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Summary record of the 3025th meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
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59. Sir Michael WOOD asked whether Recommendation CM/Rec(2008)9 of the Committee of Ministers to member states on the nomination of international arbitrators and conciliators, adopted by the Council of Europe Committee of Ministers in July 2008, had been transmitted to the United Nations—through the Sixth Committee, for example—in the context of the current debate on the rule of law.

60. Mr. PELLET asked, with relation to Protocol No. 14, whether anyone had thought of a very simple solution, which would be to allow the Russian Federation—which, as everybody knew, was the only State member of the Council of Europe that had declined to ratify the Protocol—to make reservations. He did not believe that such reservations would be inadmissible under the law of reservations or the European Convention on Human Rights.

61. Mr. LEZERTUA (Director of Legal Advice and Public International Law, CAHDI), replying to Mr. Nolte, said that to his knowledge there had been no decision by a national parliament or a national constitutional court declaring the solution adopted by the Council of Europe unconstitutional. The Council endeavoured to comply with international law. The principle of provisional application did not appear in the text of the Convention because no one had thought that a State would avoid ratification, but it did feature in the 1969 and 1986 Vienna Conventions. Meanwhile, the ratification of the new instrument—Protocol No. 14 *bis*—had taken place according to the normal procedures, with parliamentary approval, but that had presented few problems, since all the States concerned had already ratified Protocol No. 14, and Protocol No. 14 *bis* repeated only about one third of its provisions.

62. The solution adopted by the Council of Europe was indeed a one-off solution. It was not directly applicable to other organizations, such as the Inter-American Court of Human Rights or the African Court on Human and Peoples' Rights, which had their own procedures.

63. The solution suggested by Mr. Pellet had indeed been considered. CAHDI had expressly stated that the ratification of Protocol No. 14 by the Russian Federation—together with the formulation of reservations or interpretative declarations compatible with international law and the Convention, if necessary—remained a priority, but the Russian Federation was obviously free to decide for itself.

64. Mr. GUESSEL (Head of the Public International Law and Anti-Terrorism Division of the Council of Europe, Secretary of CAHDI) said that it was not the first time that the European Court of Human Rights had used two different procedures. The same thing had happened, for example, when some countries had refused to recognize the right of individual petition. With regard to efforts to combat terrorism, he noted that the ratification of the three most important Council of Europe conventions in that field—the Council of Europe Convention on the Prevention of Terrorism, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism and the Convention on cybercrime—was moving

forward. Consultations between the parties to the first two of those conventions had begun recently, and reports relating thereto would shortly be published. The Committee of Ministers had reaffirmed that counter-terrorism efforts that respected human rights remained a priority for the Council of Europe.

65. Mr. LEZERTUA (Director of Legal Advice and Public International Law, CAHDI) confirmed that the First Consultation of the Parties to the Council of Europe Convention on the Prevention of Terrorism had been held in Madrid as part of the 119th session of the Committee of Ministers. In the declaration they had adopted, they had asked the Committee of Experts on Terrorism (CODEXTER) to monitor the implementation of the Convention.

66. Replying to Sir Michael Wood, he said that he had himself transmitted Recommendation CM/REC(2008)9 of the Committee of Ministers to member states on the nomination of international arbitrators and conciliators to the Ambassador of Sweden in New York, who had chaired the Committee of Ministers at that time, and had requested him to transmit it to the United Nations. Meanwhile, the follow-up mechanism provided for by the Council of Europe Convention on Access to Official Documents was not yet operational, but he emphasized that every mechanism under a convention was independent of other mechanisms and of the Court itself. However, that by no means precluded any application to the Court for an opinion on a human rights question, in the field of bioethics, for example.

The meeting rose at 1.15 p.m.

3025th MEETING

Wednesday, 22 July 2009, at 10.05 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Al-Marri, Mr. Caffisch, Mr. Candioti, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Cooperation with other bodies (*continued*)

[Agenda item 14]

STATEMENT BY THE REPRESENTATIVE OF THE
INTER-AMERICAN JURIDICAL COMMITTEE

1. The CHAIRPERSON welcomed Mr. Aparicio, of the Inter-American Juridical Committee (IAJC), and invited him to address the Commission.

2. Mr. APARICIO (Inter-American Juridical Committee) thanked the Commission for giving him the opportunity to exchange ideas about the topics on the agenda of the IAJC, of which he was Chairperson. The IAJC, in its different forms, was the oldest inter-American organization and had been active for some 100 years. It predated the OAS and had long served as the impetus behind the development of law in the region. For example, it had been responsible for the establishment of such pillars of inter-American law as the Bustamante Code annexed to the Convention on Private International Law and the principles concerning the right to asylum, of which great use had been and was still being made in the Latin American region.

3. The IAJC held two regular sessions every year. It generally met in August at its seat in Rio de Janeiro and in March at a venue in a member State other than Brazil. In 2009, the seventy-fourth regular session had been held in Bogota and in the following year the IAJC would possibly meet in Haiti, a country where it was engaged in a juridical–institutional cooperation project.

4. One of the most important of the global topics on the agenda of the IAJC was international humanitarian law. In that context, it worked closely with the ICRC, and it offered advice to all OAS member States on how to implement international humanitarian law and on how to make the provisions of domestic law on armed conflicts, firearms and the characterization of war crimes compatible with the 1949 Geneva Conventions and the Rome Statute of the International Criminal Court. It was also conducting a survey of member States' views on what the priority issues were in the field of international humanitarian law.

5. Another global issue which was the focus of the attention of the IAJC was the promotion of the ICC. A former member of the International Law Commission, Mr. Herdocia Sacasa, had been entrusted with the work on that topic. The IAJC had recently sent Governments a letter detailing its activities in that respect and was offering its assistance in the training of officials in the executive and legislative branches with a view to facilitating the implementation of the Rome Statute of the International Criminal Court in member States. It was also collaborating with organizations such as the Due Process of Law Foundation and was planning to launch a capacity-building exercise for officials who were responsible for drafting legislation.

