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Summary record of the 3067th meeting

Topic:
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regimes. It should also be noted that the object and purpose of the treaty was not an element that was independent of the reserving State's intention, and for the reasons explained earlier, it should not be used to judge intention. The intention of the State should be deduced from its conduct, its pronouncements and its acts, not from a regime that was distinct from its personality.

83. He had two brief points to make on the last section of the report. With regard to draft guideline 4.7.4 (Effects of a conditional interpretative declaration), he agreed that such declarations were reservations in terms of their effects and that draft guidelines 4.1 to 4.6 applied to them, with the exception, in his view, of draft guideline 4.5.3. Clearly, a State that formulated a conditional interpretative declaration was making its intention to be bound by the treaty conditional upon a certain interpretation of that treaty. If, for whatever reason, that interpretation was invalid, it could not be said that the State was deemed to be bound by the treaty of its own will or that a set of criteria must be applied to determine its intention. That intention had been clear from the outset, when it had formulated its interpretation: not to be bound without the benefit of its declaration. That was not a matter of acceptance by other States, but a condition for consent which, by its nature, undermined such consent.

84. On the validity of an interpretative declaration in respect of its author, it seemed logical that when a State was granted the right to modify or withdraw an interpretative declaration (draft guidelines 2.4.9 and 2.5.12), it had the right to invoke a contrary interpretation, provided that this right was not unrestricted. He did not see why the Commission should not adopt the approach taken in the 2006 Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations,³¹¹ namely that the right to revoke a declaration was a function of the extent to which the other parties relied on the declaration. He therefore supported Mr. McRae's suggestion to amend the draft guideline concerned and to provide that the author of the declaration or the party approving it could not invoke a contrary interpretation *vis-à-vis* the party that had relied on it in its treaty relations with the interpreting State. He recommended that the draft guidelines should be referred to the Drafting Committee, pending a decision by the Commission on how to proceed with the content of draft guideline 4.5.3.

The meeting rose at 12.55 p.m.

3067th MEETING

Tuesday, 20 July 2010, at 10.05 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candioti, Mr. Comisário Afonso, Mr. Dugard, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kemicha, Mr. Kolodkin, Mr. Melescanu, Mr. Murase,

Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Sir Michael Wood.

Reservations to treaties (*continued*) (A/CN.4/620 and Add.1, sect. B, A/CN.4/624 and Add.1–2, A/CN.4/626 and Add.1, A/CN.4/L.760 and Add.1–3)

[Agenda item 3]

FIFTEENTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. The CHAIRPERSON invited the Commission to resume its consideration of the last two sections of the fifteenth report on reservations to treaties (A/CN.4/624/ and Add.1–2).
2. Mr. VÁZQUEZ-BERMÚDEZ said that, in general, he endorsed the pragmatic and sound solutions proposed by the Special Rapporteur in the draft guidelines contained in the last two sections of his fifteenth report.
3. With reference to the section on invalid reservations, he endorsed the basic thrust of draft guidelines 4.5.1 and 4.5.2, which, as the Special Rapporteur had demonstrated, were supported by international jurisprudence and practice. He would suggest that the two draft guidelines be merged under the title "Nullity and absence of legal effects of an invalid reservation". The text of the new draft guideline might read:

"A reservation that does not meet the conditions of formal validity and permissibility set out in Parts II and III of the Guide to Practice is null and void and is therefore devoid of legal effects."

Furthermore, since the current title of section 4.5 of the Guide to Practice (Effects of an invalid reservation) seemed to contradict the content of the subsequent draft guidelines, which said that an invalid reservation had no effects, the title "Consequences of an invalid reservation" would be more appropriate. In connection with the material in this section, it should be recalled that the Commission had already adopted guideline 3.2 on assessment of the permissibility of reservations and paragraph (1) of the commentary thereto.

4. Following 15 years of in-depth analysis, during which time there had been important developments in jurisprudence and practice, the Special Rapporteur presented the Commission with draft guideline 4.5.4 (Reactions to an impermissible reservation) concerning treaty relations between the author of an invalid reservation and other contracting parties—a complex and important subject on which the 1969 and 1986 Vienna Conventions were silent. After a detailed and well-argued presentation of the facts, the Special Rapporteur proposed a solution, which he referred to as a middle ground between two irreconcilable positions: viewing the author of the invalid reservation as a contracting party without the benefit of the reservation or viewing the reservation as a condition *sine qua non* for

³¹¹ Yearbook ... 2006, vol. II (Part Two), p. 161, para. 176.

the reserving State's consent to be bound by the treaty, so that, if the condition was invalid, there was no consent on the part of the author.

