on the Law of the Non-navigational Uses of International Watercourses acknowledged the importance of the regional role, with its reference to a “regional economic integration organization”. The MERCOSUR countries already complied with draft articles 5, 6 and 7 and supported the thrust of the Special Rapporteur’s comments, although they believed that there was still room for improvement.
25. While oil and gas had come to be recognized as resources subject to sovereignty, the same was not true of water. The Commission’s project to draft a convention on the uses of transboundary aquifer systems indicated that water was to be treated as a special case. Mr. Momtaz and others had argued that water was a natural resource no different from gas or oil, and therefore must be regarded as belonging to the State or region in which it was located. In his own view, the regional approach—as opposed to the universal or the national—made the most sense; that approach did not deny such fundamental principles as the obligations not to cause harm, to cooperate and to use the resource rationally, obligations that could be reflected in the draft articles.
26. He stressed that the draft articles were not intended to constitute an environmental treaty, nor were they intended to regulate conduct, although general principles naturally came into play; their primary purpose was to establish the proper use of a natural resource.
27. At an informal briefing of a working group of the Commission, an expert from FAO had put forward the thesis that water was a universal resource. He could not subscribe to that thesis. It was surely absurd that, with oil costing US\$ 40 per barrel, water should be regarded as a humanitarian resource that did not belong to the basin State or States in which it was located and that could not be marketed.
28. On 15 August 2003, the Presidents of the MERCOSUR countries had met to consider a draft document submitted by the Government of Uruguay, laying the foundation for an agreement regarding the Guarani aquifer. Two projects were currently under way, which, although linked, concerned two quite different aspects of the matter: one was a technical study, carried out with the support of the World Bank and OAS, which was considering such issues as access and potential uses and such hydrological data as the depth, temperature and salinity of the aquifer. The other project was an attempt to establish legal norms regulating the rights and duties of the States under whose territories the resource was located and duties pertaining to territories where the water was located. Considerable progress had been made with the latter topic, as could be seen from the draft MERCOSUR agreement submitted by Uruguay, copies of which had been circulated to the Commission by the Secretariat. General principles had been established and criteria laid down. That progress contrasted with the Special Rapporteur’s decision to postpone drafting an article 3 on principles governing uses of aquifer systems. The first MERCOSUR principle was that groundwaters belonged to the States under whose territories they were located. That principle was absolutely fundamental. Secondly, MERCOSUR accepted the scientific definition of groundwaters as waters not connected with surface aquifer systems. Thirdly, it accepted the definition of a “transboundary aquifer system”, and regarded the Guarani aquifer as such a system, and, accordingly, as belonging exclusively to the four MERCOSUR countries. Fourthly, MERCOSUR regarded development of the Guarani aquifer as a regional infrastructure integration project falling within its competences as a regional economic integration organization. The four MERCOSUR countries had shown an extremely responsible attitude, focusing on preservation, controlled development and shared management of the Guarani aquifer. They would continue to work in close cooperation with FAO, of which they were all members, and it was to be hoped that they would continue to receive technical information, although ownership, management and monitoring would remain the responsibility of the MERCOSUR countries themselves.
29. Thus, two crucial procedures would be continuing simultaneously: the Commission would be engaged in its codification of the relevant laws and regulations, while the development of the Guarani aquifer would also be proceeding at a more rapid pace and bringing about speedier but solidly based regional development. The

MERCOSUR countries would follow the Commission's progress and would inform it of their own progress, so a two-way process would be constantly maintained.

30. Lastly, he suggested that the Commission should give consideration to the possibility of elaborating a model law, rather than an international convention, which could be used as a basis for bringing national legislation into line with regional development priorities.

31. Mr. BAENA SOARES said that the first report of the Special Rapporteur on shared natural resources⁴ had provided a wealth of information to supplement members' existing knowledge and for many members had constituted an introduction to the complexity of the topic. There was clearly still much to learn and the Special Rapporteur's recognition of that fact had resulted in the addition of useful material contained in the second report.

32. All the evidence suggested that it was premature to decide on draft articles that could be submitted to Governments, given that so much more research was required, as noted in paragraph 5 of the report. Due caution must be exercised in considering any text at that early stage of the proceedings. The Commission should also reflect carefully before taking the Convention on the Law of the Non-navigational Uses of International Watercourses—which to date had received only 16 signatures and 12 ratifications—as the basis for a regime for groundwaters. Basic principles would need to be established, and it was telling that, as stated in paragraph 21, the Special Rapporteur did not yet feel in a position to submit a draft article on those principles.

