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Summary record of the 2799th meeting

Topic:
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disconcerting the Special Rapporteur's assertion that some groundwaters could be covered both by the 1997 Convention and by the draft articles under consideration. The question would naturally have to be considered in the future, but, for his part, he would have preferred that some part of the draft articles should specify which groundwaters were expressly excluded from their scope, in order to provide an even more precise definition of the topic.

53. With regard to article 1, he thought that the wording suggested by Mr. Mansfield was an improvement on the existing text. Although it was too soon to talk of drafting changes, he wondered whether the word "uses" should not refer to the water contained in an aquifer system rather than to the aquifer system itself. He requested guidance on that point from the Special Rapporteur. In his view, it seemed more logical to speak of the uses of water.

54. The word "exploitable" in article 2 (a) required further explanation. Firstly, he wondered what volume of water an aquifer should contain to be considered exploitable. Secondly, the opportunities for exploitation could vary from one country to another, as could the legislation governing the exploitation of aquifers. Moreover, if the volume of the water contained in a given transboundary aquifer system was not sufficient for it to be exploited, he wondered whether it would be covered by the instrument under consideration and, if not, what regime it would be covered by. As for the principles governing the uses of aquifer systems, he understood that the Special Rapporteur wished to examine the question in greater depth, but personally he was confident that water deriving from a transboundary aquifer system also constituted a shared natural resource. He endorsed the views expressed by Mr. Sreenivasa Rao in that regard: the word "shared" emphasized that the aquifer was not subject to the exclusive sovereignty of a State and that, whether the term used was "shared natural resources" or "transboundary aquifers", the situation remained the same. In any case, territorial sovereignty was not involved. The very term "transboundary aquifers" meant that a State could not have exclusive sovereign jurisdiction and that other States also had sovereign rights with regard to the aquifer.

55. With regard to article 4, he agreed with Mr. Brownlie that the concept of "significant harm" was rather vague and uncertain. He also shared the view expressed by other members of the Commission that greater attention should be paid to harm caused to groundwaters, owing to their vulnerability to pollution, particularly since far less information was available concerning such groundwaters than concerning the waters of international rivers. Given that the waters in question were very vulnerable and mostly non-renewable, he wondered whether the word "significant" did not constitute too great an obstacle. After all, even minimal or insignificant harm should be prohibited and should not be repeated. In article 4, paragraph 3, the word "impair" posed a serious problem that had already been mentioned. The paragraph was inconsistent with the commentary to it, which appeared in paragraph 27 of the report and referred not to impairment, but to the permanent destruction of a transboundary aquifer system. The paragraph was unacceptable as currently worded. As for the question of international responsibility, he acknowledged that the draft articles on international liability for

injurious consequences arising out of acts not prohibited by international law would apply, but he shared Mr. Pambou-Tchivounda's view that if the accepted threshold of harm was exceeded, the issue became one of responsibility for an internationally wrongful act rather than one of liability.

56. Article 5, paragraph 2 was too weak, in his view, and should be strengthened, especially the phrase "as deemed necessary by them".

57. Lastly, the two paragraphs of article 7 should be amalgamated. The resulting text should be worded along the following lines: "In the event of a conflict between uses of a transboundary aquifer system, it shall be resolved, in the absence of agreement or custom to the contrary, with special regard being given to the requirements of vital human needs." Vital human needs should, of course, have priority over any other use. In his view, it was premature to deal with the issue of the form that the draft articles should take.

The meeting rose at 1.05 p.m.

2799th MEETING

Friday, 14 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. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Yamada.

Cooperation with other bodies

[Agenda item 10]

STATEMENT BY THE OBSERVER FOR THE COUNCIL OF EUROPE

1. The CHAIRPERSON welcomed Mr. de Vel, Director-General of Legal Affairs of the Council of Europe, and Mr. Benítez, Deputy Head of the Public Law Department of the Directorate-General of Legal Affairs of the Council of Europe, and invited the former to address the Commission.

2. Mr. de VEL (Observer for the Council of Europe) said that he welcomed the opportunity to attend the Commission's fifty-sixth session in person, a mark of the importance that the Council attached to the Commission's work and to its cooperation with it. He wished briefly to review a number of recent developments in the Council of Europe that might be of interest to the Commission. Two documents had been prepared for the Commission's

benefit: one on the results achieved in 2003 and the other on the Council's activities to combat terrorism.

3. In April 2004, the Parliamentary Assembly of the Council of Europe had given a positive opinion in favour of Monaco's application to become the forty-sixth member of the Council. As usual, certain conditions were set, such as signature of conventions and amendment of domestic legislation; in addition, the Assembly had called on Monaco and France to renegotiate the Treaty on the admission of Monegasque nationals to certain public positions in France and on the recruitment of certain civil servants of the Principality,¹ which reserved certain important civil service posts for French public servants. The previous day, the Committee of Ministers had called for the Ministers' Deputies to accelerate consultations with a view to making progress on the application.

4. At its 114th session, held on 12 and 13 May 2004, the Committee of Ministers had adopted Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, to modify substantially the procedures of the European Court of Human Rights with a view to reducing its backlog; considered the preparations for the Third Summit of the Council of Europe, to be held in Poland in May 2005, focusing on the Council's objectives in the twenty-first century in the light, *inter alia*, of the enlargement of the European Union; and considered the Council's contribution to the fight against terrorism and organized crime.