6. On regional topics, the IAJC was actively participating in the ongoing task of elaborating a draft inter-American convention against racism and all forms of discrimination and intolerance²⁵⁸ as a member of the working group set up to prepare a text based on the first original draft presented by Brazil. Basically, the IAJC believed that the inter-American instrument should not merely reiterate the provisions of other conventions, but should place emphasis on new issues in human rights protection and in combating discrimination, racism and intolerance.

7. The IAJC was likewise collaborating with Haiti, which Mr. Aparicio had visited the previous month in order to meet with the Minister of Justice, a former

member of the Inter-American Commission on Human Rights, prior to the launching of a cooperation project centred on prisons, preventive detention and access to justice in that country.

8. The protection of migrants was another area of interest to the IAJC. The “Primer or manual on the rights of migrant workers and their families”²⁵⁹ adopted by the Committee had been distributed to all the consulates of States where there was a substantial community of migrants from the Latin American and Caribbean region. The IAJC and the Inter-American Commission on Human Rights were pursuing their joint examination of ways of protecting migrants' rights. In addition, the Committee had adopted a resolution²⁶⁰ manifesting its concerns about the directive of the European Parliament and of the Council on common standards and procedures in member States for returning illegally staying third-country nationals,²⁶¹ since it considered that the directive violated various human rights and principles enshrined in international instruments. It noted that in Italy, for example, the directive had been used to criminalize undocumented migrants, a move which the IAJC specifically condemned.

9. The topic on which the IAJC had done the most work and encountered the greatest difficulties was that of democracy and the rule of law. It was a hotly debated subject in the region, and its consideration by the IAJC entailed certain risks, because it had not only legal but also political implications. The IAJC had been able to deal with the subject of democracy and the Inter-American Democratic Charter (Lima, 11 September 2001)²⁶² because, like the Inter-American Commission on Human Rights, it was an independent body. That meant that it could take up a subject even if some member States did not wish it to do so. Indeed, it was that right of initiative which made the IAJC so important.

10. In that context, the prime concern of the IAJC was that the Charter was not binding on member States, although it had helped to forge a link between democracy and the rule of law, a matter of great importance in the Latin American and Caribbean region. Further efforts would be necessary to strengthen that link.

11. The main problem encountered with the Charter, and one which hampered the defence and promotion of democracy in the Americas, was that the political organs of OAS had limited the scope of the Charter by defining democracy solely in terms of the legitimacy of the origin of a Government and whether the electorate could exercise its right to vote. As Juan Méndez, a former member of the Inter-American Commission on Human Rights, had pointed out, that restrictive approach entailed two

²⁵⁹ Annual Report of the Inter-American Juridical Committee to the General Assembly 2008 (OEA/Ser.Q/VIII.39-CJI/doc.316/08), p. 165, document CJI/doc.292/08; see also resolution CJI/RES. 139 (LXXII-O/08), p. 137.

²⁶⁰ *Ibid.*, resolution CJI/RES. 150 (LXXIII-O/08) “Opinion of the Inter-American Juridical Committee on the Directive on Return adopted by the Parliament of the European Union”, p. 187.

²⁶¹ Directive 2008/115/EC of 16 December 2008, *Official Journal of the European Union*, No. L 348, 24 December 2008, p. 98.

²⁶² OEA, *Official Documents*, OEA/Ser.G/CP-1. See also ILM, vol. 40, No. 5 (September 2001), p. 1289.

²⁵⁸ See <http://www.oas.org/consejo/CAJP/RACISM.asp> (accessed 11 May 2015).

dangers. The first was that it conferred international legitimacy on authoritarian Governments which complied with *pro forma* democratic requirements as far as elections were concerned. The second was that it prevented the Charter from being interpreted as the fundamental means of safeguarding the rule of law and other essential elements of democracy, such as a balance between branches of government, an independent judiciary, respect for legal procedures in adopting laws, guarantees of freedom of speech and respect for a free press. Since those were matters of inherent importance to democracy, the IAJC wished to examine them in greater depth in order to avoid the types of problems that had emerged in Honduras, where a conflict had arisen between branches of government. Since the Charter was currently interpreted as something to be applied solely by the executive, other branches of government were unable to invoke it and thereby restore a balance between the executive, legislative and judicial branches.

12. Another subject of fundamental importance was the public's access to information. He had been appointed rapporteur for the topic. The IAJC had approved and forwarded to Governments a set of 10 principles on the right of access to information which should be embodied in domestic law in Latin America, the Caribbean and North America. However, in that regard, the greatest contribution of the IAJC had been the introduction of the notion that access to information was a fundamental human right, a view that had been upheld by the Inter-American Court of Human Rights in its ruling in *Claude Reyes et al. v. Chile*. Hence, if that right were violated, it would be possible to seek redress through the mechanisms for defending human rights, namely, the Inter-American Commission on Human Rights and the Court itself.

13. The remaining principles sought to remove obstacles impeding citizens' access to information, such as costs, lack of means, failure to use technology to supply information or arguments related to national security. In the opinion of the IAJC, the overarching principle should be that access should be granted to information, very few exceptions should be allowed and specific reasons must be given for refusing to supply information. Fortunately, headway was being made in the region. Mexico had adopted one of the most progressive laws on the subject. The United States and Canada had such legislation; Peru was in the process of drafting legislation; Chile had accepted the ruling of the Inter-American Court of Human Rights in *Claude Reyes et al. v. Chile* and, as a result, had passed a law on access to information. It was therefore to be hoped that a start could soon be made on the drafting of an inter-American convention on access to information.

14. In conclusion, he said that the IAJC was facing many challenges in the development of inter-American law and the incorporation in it of new facets of protection of citizens' rights in the Americas. The Committee would be working more closely with the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights to achieve that goal. Those three bodies would be holding their first joint meeting in Rio de Janeiro in August 2009, on the occasion of the fiftieth anniversary of the American Convention on Human Rights: "Pact of San José, Costa Rica", in order to coordinate their

activities in an effort to make progress on a number of the above-mentioned topics. The IAJC hoped to provide support to the Inter-American Commission on Human Rights in warding off any attempt to violate individual freedoms and the rule of law in the Americas.