33. Paragraph 23 raised a number of interesting questions to which there was as yet no answer. Governments should therefore be urged to respond to the invitation contained in paragraph 4 of General Assembly resolution 58/77 to provide information with regard to the use and management of transboundary groundwaters as a matter of urgency. The scant response so far constituted a further reason why the Commission should not try to rush through its work of establishing a legal framework.

34. He supported the comments in paragraphs 4 and 11 of the second report regarding the use of the terms “transboundary groundwaters” and “transboundary aquifer system”. He also shared the Special Rapporteur's rejection of the view that all categories of aquifers must be subject to international regulations, regardless of whether they were domestic or transboundary. The Commission should also base its work on the premise that aquifers were a sovereign resource of the State in whose territory they were located and on the obligation not to cause significant harm.

35. Mr. MANSFIELD, after commending the second report, which he found as informative and thought-provoking as the first, expressed support for the Special Rapporteur's approach of seeking assistance from hydrogeologists and other technical experts to ensure that any legal norms developed by the Commission had a sound

technical foundation and were capable of being understood and implemented by technical experts and managers. He also supported the decision to present draft articles as a way of focusing the Commission's attention on the issues, even if the Special Rapporteur believed that there was more work to be done before any articles could be referred to the Drafting Committee.

36. The decision to refer to “transboundary” rather than “shared” natural resources seemed sensible. The former term had the obvious advantage of describing the physical characteristics of the resources rather than the attitude or action taken by the contiguous States towards them.

37. He found himself convinced by the reasons given by the Special Rapporteur for adopting the term “aquifer” rather than “groundwaters”, for avoiding the use of the term “confined” in relation to such waters and for covering activities other than uses. He suggested, however, an alternative wording of the article that would highlight the three elements that constituted the scope of the Convention. Thus the text would read:

“The present Convention applies to transboundary aquifer systems and to:

- (a) Uses of;
- (b) Activities which have or are likely to have an impact upon; and
- (c) Measures of protection, preservation and management of, transboundary aquifer systems.”

Such a text would be particularly useful in asserting the applicability of the draft convention to the aquifers themselves.

38. Paragraph 14 of the report discussed the possibility of overlap between the draft articles and the Convention on the Law of the Non-navigational Uses of International Watercourses. Such an overlap could clearly occur where water was exchanged between an aquifer and a watercourse system covered by that Convention and, equally clearly, it would not be appropriate to restrict the draft articles to groundwaters not covered by the Convention. However, although the delineation between the waters of an aquifer and the groundwaters forming part of an international watercourse might be difficult, the potential overlap did not present a serious problem; as the report pointed out, a provision could be drafted to cover that point if necessary.

39. He had somewhat more difficulty with the Special Rapporteur's suggestion in paragraph 15 that the words “which have or are likely to have” [an impact on transboundary aquifer systems] should be replaced by the words “which involve a risk of causing”. Such a modification would significantly change the scope of application of the articles: whereas the present wording meant that the articles applied to activities having a current impact on the aquifer system as well as activities that were likely to have an impact in the future, the new wording would not apply to activities that were currently having an impact. That would be undesirable.

⁴ *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/533 and Add.1, p. 117.

40. With regard to the definitions contained in paragraphs 16 and 17, he questioned whether an aquifer should be defined as being “capable of yielding exploitable quantities of water”. He wondered whether the reference to exploitability implied that more aquifers might fall within the ambit of the convention as technology developed or whether the convention should be interpreted solely in the light of current technology. In addition, it was not clear whether the Special Rapporteur interpreted exploitability as referring simply to quantities of water that could be used or whether the term entailed notions of commercial or economic viability. He also wondered whether the definition proposed by the Special Rapporteur, taken together with article 4, paragraphs 2 and 3, meant that aquifer system States were under an obligation to protect aquifers that were not yet being used but that could be used at some time in the future. In his view, the convention should definitely ensure that any such aquifers were subject to appropriate protection.