5. Following the 25th Conference of European Ministers of Justice in Sofia in October 2003 and at the request of the Committee of Ministers, the Committee of Experts on Terrorism (CODEXTER) had been asked to formulate an opinion on the feasibility and possible added value of a comprehensive Council of Europe convention against terrorism with a view to contributing to United Nations efforts to combat that phenomenon. The Council had called upon Mr. Christian Tomuschat to draft an independent study on the subject. In January 2004, the Parliamentary Assembly had adopted Recommendation 1644 (2004), entitled "Terrorism: a threat to democracies", in which it had asked the Council to begin work without delay on the elaboration of a comprehensive convention. CODEXTER had discussed the study, which found that such a convention would have added value as a contribution to United Nations efforts, but had not reached a consensus on whether negotiations on such a legal instrument were to be recommended at the present stage. It had nevertheless agreed that an instrument or instruments of limited scope dealing with the prevention of terrorism and filling existing gaps in international law or action would bring added value. A number of principles and preventive and cooperation measures had been identified, including, *inter alia*, scope, duty to investigate, liability of entities, public provocation to commit acts of terrorism, measures to deny terrorist groups freedom of operation and to prevent abuse of the right of asylum and refugee status, freezing of assets, and identity questions. The Committee of Ministers had instructed CODEXTER to undertake

work on the lacunae identified and to elaborate legal instruments, binding or non-binding.

6. Another issue being addressed in the context of the fight against terrorism was protection and compensation of victims. The issue had been raised in Madrid at the First International Congress of Victims of Terrorism, which had been attended by about 300 victims. Ironically, the Congress had been held only weeks prior to the tragic events of 11 March 2004. The Madrid Declaration adopted at the Congress called for the Council of Europe to take up the concerns of victims of terrorism. It followed the invitation extended to the Committee of Ministers by the European Ministers of Justice at Sofia to review the European Convention on the Compensation of Victims of Violent Crimes of 24 November 1983. CODEXTER had studied the reasons explaining the limited number of ratifications of that Convention—only 16 to date—and had launched an exchange of information and best practice on compensation and insurance schemes introduced by States in relation to victims of terrorist acts.

7. Following the elaboration of a report on the application of the concepts of "*apologie du terrorisme*" and "incitement to terrorism" in member States, CODEXTER had acknowledged that there were lacunae in international law regarding the treatment of those phenomena and had decided to continue to consider the issue with a view to filling the lacunae through new international instruments. The Council, by virtue of its activities in the fields of human rights, protection of freedom of expression and the fight against crime, was particularly well placed to consider that sort of problem.

8. Other areas in which the Council was especially active in the fight against terrorism were special investigation techniques and protection of witnesses and *pentiti* ("collaborators of justice"). Two committees had already been instructed to elaborate legal instruments in those areas. For special investigation techniques, a soft law instrument was likely to be developed, whereas for protection of witnesses a binding convention could be envisaged.

9. The financing of terrorism was an extremely important problem and the Council's Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), which evaluated measures taken by member States to combat money laundering, had been working for over a year, at the request of the Committee of Ministers, to assess measures taken to prevent the financing of terrorist activities. At the same time, work had begun on revision of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime with a view to its covering such matters as prevention and financing of terrorism.

10. The European Commission for the Efficiency of Justice (CEPEJ) was preparing an evaluation of the efficiency of national legal systems in their response to terrorism. A pilot project had been launched by CODEXTER to develop country profiles on judicial and institutional capacity to combat terrorism in Council of Europe member and observer States. Three States were to present their profiles at CODEXTER's next meeting. The Council maintained excellent relations of cooperation with

¹ Signed in Paris on 28 July 1930 (United Nations, *Treaty Series*, vol. 981, No. 735, p. 369).

UNODC and OSCE with a view to promoting ratification of the conventions against terrorism of the United Nations and the Council of Europe. Joint operations were carried out in certain countries that wished to ratify those instruments.

11. Another area, in which the Council had been active since 1994, was the fight against corruption. Two binding instruments—the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption—one resolution, on guiding principles for the fight against corruption, and two recommendations, one on codes of conduct for public officials, the other on corruption in the funding of political parties and electoral campaigns, had been adopted. All of those legal instruments were monitored by the Group of States against Corruption (GRECO), which now had 37 members and was also open to non-member States: the United States was now a fully fledged member and had just been evaluated by GRECO. The European Commission had adopted a report advocating accession to GRECO by the European Union. The Council had participated in the Eleventh International Anti-Corruption Conference and the Third Global Forum on Fighting Corruption and Safeguarding Integrity (Seoul), and in a recent forum in Mérida, Mexico, at which it had stressed the decisive role of GRECO as an international institution for the monitoring of anti-corruption measures. The European Union had entrusted the Council with the implementation of two important programmes to combat money laundering in the Russian Federation and in Ukraine.

12. The Council's Convention on Cybercrime was the first and only international instrument of a binding nature on the subject. It had been signed by 23 member States and 5 non-members and was supplemented by an Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems. The Convention would enter into force on 1 July 2004 and the Additional Protocol was also expected to enter into force shortly.