5. The solution proposed by the Special Rapporteur in draft guideline 4.5.3 was to establish a presumption, that the treaty—when it entered into force—would apply in its entirety to the author of the reservation, unless a contrary intention of the author was established. The Special Rapporteur's proposal seemed to be reasonable: it upheld the basic principle of consent to be bound, since it focused on the intention of the author. Furthermore, it contributed towards legal certainty and should help to promote a reservations dialogue. He supported the proposal to add a reference to the nature of the treaty to the list of factors for determining the intention of the author. He also agreed that the nullity of an invalid reservation did not depend on acceptance of or objection to it, as indicated in draft guideline 4.5.4. He preferred the first version of draft guideline 4.6 (Absence of effect of a reservation on relations between contracting States and contracting organizations other than its author), which did not allow for exception and reproduced the text of article 21, paragraph 2, of the Vienna Conventions.

6. He endorsed the basic thrust of the draft guidelines contained in the section of the report on effects of interpretive declarations, approvals, oppositions, silence and reclassifications, particularly since the Special Rapporteur had already said that he agreed with the criticisms of draft guideline 4.7.2 (Validity of an interpretative declaration in respect of its author). He was in favour of referring all the draft guidelines proposed in the two last sections of the report to the Drafting Committee.

7. Mr. PELLET (Special Rapporteur), summing up the debate on the last two sections of his fifteenth report, said that, as the Commission attempted to adopt the Guide to Practice on first reading, it was paradoxical and frustrating to reach the end of the long saga and to be pressed for time. However, the sense of urgency had obliged Commission members to focus clearly on two essential points: the advisability of establishing a presumption to fill the gap in the Vienna Conventions concerning the consequences of the invalidity of a reservation and the criticism surrounding draft guideline 4.7.2, the wording of which was admittedly too radical. Apart from those two stumbling blocks, his general approach in the two sections had met with unanimous approval, with one important exception.

8. There were six main steps in the reasoning set forth in the section on invalid reservations regarding the effects (or consequences, as had just been suggested) of the nullity of an invalid reservation. First, there was a need to fill the gap in the Vienna Conventions on the matter. In that connection, he thanked the Commission member who had pointed out that most late objections to reservations deemed invalid confirmed that the effects of such reservations were not covered by the Vienna Conventions. Second, in the absence of clear practice, it was up to the Commission to fill the gap. Third, the Commission should be guided, as far as possible, by the principle of consent—in other words, the intention of the author of the reservation was the crux of the matter. Fourth, since there was no magic recipe for determining the intention of the author

of the reservation, it could only be done by reference to a set of factors. Unless he was mistaken, his reasoning up to that point had not been challenged.

9. Fifth, since there was no guarantee that the intention of the author of the reservation could be determined, even with a broad range of factors on which to base it, it was necessary to establish a presumption, either that the author of the reservation was not bound by the treaty in question (negative presumption), or that the author was bound by the treaty in its entirety without the benefit of the reservation (positive presumption). Sixth, for both logical and practical reasons, he proposed that the Commission opt for the positive presumption, given that it was eminently rebuttable and would be applied only if the real intention of the author of the reservation could not be established.

10. The fifth step in his reasoning—the need to establish a presumption—had been challenged by only two or three Commission members. According to Mr. Gaja, draft guidelines 4.5.1 (Nullity of an invalid reservation) and 4.5.2 (Absence of legal effect of an impermissible reservation) were too categorical: the nullity of invalid reservations and their absence of effects could not be corroborated unless the question of validity was assessed by an independent body competent to decide on the matter. In the absence of such a mechanism, it was for each contracting party to decide, and the reservation would be null and void only for those parties which considered it so.

11. He could not accept the generalized relativism resulting from such a position, since it would undermine all the work that had led to what he had understood to be the Commission's consensus on a crucial point, namely that a reservation was valid or invalid irrespective of the stance taken by individual parties towards it and that the nullity of the reservation must therefore be determined, not subjectively or relatively, but objectively. The reactions of the other parties were not unimportant, but that question was addressed in the set of draft guidelines under section 4.3 (Effect of an objection to a valid reservation), which had already been adopted. As Special Rapporteur, he did not have the right to veto a particular position, but if the Commission did adopt such a position, all his efforts to promote a coherent and rational approach would be undermined. The whole point of the exercise was to guide practice, not to give contracting parties *carte blanche* to take any stance whatsoever on the validity of reservations.