15. Mr. OJO said that the United States and a number of other countries were reportedly about to withdraw their aid to Honduras owing to the political imbroglio there. Such a step would cause immense suffering among the citizens of that country. He therefore wished to know what action the IAJC intended to take to hold the leaders of the military coup accountable for any disasters caused by their intransigence.

16. Mr. APARICIO (Inter-American Juridical Committee) explained that the IAJC had an advisory role and could provide advice if it was requested to do so by the Governments of the region. For example, OAS had asked it to examine whether the Helms-Burton Act²⁶³ passed by the United States violated principles of international law. In the case of Honduras, its advice had not been sought, and consideration of the problems of that country fell under the jurisdiction of the Permanent Council, the political organ of the OAS. The Council had issued a clear, unanimous condemnation of the *de facto* Government in Honduras and had expressed its support for President Zelaya. President Arias of Costa Rica, who was moderating the endeavours of the OAS to mediate in the political conflict, was in permanent contact with the Chair of the Permanent Council and with the Secretary General of OAS. It was to be hoped that the democratic order would soon be restored peacefully in Honduras.

17. Mr. VARGAS CARREÑO said that he was fully in agreement with Mr. Aparicio's analysis of the situation with regard to the Inter-American Democratic Charter. Democracy was not just a matter of free elections, but included many other elements. For democracy to prevail, especially in crises like that which had arisen in Honduras, it was essential to fully implement the Charter.

18. His specific question was related to the draft inter-American convention against racism and all forms of discrimination and intolerance which, according to Mr. Aparicio, would not reiterate the contents of universal conventions. He personally disagreed with that approach, because no harm had been done by the fact that some OAS conventions, for example, those on torture and forced disappearances, contained provisions similar or complementary to conventions on the same subjects that had been adopted by the United Nations. What was important was that there should be no backsliding. Just before the Inter-American Convention to Prevent and Punish Torture had been signed, one well-meaning delegation had stated that the convention could under no circumstances be deemed to affect the right of asylum. That had been a huge mistake, because it meant that torturers could seek asylum on the pretext that they were in danger of persecution. For that reason, it was vital to take account

²⁶³ Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No. 104-114 (1996), available from www.treasury.gov/resource-center/sanctions/Documents/libertad.pdf (accessed 15 February 2016).

of universal conventions. He was not afraid of repeating the contents of human rights instruments. On the contrary, that would be a wise course of action, because an omission could be interpreted in an unfortunate manner. He therefore wished to know why universally accepted norms could not be included in the draft convention.

19. Mr. APARICIO (Inter-American Juridical Committee) replied that, in fact, what he had meant was that there would be no point in reinventing anything and that use would be made of the contents of all existing instruments but that, at the same time, attention would be paid to aspects requiring greater emphasis because they had not been covered in other conventions. In that context, he was thinking of the rights of Afro-descendants, gender issues and new situations that had arisen in the Americas. The new convention should complement existing instruments, represent progress on certain issues and not undermine the fight against discrimination and racism.

20. The CHAIRPERSON, speaking as a member of the Commission, said that from his experiences in Colombia in 1972, it seemed that the process of integrating indigenous peoples into the larger society was producing a form of discrimination, because those peoples were losing their cultural identity. Such a loss was a tragedy, since it made society less pluralistic. He therefore wondered if the IAJC and the forthcoming convention paid attention to that specific kind of discrimination in Latin America.

21. Mr. APARICIO (Inter-American Juridical Committee) responded that the issue was being addressed in the context of the draft American declaration on the rights of indigenous peoples,²⁶⁴ but little progress had been made on the subject in the past eight years, and results had fallen short of expectations because of the complexity of the subject matter. It was likely that there would be consensus on maintaining only what had already been accepted in the United Nations Declaration on the Rights of Indigenous Peoples.²⁶⁵ Discussions on the draft inter-American convention against racism and all forms of discrimination and intolerance were still at a preliminary stage. The topic of racism, for example, was a subject of much debate and there were solid arguments both for and against employing the term, which could prove to be a double-edged sword. He therefore thought that the debate concerning indigenous peoples would continue within the framework on the draft American declaration and that the working group on the draft convention in the coming months would be examining which aspects of discrimination should be addressed by the Convention.

22. Mr. VASCIANNIE noted that the IAJC had expressed a willingness to help with training to facilitate the implementation of the Rome Statute of the International Criminal Court. He wondered if the IAJC had encountered difficulties with the bilateral agreements that the United States had been encouraging other OAS members to enter into with respect to article 98 of the Statute. In its work on the elaboration of a draft inter-American convention against racism and all forms of discrimination and

intolerance, the Committee was considering the inclusion of gender issues and issues related to Afro-descendants, and he wondered if any thought was being given to provisions on affirmative action to rectify past discrimination. Lastly, he recalled that there was a long-standing issue on how to integrate Caribbean States into the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Since the Committee was planning to work closely with those bodies, he would like to know the Committee's current thinking on how to integrate the Caribbean States into its own structure.

23. Mr. APARICIO (Inter-American Juridical Committee), replying to the first question, said that with the election of the Obama administration in the United States of America, the conflict with other countries over the waiver of immunity under article 98 of the Rome Statute of the International Criminal Court had subsided; the United States now had a much more favourable attitude towards the ICC. The IAJC was working to overcome the lack of information in Latin America and the Caribbean about the Statute and the work of the ICC. It was also training officials in preparation for the task of incorporating the Statute into domestic legislation and applying it. Because of its budgetary constraints, the Committee was negotiating with donor organizations for help in carrying out those tasks. With regard to the second question, the work on the draft inter-American convention against racism was still at a very early stage and there had not yet been any in-depth discussion of the specific issues of Afro-descendants, gender and affirmative action.