13. The independence and efficiency of the judiciary were also among the concerns of the Council of Europe. Owing to the many decisions of the European Court of Human Rights concerning delays in judicial proceedings and efficiency of justice in member States, it had been necessary to take “upstream” measures to prevent problems from accumulating at the national level. Hence the creation of CEPEJ, whose purpose was to exchange good practice and information and, above all, to provide countries that so wished with assistance in their judicial reforms. The first countries to request such assistance had been Switzerland and the Netherlands. CEPEJ had now elaborated a scheme for evaluation of judicial systems in member States. It was working in close cooperation with other Council of Europe bodies that brought together legal professionals, such as the Consultative Council of European Judges (CCJE), the Conference of Prosecutors General of Europe (CPGE), the meetings of Presidents of European Supreme Courts and of Supreme Administrative Courts and the Lisbon Network for the training of judges. Those groups constituted an impressive pool of resources for improving the efficiency of justice.

14. The Committee of Ministers had entrusted the European Committee on Legal Cooperation (CDCJ) with the task of examining a recommendation by the Parliamentary Assembly on the consequences of European Union enlargement for freedom of movement between Council of Europe member States. That task entailed compiling a list of existing good practice in terms of circulation of persons among member States. CDCJ was to formulate recommendations for the Committee of Ministers by 30 November 2004.

15. In the area of human rights, he had already mentioned Protocol No. 14 to the European Convention on Human Rights, which had been adopted on 13 May 2004 and opened for signature on 14 May, and which 17 member States had already signed, in record time. The Protocol made various changes to the Convention designed to secure a more effective operation of the European Court of Human Rights. On clearly inadmissible cases, inadmissibility decisions, which were currently taken by a committee of three judges, would henceforth be taken by a single judge, assisted by non-judicial rapporteurs. The idea was to increase the Court's capacity to filter out the “hopeless” cases. In repetitive cases, where the case was one of a series deriving from the same structural defect at the national level, the proposal was that it could be declared admissible and decided by a chamber of three instead of seven judges, under a simplified summary procedure. With a view to allowing the Court a greater degree of flexibility, a new admissibility criterion was proposed, in addition to existing conditions such as exhaustion of domestic remedies and the six-month time limit. The Court would be able to declare applications inadmissible where the applicant had not suffered a significant disadvantage, provided that “respect for human rights” did not require the Court to go fully into the case and examine its merits. Under the Protocol, the Committee of Ministers would be empowered, if it decided by a two-thirds majority to do so, to bring proceedings before the Court where a State refused to comply with a judgement. The Committee of Ministers would also have a new power to ask the Court for an interpretation of a judgement, so as to assist it in its task of supervising the execution of judgements and particularly in determining what measures might be necessary to comply therewith. Other measures in the Protocol included changing the judges' term of office from the present six-year renewable term to a single nine-year term, and a provision envisaging the possibility of accession by the European Union to the Convention.

16. Good progress had been made in the elaboration of a European convention on action against trafficking in human beings, which would be open to non-members of the Council of Europe and would go further than the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, by providing for a monitoring mechanism. Bilateral and multilateral programmes of cooperation were carried out, *inter alia*, with countries in south-eastern Europe.

17. The Committee of Experts on Nationality was preparing a binding instrument on prevention of statelessness in connection with State succession. Principles and rules in that area would be presented in the form of an additional protocol to the European Convention on Nationality. That

work took account of other instruments, among them the draft articles on nationality of natural persons in relation to the succession of States adopted by the Commission at its fifty-first session.²

18. Guidelines on protection of personal data with regard to the use of smart cards were being finalized. In bioethics, the Parliamentary Assembly had just given an opinion in favour of the draft additional protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Convention on Human Rights and Biomedicine) dealing with biomedical research, recommending that the Committee of Ministers should adopt it.

19. A Convention on Information and Legal Co-operation concerning "Information Society Services" had been opened for signature in 2001. The Convention would enable cross-border legal questions concerning "Information Society Services" to be addressed and discussed, thereby allowing minimum standards and a degree of harmonization to be developed in that rapidly evolving field by facilitating an exchange of information and expertise. The European Union had just acceded to that Convention, and contributed to the funding of its implementation.

20. The *Ad Hoc* Committee of Legal Advisers on Public International Law (CAHDI) was finishing the second phase of a pilot project on State practice concerning the immunities of States and their goods. In the context of Recommendation 1602 (2003) on immunities of members of the Parliamentary Assembly, CAHDI was studying an extensive interpretation of the General Agreement on Privileges and Immunities of the Council of Europe, with a view to identifying the best procedural means of arriving at a common interpretation of the instrument while averting the need for its revision.

21. Another of the CAHDI activities that deserved mention was its operation as a European observatory of reservations to international treaties. That activity, which had been referred to in the Commission's own reports, had steadily intensified and was becoming increasingly useful, as demonstrated by its extension to cover reservations to international treaties, whether or not open to objection, on the struggle against terrorism. Many such reservations were no longer open to objection but needed to be studied closely with a view to contributing to the Council's efforts to combat international terrorism. In-depth discussions were continuing on the various international criminal tribunals and the revitalization of the work of the United Nations General Assembly.