41. It might be premature to raise the separate question as to whether a definition of “aquifer waters” might eventually be needed in addition to the definition of “aquifer”. The present definition covered both the rock formation and the waters contained within it, thus highlighting the importance of the integrity of the structure and the need to ensure that it was protected as a whole. However, that definition might prove insufficient or too imprecise in relation to obligations relating to the exploitation of the aquifer.

42. While he did not wish to raise the spectre of purely theoretical difficulties that might arise in connection with the definition of a “transboundary aquifer system”, he nevertheless wondered whether the definition proposed by the Special Rapporteur would be sufficient to cover a situation in which an aquifer was located wholly or partly in disputed territory. An amendment to the definition that would encompass an aquifer located in a territory subject to competing claims might usefully address the need for the States concerned to adopt interim measures of protection pending the resolution of any territorial dispute.

43. More generally, he supported the approach taken by the Special Rapporteur in his definition of an “aquifer system”: if there was hydraulic linkage between aquifers, then sensible management surely required that they should be treated as a single system. The Special Rapporteur was also right to conclude, in paragraph 19, that the Commission should seek at present to regulate only transboundary aquifer systems and not those occurring within a single State. Yet with the development of international human rights law, it had become accepted that the international community had an interest in the way a State treated its citizens. The question thus arose as to whether, in a world heading for a water crisis, the international community ought to take a similar interest in ensuring that a State acted responsibly towards future generations of its own citizens with regard to that most fundamental necessity of life.

44. As the Special Rapporteur had indicated that he was not ready to suggest articles that might differ from the principles contained in the Convention on the Law of the Non-navigational Uses of International Watercourses, he

would not address paragraphs 21 to 23 of the report. He nevertheless wished to note that the draft articles already contained some important principles such as the prohibition of significant harm to aquifer States, adequate protection and appropriate utilization, and the primacy of vital human needs in the event of a conflict of uses.

45. The chapter of the report on the obligation not to cause harm raised a number of interesting issues. Firstly, the concept of limiting the proscribed harm to harm caused *through the aquifer system* to other aquifer system States seemed to represent a new approach, though one that might well be correct. Moreover, article 4, paragraphs 1 and 2, appeared to limit the harm to be prevented to harm to the aquifer State, rather than harm to the aquifer itself. Considerations of intergenerational equity and respect for the integrity of the environment would seem to warrant an obligation to prevent harm to the aquifer itself. For example, the natural functioning of an aquifer system might include the filtration of impurities from groundwater as it entered and moved through the aquifer. Would that allow aquifer States to agree to allow treated wastewater to enter an existing transboundary aquifer in order to recharge the aquifer? Could they then argue that they were suffering no harm and that paragraphs 1 and 2 therefore did not apply; and that the purification of contaminants was part of the natural functioning of the aquifer, so that paragraph 3 therefore did not apply? That was an interesting thought.

46. On the question of liability and dispute settlement mechanisms mentioned in paragraph 28 of the report, he simply wished to note that prevention in that area was critical and that compensation could probably never be an adequate remedy. The Commission might therefore have to devise provisions that encouraged States to act cooperatively, recognize their interdependence in respect of such critical resources and identify ways of obtaining appropriate and timely assistance in the resolution of any disputes that might arise.

47. Lastly, he sought clarification concerning the relationship between paragraphs 1 and 2 of article 7, discussed in paragraphs 33 and 34 of the report. He was not certain whether the vital human needs referred to in paragraph 2 would take precedence over the existence of an agreement or custom, referred to in paragraph 1. Paragraph 1 appeared to grant priority to an existing agreement or custom relating, for example, to irrigation use, while paragraph 2 indicated that, in the event of a conflict of use, special regard must be given to vital human needs.

48. In concluding, he thanked Mr. Opertti Badan for the valuable supplementary material he had contributed.

49. Mr. BROWNIE said that the Special Rapporteur was quite right to ask for a moratorium. The topic was a highly specialized one and possibly unique. The diversity of aquifers, which had been mentioned several times at the previous session, meant that the Commission was highly dependent on scientific data, and the Special Rapporteur had, for very good reasons, already modified his use of terms in the light of developments in the availability of scientific data.