24. On the third question, he said that cooperation between the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights was essential to the protection of human rights in the region. The greatest successes had been achieved through the Court's adjudication of contentious cases following referral by the Commission. The IAJC aimed to support that cooperation. In the past, the use of the death penalty in Caribbean countries had obstructed their integration into the inter-American system. A *rapprochement* was now taking place, however, and their stronger representation on the Commission, the IAJC and the Court was being sought to ensure that attention was given to issues of concern to Caribbean countries. Haiti, which desperately needed help with its daunting problems of prison and pretrial detention conditions and access to justice, exemplified the need for greater sensitivity to the problems of Caribbean countries.

25. Mr. NIEHAUS said that he welcomed the valuable efforts of the IAJC to promote access to information as a fundamental human right. Unfortunately, in many countries of Latin America, the principle of access to information was now under severe threat. Perhaps the IAJC might undertake initiatives to induce States not only to promote access to information but also to work against the retrograde trends in that regard that were now being witnessed.

26. Mr. APARICIO (Inter-American Juridical Committee) said that there were indeed contradictory trends in the region. Mexico, for example, had adopted legislation on access to information that was among the most advanced in the world, breaking with its long tradition of centralized

²⁶⁴ AG/RES.1022 (XIX-O/89) (www.cidh.oas.org/ProjetDeclaration.htm, accessed 15 February 2016).

²⁶⁵ General Assembly 61/295 of 13 September 2007, annex.

control of power, and Chile and Costa Rica had also made major steps forward, but there were instances of serious backsliding on freedom of expression and information. The IAJC was working to ensure that legislation was not only adopted but actually applied. Nicaragua, for example, had a law on access to information, but there had been setbacks in its application. Freedom of information was contrary to the whole tradition of *caudillismo*, or autocratic government, in Latin America. His organization was working with OAS on a model law on access to information and trying to induce States to take the subject seriously. It was also working with civil society to promote freedom of information.

27. Mr. SABOIA said he agreed with earlier comments that while much progress had been made in combating racism, there was a need to avoid backsliding. At a very productive regional meeting held in December 2000, in Santiago, preparatory to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, a draft declaration offering a broad and balanced approach to the issues of racism, racial intolerance, gender, Afro-descendants and indigenous populations had been adopted.²⁶⁶ It might be of use to the IAJC in its efforts.

28. He noted that the IAJC had adopted a “Primer or manual on the rights of migrant workers and their families” and a resolution opposing the European Parliament’s directive on return of illegal immigrants. One of the topics on the Commission’s agenda was expulsion of aliens. It would be useful for the Special Rapporteur on that topic to learn more about the approach taken by the IAJC in its work on migrants’ rights and to have more detailed information on the Primer and on the resolution.

29. Mr. APARICIO (Inter-American Juridical Committee) said such an exchange would indeed be useful and he would certainly support it. The IAJC had concluded that the European directive did not sufficiently protect the due process rights of migrants subject to expulsion, and that was a subject on which the Commission and the IAJC might well work together.

30. Mr. NOLTE, reverting to the situation in Honduras, said that it raised two issues from a legal point of view. The first was whether a democratically-elected president could call a referendum to change the constitutional set-up, and the second was whether such a president could be ousted. The focus of the international community had been on the second aspect, while the attention of legal committees should be trained on the first and particularly on preventing the problem from arising in other countries. The European Commission for Democracy through Law, or Venice Commission, an advisory body on constitutional matters of the Council of Europe, which encompassed not just European countries but also Brazil, Chile and Peru, with observers from Argentina and Mexico, had dealt with a case that in some respects was reminiscent of the situation in Honduras. It had concerned an initiative by the Principality of Liechtenstein to submit the question of expanding the House’s powers to a referendum, raising

the issue of whether it was compatible with the principle of democracy to hold a referendum on the expansion of the powers of a monarch. True, a monarch was not democratically elected, so that the parallel with Honduras was not perfect, but from a substantive point of view, the question was the same: to what extent might a constituted power, such as a president, appeal to a constituent power to circumvent constitutional rules. He would like to know how the IAJC viewed that issue, in particular with a view to preventing the possible regression of Latin American countries from established democracies to what might be called “Bonapartist” tendencies.

31. Mr. APARICIO (Inter-American Juridical Committee) said that he was personally convinced of the urgency of addressing that problem. At the most recent session of the OAS General Assembly, held in Honduras, he had made a statement on precisely that subject. It had not been very well received, and was perhaps in the nature of a premonition, since within three weeks of his statement, the fears he had expressed about the trend in the region towards legitimizing unconstitutional acts through popular referendums had been borne out by the events in Honduras. Constitutional crises of that sort were not confined to Honduras: in his own country, a constitution had been adopted without following constitutional procedures and had been legitimized through popular referendum. A series of flawed democracies was emerging, democracies based on popular elections carried out with no respect for proper legal procedures. It had even been argued that such procedures had been imposed by “Western” countries and were aimed at dominating and controlling certain segments of society. It was a dangerous situation. Certainly the Inter-American Democratic Charter established the duty to support democratically-elected presidents. But it was crucially important to strengthen the other elements of democracy and the rule of law—freedom of expression, the balance of power between branches of government and the independence of the judiciary—and above all to prevent the legal system from being used for political purposes.

32. Ms. JACOBSSON welcomed the prospect of better cooperation between the Commission and the IAJC in their respective work on protection of migrants and asked for more information on the approach of the IAJC, for example, whether it worked in liaison with European and other institutions, such as CAHDI of the Council of Europe. She was very glad to hear about the work being done on international humanitarian law, the rule of law and access to information and would like more information on those efforts.