22. The European Commission for Democracy through Law (Venice Commission) had elaborated a draft Declaration on the Code of Good Practice in Electoral Matters, which had just been adopted by the Committee of Ministers. In the Declaration, the Ministers reaffirmed their commitment to the holding of elections in conformity with the principles of the European electoral heritage.

² *Yearbook ... 1999*, vol. II (Part Two), document A/54/10, p. 20, para. 47.

23. The Council of Europe's cooperation with other international bodies and European institutions was continuing and being intensified, particularly with the expansion of membership of the European Union. Twenty-five Council conventions were officially part of the European Community's *acquis communautaire*. OAS was encouraging its members to ratify the Council's Convention on Cybercrime. Other organizations with which excellent cooperative relations were in place were the United Nations and OSCE. The Chairman of the Counter-Terrorism Committee of the United Nations Security Council had recently held an exchange of views with CODEXTER which had greatly advanced the Council's work in that field.

24. Mr. GALICKI, referring to his experience as a current member of CODEXTER, said that the Council had a number of competitors in the legal area, above all the European Union. Cooperation between the Council of Europe and the European Union was not always smooth, and the European Court of Human Rights and the Court of Justice of the European Communities had handed down diverging judgements and decisions on a number of similar cases. As the European Union's competence and scope of operations expanded, further clashes were bound to occur. A spirit of understanding, compromise and cooperation would be needed if the two bodies were to achieve good results.

25. A problem had arisen at CODEXTER's most recent meeting, at which the idea of a comprehensive European convention on terrorism had been addressed. Support for the proposal, although not universal, had been growing. CODEXTER had asked an outside expert, Mr. Tomuschat, to prepare an opinion on the possible added value of such a convention. Mr. Tomuschat had concluded that much would be gained from such an instrument.³ Then, at the last moment, the European Union had issued an opinion to the effect that it was too early for such a convention which, it claimed, would be detrimental to the work of the United Nations in the area; further asserting that there was no prospect of any progressive development on the question for at least another two years. That was not a happy example of cooperation between the European Union and the Council of Europe. The lesson to be learned was that it served no purpose to try to impose one's views unilaterally. It was gratifying to note that cooperation was now improving in the light of that experience.

26. The Council's Committee of Experts on Nationality was expected shortly to adopt the final draft of the additional protocol to the European Convention on Nationality, dealing with statelessness in cases of succession of States. Many problems encountered by the Committee's working party had been resolved by reference to the draft articles on nationality of natural persons in relation to the succession of States,⁴ and the protocol would reflect that draft.

³ C. Tomuschat, "On the possible 'added value' of a comprehensive Convention on Terrorism", *Human Rights Law Journal*, vol. 26, Nos. 5-8 (November 2005), pp. 287-306.

⁴ See footnote 2 above.

27. Mr. MOMTAZ said that he had been impressed by the very broad range of subjects on the Council of Europe's agenda and the work that it had completed. Referring to the Council's efforts to strengthen legal action against terrorism, he said that the question of the liability of entities was a serious and sensitive issue, in a sense the Achilles heel of the fight against terrorism; he would welcome information on how the Council viewed that crucial issue.

28. Mr. de Vel had referred to the possibility of drafting a legal instrument to protect witnesses of acts of terrorism. He did not see why such an instrument should be confined to the fight against terrorism; the question was just as relevant in respect of witnesses to war crimes, crimes against humanity and genocide. The International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda had had to address that issue, which had also been raised at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, and might well arise if the tribunal to be set up by the provisional authorities in Iraq commenced its work.

29. Ms. ESCARAMEIA said that she too was very impressed by the wealth of information provided by Mr. de Vel and the wide range of Council of Europe activities. She would like to have more details about the possible partnership between the European Union and the Council of Europe on support to the International Criminal Court. Was the partnership related to the position of the United States, or did it have to do with a campaign to promote ratification? Did the partnership already exist, or was it planned for the future? She also asked for further information on discussions to revitalize the role of the United Nations General Assembly and on how those discussions tied in with current developments in the United Nations.

30. Mr. CHEE said he was impressed by the progress made in Europe in the area of human rights. He wondered what happened in the event of a conflict between European Union directives and internal legislation. Were the former binding? The situation seemed reminiscent of conflicts between federal and state law. Was an eventual unification of European legislation envisaged?

31. Mr. PAMBOU-TCHIVOUNDA noted that the Council of Europe had set up CEPEJ to monitor the functioning of the justice system in Council of Europe member States. Given the diversity of national systems, did CEPEJ aim to identify a common core with a view to achieving a minimum harmonization of rules on the functioning of the system of justice? Bearing in mind the crucial role of procedure in the functioning of the system of justice, did it also envisage codifying procedural rules? It was important to determine whether the various national judicial systems had specialized branches for a given type of jurisdiction and whether the Council might codify common rules to improve effectiveness.

32. He would also like to know whether, in asking the European Court of Human Rights to interpret a judgement, the Committee of Ministers merely sought its opinion or whether its intention in so doing was to play an active role in shaping Council of Europe action in that area.