50. Turning to the definitions proposed by the Special Rapporteur, he said that the terms “aquifer” and “aquifer system” were based on technical terms and must be accepted as such. He wished, however, to distinguish between the terms “harm” and “significant harm” in respect of other aquifer system States. While it might seem obvious to say so, the use of the word “significant” was important and useful. It was, however, a loose concept, that required the presence of proof that a certain level of harm had been inflicted. Thus, while necessary, the term was not sufficient. Moreover, as the definition of “harm” was itself very obscure, the Commission ought to give further thought to identifying the types of harm that it had in mind. Article 1 distinguished between “uses” of aquifer and “other activities”. In article 4, on the obligation not to cause harm, paragraph 1 referred to the duty to prevent the causing of significant harm in the utilization of an aquifer system; paragraph 2 used the term “other activities”. Paragraph 3, meanwhile, introduced a new aspect of the question when it spoke of impairing the natural functioning of a transboundary aquifer system. What he found problematic was the fact that in certain cases of pollution of an aquifer or interference caused by such actions as drilling, the concept of significant harm was not clearly related to the rate of extraction, although it was possible that paragraph 3 represented an attempt to cover that case. In practice, however, it was extraction rates that created problems, as was demonstrated by the shared use of aquifers by France and Switzerland, and it was difficult to apply the present concept of significant harm to the selfish, unilateral or non-sustainable use of water.

51. The Commission must give the Special Rapporteur some guidance in connection with one possible outcome of the work on his topic, namely the discovery that there was little or no State practice in the matter. In his work thus far, the Special Rapporteur had chosen to focus on scientific data rather than State practice, although it was possible that some State practice might yet emerge. If it turned out that there was in fact no State practice, the Commission should nevertheless encourage the Special Rapporteur to pursue the topic. It should not take the position that in the absence of any State practice the topic should be dropped, for the Commission’s work was not only to codify existing practice but to look forward as well.

52. Ms. ESCARAMEIA commended the Special Rapporteur for the clarity of his report, which succeeded in making difficult material easily comprehensible. She endorsed the change of focus to the subtopic of transboundary groundwaters and the choice of draft articles as the general framework for the Commission’s consideration of the topic. She also welcomed the extensive contacts that the Special Rapporteur had forged with the international scientific community, which greatly enhanced the report.

53. The statement by Mr. Operti Badan had been enlightening and she appreciated the concerns that he had expressed. However, she did not think that the draft convention was incompatible with the approaches to the matter taken at the regional or national level. Much of the material was already reflected in the draft MERCOSUR agreement, and there was still scope for cooperation.

54. The Convention on the Law of the Non-navigational Uses of International Watercourses provided a good model insofar as a general framework for the Commission’s deliberations was concerned. However, the Special Rapporteur had noted that several principles of that instrument were not automatically applicable to groundwaters, a position with which she concurred. The Commission must be careful in that regard, for the Convention was not yet in force and there had in fact been few ratifications to date; it also referred to a very different situation, although with some degree of overlap. The Special Rapporteur had also suggested that the draft articles on prevention of transboundary harm from hazardous activities⁵ might also provide a useful guide in the present exercise. However, it might be premature to follow that approach, as those draft articles had not yet been adopted or even considered by the Sixth Committee of the General Assembly.

55. She agreed that article 1 should apply not only to “uses” of an aquifer but also to “other activities”. She welcomed the change in terminology from “confined transboundary groundwaters” to “transboundary aquifer system”. She also welcomed the rewording of the article to refer to activities that “have or are likely to have” an impact, as the new wording was more likely to accommodate environmental concerns.

56. In article 2, paragraph (b), she did not see why it was necessary to state that an aquifer or series of aquifers was associated with specific rock formations; the fact that they were identified as being “hydraulically connected” ought to suffice.

57. With regard to the principles governing the uses of aquifer systems, she noted that although a number of principles were already contained in the Convention on the Law of the Non-navigational Uses of International Watercourses, the Commission needed to deal with many more principles in the present draft, especially in the area of environmental protection and the sustainable use of aquifers. Some of those concerns had been reflected in the draft MERCOSUR agreement, which showed that they were important considerations at the regional level. The protection of vital human needs was another major principle that should be enunciated in the convention.

58. Mr. Brownlie had mentioned, in connection with article 4, the problems associated with the notion of “significant harm”, a concept that had always posed problems for her: it seemed to imply that some degree of harm was permissible. The concept merited further consideration; perhaps technical experts could provide examples of what constituted significant harm as well as examples of what was not significant, especially in the case of non-renewable water resources.