33. Mr. APARICIO said that, in respect of protection of migrants, the main concern of the IAJC was to disseminate information on migrants’ rights, including through the Primer that was already being distributed, and to avert the criminalization of undocumented workers. With regard to cooperation with European institutions, meetings had been held with representatives of the European Union to convey OAS concerns about the directive on return of illegal immigrants. Work on humanitarian law had been undertaken in concert with the ICRC and aimed ultimately at the adoption of an inter-American declaration on humanitarian law. Efforts focused on training,

²⁶⁶ Report of the Regional Conference of the Americas, Santiago, Chile, 5–7 December 2000 (A/CONF.189/PC.2/7), chap. I.

harmonization of domestic laws with the 1949 Geneva Conventions and the Rome Statute of the International Criminal Court, and internal armed conflicts. The work of the IAJC on access to information was related to “quality control” of democracies and combating corruption.

34. Mr. CANDIOTI agreed that quality control of democracies in Latin America was indeed of the greatest importance; developments in that area had to be closely followed and guidance provided on the basis of such important instruments as the Inter-American Democratic Charter. The Commission welcomed its yearly dialogue with a representative of the IAJC. It would be useful to know whether the IAJC had sufficient access to the Commission’s documentation, whether it used it in its own work and whether it might be prepared to comment occasionally on the Commission’s efforts, as did the Asian–African Legal Consultative Organization (AALCO). IAJC input on expulsion of aliens, for example, would offer a valuable and different perspective on that complex issue. The rational management and protection of transboundary aquifers was another subject on which it would be useful to have IAJC input, especially since many of those aquifers were situated in Latin America. He would also like to know what other topics the IAJC was addressing in the environmental field. Lastly, he wondered if the IAJC could suggest any topics that the Commission might take up in the future.

35. Mr. APARICIO (Inter-American Juridical Committee) said that the IAJC remained abreast of the activities of the Commission—but only to a limited extent—and should have a much broader relationship with the Commission. The IAJC struggled under a very heavy agenda, given that it met for only four weeks each year. Nevertheless, the IAJC had received the visit of Mr. Vasciannie, which had been very positive, and the former Chairperson of the IAJC, Mr. Hubert, in turn, had visited the Commission the previous year. He agreed that the IAJC should receive more visits from representatives of the Commission and that consideration should be given to organizing a joint meeting between the two bodies, including all or some of their members, in order to foster an exchange of information, which, in his view, was very important. On his return, he would propose to the IAJC that at each of its sessions time should be allotted for an analysis of the Commission’s activities, with a view to contributing to the Commission’s work and, especially, with a view to receiving the Commission’s input on issues the IAJC wished to address, such as migration, access to information, environmental law and consumer protection. He would also propose that, at each session, the IAJC should consider which of its reports were worth sending to the Commission, as well as take stock of any requests it wished to transmit to the Commission. The Commission might perhaps consider adopting a similar approach.

36. Mr. VALENCIA-OSPINA said that during Mr. Aparicio’s informative briefing, he had been reminded of the concerns expressed in the Commission and the Sixth Committee about the future role of the Commission as a body dedicated to the codification and progressive development of international law. Although the main function of the IAJC was also the

codification and progressive development of international law, albeit at the inter-American level, the IAJC was apparently developing a series of other activities, such as training and the dissemination of information, which could almost be considered technical cooperation in respect of certain countries. Although he was not suggesting that the International Law Commission should follow the same path, he nevertheless wondered to what extent such an expansion in the role of the IAJC was compatible with its primary function of codification and progressive development of international law. Since the meetings of the IAJC were limited to four weeks a year, he also wondered whether that meant that it had a permanently staffed office to enable it to carry out its additional activities outside of that four-week period.

37. Mr. APARICIO (Inter-American Juridical Committee) said that the work of the IAJC did in fact suffer from time constraints. For the time being, OAS was experiencing major financial difficulties, which was why the IAJC sessions had been reduced to a little less than four weeks a year and which had prevented the Committee from carrying out a series of other activities. As the IAJC was subject to the decisions of the OAS Permanent Council and General Assembly, there did not appear to be any real possibility in the short term of expanding the codification activities of the IAJC. One of the major areas where codification was needed was private international law; however, OAS member States had not yet agreed on when to hold the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII), which was to codify new standards, taking into account new issues, such as regional trade law, the protection of personal data and consumer protection. While progress in that area had come to a standstill, he hoped that the situation would gradually begin to improve.

38. The CHAIRPERSON thanked the representative of the Inter-American Juridical Committee for his valuable contribution to the work of the Commission.

Reservations to treaties (concluded) (A/CN.4/606 and Add.1, sect. C, A/CN.4/614 and Corr.1 and Add.1–2, A/CN.4/616, A/CN.4/L.744 and Corr.1–2 and Add.1)

[Agenda item 3]

FOURTEENTH REPORT OF THE SPECIAL
RAPporteur (concluded)

39. Mr. PELLET (Special Rapporteur) introduced new proposals for draft guidelines 3.4 to 3.6, revised in the light of the plenary debate, which read as follows:

“3.4 *Substantive validity of reactions to reservations*

“3.4.1 *Substantive validity of the acceptance of a reservation*

“The explicit acceptance of a non-valid reservation is not valid either.”

“3.4.2 Substantive validity of an objection to a reservation

“An objection to a reservation by which the objecting State or international organization purports to exclude in its relations with the author of the reservation the application of provisions of the treaty not affected by the reservation is not valid unless:

“(a) the additional provisions thus excluded have a sufficient link with the provisions in respect of which the reservation was formulated [affected by the reservation];

“(b) the objection does not result in depriving the treaty of its object and purpose in the relations between the author of the reservation and the author of the objection.”

“3.5 Substantive validity of interpretative declarations

“A State or an international organization may formulate an interpretative declaration unless the interpretative declaration is expressly or implicitly prohibited by the treaty or is incompatible with a peremptory norm of general international law.”

“3.5.1 Conditions of validity applicable to interpretative declarations recharacterized as reservations

“The validity of a unilateral statement which purports to be an interpretative declaration but which constitutes a reservation must be assessed in accordance with the provisions of guidelines 3.1 to 3.1.15.”