33. Mr. GAJA said that Protocol No. 14 to the European Convention on Human Rights would enable the European Court of Human Rights to survive, given that it currently had more than 70,000 cases pending. Clearly, if nothing was done, the Court would not be able to fulfil its purpose. Henceforth, the Court would hear only particularly important cases, and not repetitive ones; unfortunately, that would result in a lacuna in the system of human rights protection, because repetitive cases were by definition the most frequent. The trend had been to let domestic judges deal with such cases, and national courts had been awarding financial compensation rather than remedying the situation and preventing its recurrence. One example of such repetitive cases had to do with the protracted nature of court proceedings, an endemic problem in Europe. Little was being done in that regard. He asked whether the Council of Europe envisaged any measures to deal with the problem in the future.

34. Mr. ECONOMIDES said he was confident that Protocol No. 14 to the European Convention on Human Rights would be of enormous help to the European Court of Human Rights in coping with its case backlog. Mr. de Vel had referred to an extensive interpretation of the General Agreement on Privileges and Immunities of the Council of Europe. It had always been his understanding that privileges and immunities had to be interpreted in a very restrictive manner, upholding State sovereignty rather than the extension of such privileges and immunities. That was virtually universal practice. He did not see how privileges and immunities could be extended by means of a mere interpretation.

35. He had been pleasantly surprised to hear Mr. de Vel speak of measures that had made it possible for conventions to be ratified in record time. He would be interested in hearing more about those measures, given that ratification procedures tended to be notoriously slow.

36. He also drew attention to the Council of Europe's European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), whose excellent results were of direct interest to the Commission, the prohibition of torture being part of *jus cogens*. Notwithstanding the confidential nature of the work of CPT, it would be very useful to have some general information on how that body functioned.

37. Mr. Sreenivasa RAO said that he was very impressed by the breadth and depth of the Council of Europe's activities to deal with terrorism, not least the Protocol amending the European Convention on the Suppression of Terrorism. That Protocol, and the Council's various guidelines, should act as an inspiration, not only to European countries, but also to the rest of the world. The efforts of the Indian delegation at the United Nations in favour of a comprehensive convention against terrorism had been greatly helped by the European Convention on the Suppression of Terrorism, and the adoption of Protocol No. 14 to the European Convention on Human Rights was evidence that the international community's efforts to establish certain universal legal standards were coming to fruition. He asked what the relationship was between the possible future European comprehensive convention and the European Convention on the Suppression of

Terrorism and its Protocol. Would such a convention contain additional human rights standards? Would it provide for enhanced cooperation between investigating agencies and prosecuting agencies? Lastly, he asked whether, in referring to international standards for fighting terrorism, the background documentation provided had in mind observance of human rights standards.

38. The CHAIRPERSON, speaking as a member of the Commission, said that there were three areas in which the activities of the Commission and the Council were complementary. The first was the topic of nationality. If the Council succeeded in finalizing a European instrument on nationality on the basis of the Commission's work, that would represent the first fruits of the Commission's labours in elaborating its draft articles on that topic. He hoped that due acknowledgement would be made of that fact somewhere in the convention.

39. The second topic was reservations to treaties. In that regard, the Council's work had been of inestimable value in providing the Commission with examples of how reservations, especially to human rights treaties, were dealt with; the absence of European practice in that regard had been a considerable handicap, and the Commission had therefore drawn heavily on the Council's experience.

40. The third topic was the Council's work on the liability of entities, which was a very important issue given that, for the first time in history, States did not have a monopoly on international violence. The topic was one close to the Commission's heart, since it tied in with the draft articles on State responsibility of States for internationally wrongful acts adopted by the Commission at its fifty-third session⁵ and with its current work on draft articles on the responsibility of international organizations. The Council's conclusions on the issue would therefore be of great interest to the Commission.

41. There was a great need for a comprehensive convention on terrorism; yet, to date, it had not been possible even to establish a generally accepted definition of the word "terrorism". It would therefore be a significant step forward if the European countries at least could agree on a definition. With regard to the question of revitalizing the General Assembly, he wondered whether the Council had in mind only General Assembly activities or the United Nations as a whole, including the regional bodies. Lastly, speaking as a citizen of Romania, he said that the Government of Romania welcomed the adoption of Protocol No. 14 to the European Convention on Human Rights. Romania had a record number of applications on the question of the right to own property, and the Protocol would help to ensure that cases were considered more expeditiously in future.

42. Mr. de VEL (Observer for the Council of Europe), responding first to the Chairperson's remarks, said that a binding instrument on prevention of statelessness in connection with State succession should be ready by early 2005. Due credit would be paid to the Commission's work in the preamble to that instrument. With regard to reservations to treaties, the European observatory had a crucial

role: it not only kept a watch on reservations but discouraged reservations to new conventions and urged States to modify or withdraw their reservations to existing ones. The Committee of Ministers had asked States to review their reservations to treaties after the terrorist attacks in the United States on 11 September 2001.

43. Liability of entities had been identified by CODEX-TER as a lacuna in international law. However, work on the study had not yet progressed very far.

44. Cooperation between the Council of Europe and the European Union was of paramount importance, especially since the recent enlargement. Cooperation had sometimes been highly successful—for instance, in the fight against corruption and cybercrime—thanks to the European Union's common positions on the signature and ratification of Council of Europe instruments. It was true that some misunderstandings had arisen in connection with the elaboration of a comprehensive convention on terrorism, but he was confident that any difficulties would be ironed out at the forthcoming six-monthly meeting between representatives of the Council of the European Union and of the Council of Europe.