59. Paragraph 3 of article 4 should be retained, but should be made more precise. What was meant by the word “impair”, and what uses of an aquifer were acceptable? Paragraph 4 of that article, which dealt with compensation, was too weak. If a State impaired a transboundary aquifer, it should be required to do more than merely “discuss the question of compensation”. The situation raised

⁵ See footnote 3 above.

issues not only of liability but also of responsibility, since impairment could be the result of a wrongful act.

60. Lastly, with regard to article 5, she suggested that the obligation to cooperate, enunciated in paragraph 1, should include a specific reference to such areas of cooperation as environmental protection and sustainable use.

Organization of work of the session (continued)*

[Agenda item 1]

61. The CHAIRPERSON said that if he heard no objection he would take it that the Commission wished to establish a Working Group on transboundary groundwaters.

It was so decided.

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

The meeting rose at 11.40 a.m.

2798th MEETING

Thursday, 13 May 2004, at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

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

Shared natural resources¹ (continued) (A/CN.4/537, sect. F, A/CN.4/539 and Add.1²)

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. GAJA thanked the Special Rapporteur for his appraisal of current scientific and technical knowledge relating to groundwaters and his exploration of State practice. He supported the approach the Special Rapporteur had taken to defining the scope of his study, which, in the light of the consultations with technical experts, should focus on transboundary aquifer systems as described in article 2 and extend to other cases that the Special Rapporteur had indicated in his presentation.

* Resumed from the 2792nd meeting.

¹ For a summary of the Commission's work on the subject, see *Yearbook ... 2003*, vol. II (Part Two), chap. IX, pp. 93–95.

² Reproduced in *Yearbook ... 2004*, vol. II (Part One).

2. In view of the connection that most aquifer systems appeared to have with watercourses, a definition that covered only those groundwaters to which the Convention on the Law of the Non-navigational Uses of International Watercourses did not apply would give the study a very limited scope, and that would be particularly regrettable because the Convention did not adequately address certain problems specific to groundwaters. Paragraph 14 of the second report (A/CN.4/539 and Add.1) appeared to suggest that a boundary could be drawn between the topics covered by the Convention and those covered by the new instrument, since the Convention would be interpreted as applying only to those groundwaters that were more closely connected with a river basin. Only then would there be “a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus”, to use the wording of the Convention (art. 2). Such a boundary would not be easy to define and it would imply a restrictive interpretation of the Convention. Moreover, it might not be necessary. The new instrument—whether it took the form of a non-binding instrument, a protocol to the Convention or an independent treaty—could state obligations that were additional to those set out in the Convention on the Law of the Non-navigational Uses of International Watercourses, other treaties or general international law in respect of watercourses.

3. In article 1, the Special Rapporteur proposed that the new instrument should apply “to uses of transboundary aquifer systems and other activities which have or are likely to have an impact on those systems and to measures of protection, preservation and management of those systems”. Some members of the Commission had expressed a preference for a broader text that reasserted the territorial sovereignty of each State over that part of the aquifer that lay beneath its territory. Whether or not the Commission chose to do so, it might be useful to state, if only in the preamble, that territorial sovereignty over groundwaters was not under discussion, whether or not one accepted the principle of Roman law that *dominium* extended *usque ad infera* (“down to hell”).

4. The Special Rapporteur had rightly insisted on the need to examine State legislation and practice before drafting principles. However, it was necessary to have some indication of the content of those principles in order to have a meaningful discussion of obligations relating to aquifers. For example, article 4, paragraph 1, which said that States were under an obligation to “take all appropriate measures to prevent the causing of significant harm to other aquifer system States”, appeared to be based on the premise that there was no obligation to protect aquifer systems *per se*, while the obligation set out in paragraph 3 of that article pertained only to the “natural functioning” of the aquifer, which should not be impaired. As Mr. Mansfield had noted, the issue was an important one, since aquifer systems were either non-renewable or hardly renewable resources. Accordingly, the consideration of articles 4 to 7 should be postponed until the context had been defined and the aforementioned principles had been formulated.

5. Mr. NIEHAUS commended the Special Rapporteur on the quality of his work. Reviewing the background