“3.6 Substantive validity of an approval, opposition or recharacterization

“1. A State or an international organization may not approve an interpretative declaration which is expressly or implicitly prohibited by the treaty.

“2. The opposition to, or the recharacterization of, an interpretative declaration shall not be subject to any condition for substantive validity.”

40. After further consultation with several members who had taken a position on the matter, he had decided not to propose an amendment to draft guidelines 3.5.2 and 3.5.3 on conditional interpretative declarations. The Drafting Committee would, of course, review the wording of those drafts, but in principle, the Commission could continue to consider that conditional interpretative declarations, even on the somewhat tangential problem of validity, would be subject to the same treatment as reservations.

41. In the light of those comments, he requested the Commission, in accordance with its usual practice, to refer draft guidelines 3.4, 3.4.1, 3.4.2, 3.5, 3.5.1, 3.5.2, 3.5.3 and 3.6 to the Drafting Committee, on the understanding that it was, of course, the latter’s responsibility to improve the wording that he had proposed. However, he believed that the current wording did adequately incorporate, in substance at any rate, the conclusions to be drawn from the debate.

42. Mr. NOLTE said that he commended the Special Rapporteur for having summed up the debate on the topic in an objective and constructive manner. While he

certainly did not wish to impede the progress of work on the topic, he nevertheless wondered whether the issue of the validity of objections, on which the Special Rapporteur had commented extensively in his summing up, with reference to its as-yet undefined relationship to peremptory norms of international law, should be debated in the plenary Commission or in the Drafting Committee.

43. Mr. PELLET (Special Rapporteur) said that, since that issue concerned a matter of principle, in his view, it should be discussed in the plenary, not in the Drafting Committee.

44. Mr. MELESCANU asked whether, in the opinion of the Special Rapporteur and that of Mr. Nolte, the phrase “or is incompatible with a peremptory norm of general international law” in draft guideline 3.5, effectively addressed the points that had been raised by Ms. Escarameia, Mr. Nolte and many other members.

45. Mr. NOLTE said that draft guideline 3.5 did not address the points he had raised, since it concerned the substantive validity of interpretative declarations. His point related to draft guideline 3.4.2 concerning the substantive validity of an objection to a reservation, which was quite different.

46. In that connection, he would launch the discussion by reiterating his position, which was that he did not fully understand why the Special Rapporteur accepted the invalidity of reservations that excluded or modified the legal effect of a treaty in a manner contrary to a peremptory norm of international law, as well as the invalidity of interpretative declarations that were incompatible with a peremptory norm of international law, but did not accept the invalidity of objections to a reservation that purported to exclude the application of a provision not addressed by the reservation and as a result rendered the treaty incompatible with a peremptory norm of international law. In the practical example he had provided in the earlier debate, he had tried to demonstrate that whenever an objection excluded the application of an exception to a general rule, it enlarged the general rule and thereby opened up the possibility for the treaty to give rise to a violation of a peremptory norm of international law.

47. In order to remedy that problem, he proposed that draft guideline 3.4.2 should be amended to include a subparagraph (c), which would read: “the objection does not result in rendering the treaty incompatible with a peremptory norm of international law.” That subparagraph would be cumulative with subparagraphs (a) and (b) and was modelled on the wording used in draft guideline 3.5 to refer to the incompatibility of an interpretative declaration with a peremptory norm of international law. In his view, it was in the interest of the Commission to take a decision on the matter, irrespective of the outcome, given its relative importance to the Commission’s debates.

48. Mr. HMOUD said that, if the Commission did not wish to address the situation whereby an objection excluded the application of a provision of a treaty that led to the violation of a peremptory norm of international law under the heading of the substantive validity of reactions to reservations, it should do so under the heading

of their legal effects. Having said that, he could support Mr. Nolte's proposed addition to draft guideline 3.4.2, but pointed out that it did not constitute a third choice but an alternative criterion to subparagraph (b), which could be divided into two parts, (i) or (ii), either alternative to be considered cumulative with subparagraph (a).

49. The CHAIRPERSON said that the Commission should refrain from making too many detailed drafting suggestions at the current stage. Instead, it should establish the general orientation to be followed by the Drafting Committee.

50. Ms. ESCARAMEIA said that she endorsed Mr. Nolte's proposal and agreed that it should be added to subparagraph (b). While her own position had been much more ambitious, she would be content with the inclusion of Mr. Nolte's formulation in draft guideline 3.4.2. The matter of validity was distinct from that of effects; that was how the Commission had constructed the Guide to Practice. In her view, an objection was permissible or impermissible independently of its effect on the treaty. That view, however, was apparently not shared by the majority of members, and she could accept that they had a differing perspective. But at least the Commission should not consider an objection permissible that rendered a treaty incompatible with *jus cogens*, and for that reason she supported Mr. Nolte's proposal.

51. Mr. GAJA said that he wished to make two points. First, it troubled him that draft guideline 3.4.2, although ostensibly concerning only validity, seemed also implicitly to deal with effects and assumed that effects were produced. It appeared to suggest that it was sufficient to make an objection in order for the objecting State to reach its intended purpose. That was a question regarding which the Commission had said it would defer consideration, and personally he would favour that course of action.

52. Second, he had been surprised at the proposed new text in draft guideline 3.6, since what first sprang to mind when thinking of an opposition to an allegedly invalid interpretative declaration was simply a statement pointing out that this particular interpretative declaration was prohibited. It was difficult to understand why that kind of opposition should be considered invalid. There was also another kind of opposition to an invalid interpretative declaration: one in which the author considered the interpretation provided in the declaration to be incorrect and proposed another interpretation. If the original interpretative declaration was prohibited, an opposition proffering another interpretation should be considered invalid as well.

53. Since he would not be able to participate in the Drafting Committee during its next few meetings, he proposed to add the following wording to draft guideline 3.6: "When a treaty prohibits the formulation of an interpretative declaration, the prohibition also applies to the formulation of an interpretation in reaction to an interpretative declaration."