45. With regard to the protection of witnesses, he agreed with Mr. Momtaz that the procedure should not be confined to witnesses of terrorism. Similar protection had already been extended to *pentiti*. He had also discussed the matter with the President and the Chief Prosecutor of the International Criminal Court. In response to Ms. Escrameia's question, he said that there was as yet no partnership with the European Union on support to the International Criminal Court. Such support might not only be political, but could also take the form of legal and material assistance. Provision of financial support, at least by the European Union, was not out of the question. The Council would continue to actively monitor developments in that regard.

46. Turning to the questions posed by Mr. Chee, he said he did not wish to comment on relations between member States of the European Union. The Council of Europe did, however, have to deal with the relations between federal States and their regional entities, and their respective legislative powers. It was currently assisting the Russian Federation in clarifying the respective competences of the Federation and its subjects in such matters as the budget, taxes and the environment. As for the question of unifying European legislation, there was no intention of doing so; at most, it was desirable to harmonize such legislation to a certain degree.

47. With regard to CEPEJ, to which Mr. Pambou-Tchivounda's question had related, the reason for its establishment had been to encourage national judiciaries to review deficiencies that had led to an increasing number of applications to the European Court of Human Rights and contributed to the substantial backlog of cases. A wealth of normative texts and abundant case law already existed. What CEPEJ tried to do was to solve problems that arose in the functioning of the system in a pragmatic and practical manner, through exchanges of views and good practice and provision of practical assistance. However, where CEPEJ found gaps in the law, it proposed the adoption of new provisions.

⁵ See 2792nd meeting, footnote 5.

48. With regard to the question of the interpretation of a judgement of the Court, the Committee of Ministers could request an advisory opinion from the Parliamentary Assembly. Moreover, Protocol No. 2 to the European Convention on Human Rights permitted the Court to be approached for an advisory opinion.

49. With regard to Protocol No. 14 to the European Convention on Human Rights, Mr. Gaja was correct in his assertion that the Protocol was crucial to the Court's survival. The backlog of cases was the price paid for the rise in membership of the Council of Europe, which had grown from 21 member States in 1989 to 45 currently, and would soon reach 46; only the Republic of Belarus was missing from the roll-call of European countries. The role of the Council of Europe Commissioner for Human Rights was also important: under Protocol No. 14, the Commissioner could now submit written comments and take part in the Court's hearings.

50. With regard to Mr. Economides's question about measures to secure the speedy ratification of conventions, he said that new members were given a deadline for signature and ratification of certain key instruments as a condition of entry. Long-standing members were urged to ratify conventions, *inter alia*, by the Secretary-General or himself on their visits to capitals.

51. With regard to Mr. Sreenivasa Rao's comments, the Council of Europe was extremely impressed by the efforts of the Indian delegation at the United Nations to raise awareness of the global threat posed by terrorism. The 2003 Protocol amending the European Convention on the Suppression of Terrorism was an important addition to the 1977 European Convention on the Suppression of Terrorism, but it was still only a protocol, with the limited objective of preventing the politicization of various crimes. The Council had refrained from embarking on the elaboration of a comprehensive convention on terrorism because at the time it had supposed that the United Nations would itself shortly conclude such a convention. Lastly, the reference to international standards for fighting terrorism did of course include human rights standards.

52. Mr. BENÍTEZ (Observer for the Council of Europe), in response to Mr. Momtaz's question, said that while the word "entity" could cover a wide range of situations, it was essentially taken to signify organizations in the voluntary sector, such as charities, which had a specific objective but might undertake activities with other purposes. The aim of the work on liability of entities was to prevent the abuse of their charitable status for purposes such as the recruitment of terrorists or other support for terrorism (the question of financing was already covered by the work of the Financial Action Task Force on Money Laundering). The lacunae had been identified, and the task of elaborating a normative instrument could now begin in earnest.

53. With regard to the protection of witnesses, the Committee had decided that there was no reason for witnesses in terrorism cases to be treated differently from witnesses in cases of serious or organized crime. If witnesses were to be provided with protection, the aim must be to avoid a plurality of *ad hoc* agreements; a single agreement would be preferable. In that context, he said, in response

to Ms. Escarameia, that the Council had no formal partnership with the International Criminal Court, although it had always supported its establishment and had been pursuing multilateral consultations between member and observer States of the Council both to secure ratification of the Rome Statute of the International Criminal Court and to address the major challenges faced by the Court. The consultations had been most valuable because only States had participated, which had meant that they had been able to discuss their problems frankly. The consultations had been welcomed by the Court.

54. With regard to revitalizing the United Nations General Assembly, he said that, inasmuch as CAHDI was effectively the European component of the Sixth Committee, it had a direct interest in improving the manner in which issues were debated in the General Assembly. It was therefore discussing ways of enhancing the effectiveness of debates in that body, and also, incidentally, in the Commission. The most recent meeting of CAHDI had considered a specific proposal on how the debate should be articulated so as to avoid a succession of prepared statements and focus discussion on the real issues.

55. One area of concern to CAHDI that was of relevance to the Commission was the implementation of sanctions pursuant to Security Council resolutions. At the international level, the Committee was concerned about the impact of sanctions on human rights in areas such as due process. It was also concerned about the manner in which sanctions were implemented at the national level and had therefore decided to conduct a survey of State practice in the area of sanctions enforcement.