54. Mr. PELLET (Special Rapporteur) suggested that, without taking a position as to their merits, Mr. Gaja's misgivings and proposed reformulation of draft

guideline 3.6 could be referred to the Drafting Committee for its consideration.

55. As far as Mr. Nolte's comments were concerned, he thought that the Commission should settle the issue of whether to incorporate the amendment to draft guideline 3.4.2 proposed by Mr. Nolte by means of a vote, whether formal or informal. Since he had explained his position on the substantive point at length during the previous meeting, he would not do so again. He would merely reiterate that he was strongly opposed to the proposal, quite simply because it was not possible for an objection to render a treaty incompatible with a peremptory norm of general international law. The most an objection could do was to deregulate relations between the reserving State and the objecting State, automatically referring States to general international law, which, even in the case postulated, obliged States to respect the peremptory norms of general international law. Mr. Nolte's proposal would therefore have the Commission adopt a provision that was, in his opinion, objectively false. He had to say that it would trouble him greatly if the Commission were to adopt that proposal, which he considered to represent a serious question of principle. It was not even an ideological or doctrinal issue for him, as he was one of the few Frenchmen who had always been quite militantly in favour of *jus cogens*. It was simply that it was impossible and technically incorrect. He would not say anything more on the matter other than to reiterate that once everyone had had a chance to express their opinion, the Commission should proceed to a vote. It was definitely a decision to be taken by the plenary Commission, not by the Drafting Committee.

56. Sir Michael WOOD said that the Commission should not force on the Special Rapporteur a formulation that he regarded as false. Moreover, Mr. Nolte's proposal was, as he himself had admitted, very closely related to the question of effects. Draft guideline 3.4.2 already tended in that direction, but Mr. Nolte's proposal made it more explicit. Sir Michael would prefer to defer discussion of the point to the next session, when the Commission debated the issue of effects. It would then be possible to see whether there was any need for an additional provision about *jus cogens* in draft guideline 3.4.2. He doubted, however, that there would be such a need.

57. Ms. ESCARAMEIA wondered whether it was necessary to vote on Mr. Nolte's specific proposal, which was a matter more for the Drafting Committee than the plenary. The Commission should vote rather on whether the Drafting Committee should be dealing with the issue of peremptory norms of international law and the permissibility of objections. If the Commission voted in favour of such a proposition, the Drafting Committee could come up with a formulation—or fail to do so—but the issue would at least be discussed. In her view, it was not simply a matter of effects and should therefore not be left to the next session. She considered that the question of permissibility was separate from that of effects, so she would be glad if the problem of *jus cogens* could be considered in the context of permissibility. In the informal setting of the Drafting Committee, there could be a free exchange of views. She appealed to the Special Rapporteur to allow the issue to go to the Drafting Committee.

58. Mr. MELESCANU said that he strongly supported the views of the Special Rapporteur and Sir Michael. He could not accept the idea that, by objecting to a reservation, a State could make a treaty incompatible with the peremptory norms of international law. If the matter went to the Drafting Committee, the end result would be not a provision confirming the importance of *jus cogens* but a clear suggestion that, by making an objection, a State could call into question the peremptory norms of international law. That would be unacceptable to many members of the Commission. Any discussion should be deferred until the Commission came to debate the effects of a reservation.

59. Mr. NOLTE said that he and the Special Rapporteur each thought the other guilty of a logical error. He persisted in believing that the draft guidelines would be inconsistent if no provision was made for the consequences of invalidity to objections in certain circumstances. If the Commission could determine where the logical error lay, a text could be referred to the Drafting Committee. Otherwise, the authority of the Special Rapporteur should prevail. If that was the collective wisdom of the Commission, he would gladly submit.

60. Mr. McRAE said that, referring the issue to the Drafting Committee, as suggested by Ms. Escarameia, would not solve the problem, for the same debate would be carried on by the same people who had shown themselves to be divided on the issue. A decision should be taken by the full Commission. He agreed with Sir Michael that the matter was one of effects and should form part of the Commission's discussion on that topic at the next session. He understood the views both of the Special Rapporteur—who believed that Mr. Nolte's proposal constituted a logical impossibility—and of Mr. Nolte, who held that without such a provision the draft guidelines would appear inconsistent. Personally, he could not see how an objection could render a treaty incompatible with peremptory norms of international law. He therefore opposed the provision proposed by Mr. Nolte.

61. Mr. PELLET (Special Rapporteur) said that he had almost been persuaded by Ms. Escarameia's argument. He continued, however, to be opposed to the proposed provision, since it was an issue of principle. The full Commission should therefore take the decision. He noted that both Mr. Hmoud and Sir Michael, whether or not they agreed on the substance of the matter, both considered that Mr. Nolte's proposal related to effects and he supported the suggestion that it should be discussed at the next session. The Commission should vote on the issue, either formally or informally.

62. Mr. HMOUD said that it was quite acceptable to him to defer discussion of Mr. Nolte's proposal to the Commission's debate on effects. He wished, however, to ask the Special Rapporteur why draft guideline 3.6, as revised, posed the question of validity only with respect to approval. In his own statement on the matter, he had given an example of why opposition also formed part of the equation: if an opposition to an interpretative declaration that was prohibited by the treaty also proffered an interpretation, it should be equally invalid. He would be prepared to accept Mr. Gaja's proposal, which would restore opposition as a factor in the question of validity.

63. Mr. PELLET (Special Rapporteur) said that he had already answered the question when responding to the statement by Mr. Gaja, who had argued along similar lines. The Drafting Committee could discuss the precise wording.

64. The CHAIRPERSON said that an indicative vote should be held, but he wondered what the precise wording should be.

65. Mr. PELLET (Special Rapporteur) said that, since it was only an indicative vote, the wording could be broad. The Commission could be asked whether it was in favour of adding to draft guideline 3.4.2 a third provision dealing with *jus cogens*.