56. The question of the interpretation of the General Agreement on Privileges and Immunities of the Council of Europe was interesting, not because the interpretation was extensive, but because the members of CAHDI could not themselves agree on whether the request by the Parliamentary Assembly constituted an extensive interpretation or fell within the terms of the Agreement. Often the easiest way to deal with a divergence of views was to formulate a protocol to the text in question. In the present case, however, CAHDI was trying to find an alternative to the cumbersome procedure of negotiating a new protocol. It had therefore been suggested that the Committee of Ministers, in its composition as the Parties to the Agreement, should adopt an interpretation that would be binding on all States parties. Although the Parliamentary Assembly had already received a preliminary opinion from CAHDI through the Committee of Ministers, CAHDI was considering the matter further and was expected to submit an additional opinion to the Committee of Ministers.

57. Although Mr. de Vel had already responded to Mr. Sreenivasa Rao's question by explaining the interconnection between the two instruments, it should be noted that the Council had not yet been given a mandate to elaborate a comprehensive convention. Instead, it had been agreed in CODEXTER that the Council might elaborate one or more instruments aimed at prevention and covering existing lacunae in international law and action. The form that such instruments should take had not yet been decided; the Committee of Ministers had concluded that they could be, but did not have to be, legally binding instruments. In

fact, some of the instruments mentioned by Mr. Sreenivasa Rao, including the guidelines on human rights, were not legally binding. Obviously, it was difficult to deal with lacunae in international law in a non-binding instrument.

58. The Council was interested in upgrading the counter-terrorism capacity of States. CODEXTER was engaged in a survey of member States' legal and institutional counter-terrorism capacity with a view to promoting an exchange of best practices and an open debate on the best way to meet the requirements of Security Council resolution 1373 (2001) of 28 September 2001.

59. The CHAIRPERSON thanked Mr. de Vel and Mr. Benítez for their information concerning the activities of the Council of Europe and wished them a pleasant stay in Geneva.

Shared natural resources⁶ (concluded) (A/CN.4/537, sect. F, A/CN.4/539 and Add.1⁷)

[Agenda item 7]

SECOND REPORT OF THE SPECIAL RAPPORTEUR (concluded)

60. Mr. RODRÍGUEZ CEDEÑO said that the Special Rapporteur's choice of draft articles as the format in which to present his topic would surely facilitate the Commission's understanding of a technically complex subject. He agreed with other members that although it was too early to take a final decision as to the ultimate form that the draft articles might take, the idea of a model convention on which national legislation could be patterned and which could facilitate the negotiation of bilateral and multilateral agreements should not be ruled out. Such models could be very useful, as had been seen in the case of agreements for the avoidance of double taxation.

61. The draft articles should be based on the fundamental principle that ownership, management and monitoring of the use of an aquifer system fell to the State of jurisdiction under whose territory the system was located. Thus, the term "shared", in the title of the topic, should be interpreted as meaning that the resources were transboundary, lying within the territories of two or more States. The term did not, however, imply joint ownership. The Special Rapporteur had made that clear in article 1, in which he set out the purpose of the draft articles.

62. In its consideration of aquifer systems, the Commission should refrain from making reference to other resources such as natural gas and oil. While there were surely certain physical and geological similarities between aquifers and natural gas and oil deposits, the specific characteristics of the latter two resources meant that there could be no question of elaborating principles applicable to all three resources.

63. Draft articles 4, 5, and 6 were fundamental to the Commission's final outcome on the topic, as they set out the obligations not to cause harm, to cooperate and

to exchange data and information relating to the management of water resources. The obligation to cooperate, set out in article 5, was particularly important. Good faith must underpin the protection of groundwaters and the principle of cooperation. The modalities set out by the Special Rapporteur in paragraph 2 of article 5 would, together with the provisions of article 6, play an important preventive role in the settlement of disputes.

64. Mr. YAMADA (Special Rapporteur), summarizing the debate on the topic, thanked the members of the Commission who had commented on his second report (A/CN.4/539 and Add.1) and said that he would take their views into consideration in his further work on the topic. He concurred with some members that the lack of State practice in the area of transboundary groundwaters posed a serious problem. Existing agreements, even if they explicitly mentioned groundwaters, dealt with them only marginally. Yet there was a growing awareness of the vital importance of groundwaters and the need for international cooperation for their proper management. Efforts to that end were beginning to be seen at the regional level, and he would endeavour to extract examples of State practice from them.

65. Some members had stressed the importance of regional arrangements elaborated by the States of the region concerned. He supported that view: just as each region had its own historical, political, social and economic characteristics, so regional aquifers also had specific regional characteristics. While the rules that the Commission intended to develop would be universal, they would also serve as guidelines and models for regional arrangements.

66. The question of the form that the Commission's final product might take posed a chicken-and-egg problem, as form affected substance and vice versa. Mr. Matheson had expressed a preference for guidelines rather than a convention. However, the fact that he had submitted his own proposals in the form of draft articles and had made frequent reference to the Convention on the Law of the Non-navigational Uses of International Watercourses did not mean that he had ruled out the adoption of some other format. In that connection, it was worth noting that during the elaboration of that Convention, the Commission had often referred to it as a framework convention, even though the word "framework" did not appear in the final title of the instrument.