66. The CHAIRPERSON invited the Commission to take an indicative vote.

An indicative vote was taken by a show of hands.

67. The CHAIRPERSON said that, according to the indicative vote, 13 members were against a new provision and 4 were in favour, with 6 abstentions. One vote was unaccounted for. He therefore took it that the Commission wished to refer draft guidelines 3.4, 3.4.1, 3.4.2, 3.5, 3.5.1, 3.5.2, 3.5.3 and 3.6, as revised by the Special Rapporteur, to the Drafting Committee.

It was so decided.

REPORT OF THE DRAFTING COMMITTEE (*concluded*)*

68. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Drafting Committee) introduced the text and titles of draft guidelines 3.3 and 3.3.1 provisionally adopted by the Drafting Committee on 29 May and 4 June 2009, as contained in document A/CN.4/L.744/Add.1, which read:

“3.3 Consequences of the non-validity of a reservation

“A reservation formulated in spite of a prohibition arising from the provisions of the treaty or in spite of its incompatibility with the object and the purpose of the treaty is not valid, without there being any need to distinguish between the consequences of these grounds for invalidity.”

“3.3.1 Non-validity of reservations and international responsibility

“The formulation of an invalid reservation produces its consequences pursuant to the law of treaties and does not, in itself, engage the international responsibility of the State or international organization which has formulated it.”

69. With those texts, he was presenting the fourth report of the Drafting Committee relating to the non-validity of reservations, which the Commission had referred to the Committee at the 2891st meeting on 11 July 2006.²⁶⁷

* Resumed from the 3014th meeting.

²⁶⁷ *Yearbook ... 2006*, vol. I, 2891st meeting, para. 44.

70. Draft guideline 3.3 was entitled “Consequences of the non-validity of a reservation”, as originally proposed. The draft guideline, which had been referred to the Drafting Committee in 2006 following an indicative vote, had given rise to extensive debate in the Committee. Some members had agreed with the Special Rapporteur’s view that there was no distinction to be made, with regard to the consequences of invalidity, between the different grounds for invalidity listed in draft guidelines 3.1. Other members had considered that the consequences of the invalidity of a reservation might be different, depending on the grounds for such invalidity. Furthermore, some members had been of the view that it was premature to adopt the draft guideline, since the Commission had not yet examined the consequences arising out of the invalidity of a reservation.

71. The Drafting Committee had finally agreed on a text that was largely based on that originally proposed by the Special Rapporteur. However, following a suggestion made in the plenary Commission, the words “explicit or implicit”, referring to the prohibition of a reservation, had been deleted, in order to bring the text into line with that of other draft guidelines provisionally adopted by the Commission. Moreover, an explicit reference to the consequences of invalidity had been included in the text. The provision thus stated the principle that a reservation formulated in spite of a prohibition arising from the provisions of the treaty or in spite of its incompatibility with the object and purpose of the treaty was not valid, without there being any need to distinguish between the consequences of those grounds for invalidity. He noted, however, that, according to some members, the statement contained in the draft guideline should not be interpreted as prejudging any final determination as to whether the consequences of the various grounds for invalidity were necessarily identical. Some members had also been of the view that the draft guideline might need to be revisited in the light of the outcome of the Commission’s consideration of the question of the consequences of the invalidity of a reservation.

72. Draft guideline 3.3.1, which was entitled “Non-validity of reservations and international responsibility”, enunciated the principle that the formulation of an invalid reservation produced its consequences pursuant to the law of treaties and did not, in itself, engage the international responsibility of the State or international organization that had formulated the reservation.

73. The draft guideline as adopted by the Drafting Committee was largely based on the text proposed by the Special Rapporteur, which had not given rise to many comments during the plenary debate in 2006. Some minor changes had been introduced by the Committee to the text proposed by the Special Rapporteur, namely the replacement of the word “effects” by the word “consequences”; the replacement of the expression “within the framework of” by the expression “pursuant to”; the replacement in the English text of the words “shall not” by the words “does not”; and the addition of the word “international” before the word “responsibility” in both the text and the title of the draft guideline.

74. The view had been expressed in the Committee that the formulation of a reservation incompatible with

ius cogens would engage the international responsibility of the author of the reservation. The majority of members, however, had been of the opinion that the general statement contained in the draft guideline remained accurate, as far as the formulation of the reservation was concerned. The commentary would indicate that the purpose of the words “in itself” was to clarify that the draft guideline referred only to the formulation of an invalid reservation and was without prejudice to the consequences that might be attached, in terms of international responsibility, to any conduct that could be adopted by a State or an international organization in relation to, or as a consequence of, the formulation of an invalid reservation. He hoped that the Commission would be in a position to adopt the draft guidelines.

75. The CHAIRPERSON, after noting that the Special Rapporteur had offered to write the commentaries to the draft guidelines, said that he took it that the Commission wished to adopt draft guidelines 3.3 and 3.3.1.

It was so decided.

The meeting rose at 12.45 p.m.

3026th MEETING

Thursday, 23 July 2009, at 10 a.m.

Chairperson: Mr. Ernest PETRIČ

Present: Mr. Al-Marri, Mr. Cafilisch, Mr. Candioti, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vascianie, Mr. Vázquez-Bermudez, Mr. Wisnumurti, Sir Michael Wood, Ms. Xue.

Cooperation with other bodies (*concluded*)

[Agenda item 14]

STATEMENT BY THE REPRESENTATIVE OF THE ASIAN–AFRICAN LEGAL CONSULTATIVE ORGANIZATION

1. The Chairperson invited Mr. Singh, President of the forty-seventh session of the Asian–African Legal Consultative Organization (AALCO), to address the Commission.

2. Mr. Singh (Asian-African Legal Consultative Organization) said that his organization attached the greatest importance to its traditional and long-standing relationship with the International Law Commission. One of the functions of AALCO under its statute was to study the subjects under consideration by the Commission and to forward to it the views of its member States. Over the years, that had forged a closer relationship between the