67. While he intended to respond to all the specific suggestions and questions from members, he would defer his answers on some of them until after the meeting with groundwater experts later in the session.

68. He thanked Mr. Mansfield for his valuable proposal for a reformulation of article 1. As to his question regarding the requirement in the definition of an aquifer that it should yield "exploitable quantities" of water, he acknowledged that the volume implied by the term "exploitable quantity" would require further explanation in the commentary. He agreed that such an amount was hard to quantify, and was dependent on economic and social considerations. In any case, the notion of exploitability as he understood it did not refer to an aquifer's

⁶ For a summary of the Commission's work on the subject, see *Yearbook ... 2003*, vol. II (Part Two), chap. IX, pp. 93–95.

⁷ Reproduced in *Yearbook ... 2004*, vol. II (Part One).

temporal potential for future exploitation; rather, the implication was that if an underground source of water did not yield exploitable quantities of water, then it was not an aquifer.

69. Mr. Mansfield had suggested that a separate definition of “aquifer system waters” might be necessary. While he was not certain that that was the case, he wondered whether use of the rock formation, as well as use of the aquifer waters, should be covered. He would give more thought to the question, raised by Mr. Mansfield, as to why the obligation not to cause harm had been limited in article 4, paragraph 2, to harm to other aquifer system States, rather than to harm to the aquifer system itself.

70. Some members had questioned the relationship between the impairment of the functioning of an aquifer, mentioned in article 4, paragraph 3, and the permanent destruction of an aquifer, referred to in paragraph 27 of his second report. His understanding was that an aquifer could be exploited to an extent that made it impossible to extract further water from the rock formation. However, as he had already said, he might decide to relocate paragraph 3 elsewhere in the draft articles.

71. Several members had addressed the concept of “significant harm” from different perspectives. There was a long history of debate on that topic in the Commission, on which he intended to draft an informal information note for members. At present he wished briefly to recall that the text of the Convention on the Law of the Non-navigational Uses of International Watercourses considered by the Commission on first reading had used the term “appreciable harm”.⁸ Much thought had gone into considering possible alternatives to the word “appreciable”, such as “significant”, “substantial” or “serious”. The Commission had sought to find a term to indicate a threshold that was low enough to trigger discussions before serious damage occurred yet high enough to ensure that consultations were not required to deal with trivial matters. The word “appreciable” had been considered to mean both “capable of being measured” and “significant”. Even on first reading of those draft articles, the concern had been the degree of harm. The Commission had considered that harm was “significant” if it was not minor or trivial, but was less than “substantial” or “serious”. The degree of harm constituted by the term “significant” in a particular case would depend on the circumstances. Ultimately, the Commission had settled for the word “significant” on second reading.⁹ That precedent had been followed when the Commission had adopted article 3 of the draft articles on prevention of transboundary harm from hazardous activities, in 2001.¹⁰ Thus, the Commission had recommended the threshold of significant harm to the General Assembly twice in similar drafts, and it would need to have a

⁸ At its thirty-second session, in 1980, the Commission had begun the first reading of the draft articles on the law of the non-navigational uses of international watercourses [see *Yearbook ... 1980*, vol. II (Part Two), chap. V, pp. 110–136]; at its forty-third session, in 1991, the Commission had provisionally adopted all the draft articles on first reading [see *Yearbook ... 1991*, vol. II (Part Two), chap. III, pp. 66–78].

⁹ At its forty-sixth session, in 1994, the Commission had adopted the final text of the draft articles on the law of the non-navigational uses of international watercourses [see *Yearbook ... 1994*, vol. II (Part Two), chap. III, pp. 89–135].

¹⁰ See 2797th meeting, footnote 3.

compelling reason if it were to modify that threshold in the current text. He would, however, give careful consideration to any suggestions for an alternative formulation.

72. Ms. Escarameia had asked why it was necessary to include the phrase “each associated with specific rock formations” in the definition contained in paragraph (b) of article 2. While the phrase in question was a precise scientific description of an aquifer system, he conceded that it had no legal significance and could be deleted.

73. Mr. Gaja had raised the issue of the scope of the Convention on the Law of the Non-navigational Uses of International Watercourses. It was for members of the Commission, as the drafters of the Convention, to answer that question. He himself would prepare a paper on the question of what aquifers, if any, were covered by that Convention. It was nevertheless his intention that the current draft should cover all aquifers, even if that entailed some overlap with the Convention.

74. Several members had touched on the relationship between the different types of use referred to in article 7. In his view, the article depended on the Commission’s ultimate formulation of the principles governing the various uses of aquifer systems. In his view, paragraph 2 of that article as currently drafted did not constitute an exception to paragraph 1. Paragraph 2 simply said that in the event of a conflict between, for instance, extraction of drinking water for the local population and extraction for the purpose of filling a swimming pool for foreign tourists, priority should be given to the former.

75. Mr. Chee had reminded him of the ILA Rules on International Groundwaters, which would be finalized when the Association met in Berlin later in 2004.¹¹ He fully intended to take the outcome of that meeting into consideration.

The meeting rose at 1 p.m.

2800th MEETING

Tuesday, 18 May 2004 at 10 a.m.

Chairperson: Mr. Teodor Viorel MELESCANU

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

¹¹ See 2798th meeting, footnote 10.