12. For the sake of intellectual honesty, he would read out Mr. Gaja's proposal for the text of guideline 4.5.2:

“An invalid reservation does not produce the effects intended by its author. However, a State or international organization party to the treaty may consider that the treaty should apply with benefit of the reservation in its treaty relations with the author of the reservation.”

Such a proposal was not possible unless the Commission wished to introduce the generalized intersubjectivity against which he had battled for some years, and which was not compatible with article 19 of the Vienna Conventions and several of the guidelines already adopted. Fortunately, Mr. Gaja's proposal had not been taken up by others, and although he was willing to mention it in

the commentaries to draft guidelines 4.5.1 and 4.5.2, he hoped that it would not receive the Commission's support. If there was any doubt in that regard, which for the time being did not seem to be the case, he would ask for the proposal to be put to the vote.

13. The statements by the other two members had, to some extent, been along similar lines. Challenging the need for a presumption, they considered that, in accordance with the principle of consent, it was for the author of reservation to decide on the matter. Accordingly, one of those two members had proposed that the phrase "unless the contrary intention is clearly stated by the author of the reservation or by a competent body" should be added to the end of draft guideline 4.5.3. He had no particular problem with the reference to a competent body, although it would not be acceptable in isolation because it would lead to the same pitfalls as Mr. Gaja's proposal. The problem was when exactly the author of the reservation should state its intention. If it was at the time of formulating or drafting the reservation, that would be acceptable and consistent with his own proposals; however, it would be a different matter if the intention was stated after the dispute had arisen. In that connection, he referred the Commission to the reasoning of the European Court of Human Rights in its judgement in the *Loizidou* case.

14. According to the more fully developed statement of the "extreme consensualist" position, if after a series of tests, which should be more comprehensive than those proposed in draft guideline 4.5.3, an independent body declared the reservation to be null and void, the matter should be held in abeyance to give the author time to clarify its position, which was a means of encouraging the reservations dialogue.

15. He was less alarmed by that proposal than by Mr. Gaja's; indeed, he had made a proposal along similar lines in his second report,³¹² which had led in 1997 to the adoption of the Commission's preliminary conclusions on reservations to normative multilateral treaties including human rights treaties.³¹³ However, that was done long ago, before the Commission's lengthy dialogue with the human rights bodies and his realization that a reasonable intermediate solution based on a presumption was possible. Furthermore, as he had stated in his introduction to the fifteenth report, while such a solution was not unthinkable *de lege ferenda*, it would give rise to serious problems in practice. He was especially reluctant to pursue such a solution because it went beyond the scope of what one would expect of a non-binding instrument like the Guide to Practice. He wondered what the legal basis for a decision by an international court or tribunal would be. It would not constitute progressive development of the law, but rather international law-making *ex nihilo*.

16. For the same reason, although he was rather attracted by the idea of making the conditions for withdrawing from a treaty more flexible in the case of invalid reservations, he was not in favour of its adoption. It could be argued that since the Vienna Conventions were silent on the matter, the Commission was allowed to set

up new mechanisms. However, it would be working without any safety net; it could not invoke any precedents; in fact, there was ample practice to the contrary. Moreover, it would entail the Commission's moving very far from the law on reservations to treaties into other realms of treaty law and adding a codicil to article 56 of the Vienna Conventions, which would seem to exceed its mandate.

17. Setting aside those extreme, albeit interesting, theories, which had not garnered support, the plenary Commission must decide two questions of principle: whether a presumption was necessary and, in the affirmative, whether it would choose the positive presumption that he recommended or the negative presumption favoured by some other members.

18. With respect to the first question, with the exception of three members, whose views he hoped he had described accurately, the principle of establishing a presumption had met with general approval. In the opinion of another member, the best solution would be not to adopt any position at all, but to supplement the list of factors or criteria for determining the intention of the author of the reservation and to allow practice to develop by leaving the matter open. Frankly, by avoiding the issue in that way the Commission would be shirking its responsibilities.

19. If it was agreed that the Commission would assume its responsibilities, the question remained as to whether the presumption should be negative or positive. As one member, whose very nuanced statement had been a brilliant balancing act, had commented, it was "easier to state the options than to choose between them". The arguments put forward by various speakers in favour of one or other presumption were by and large the same. Those in favour of the negative presumption (that the author of an invalid reservation was not bound by the treaty in the absence of a contrary intention) claimed that it was the only one in keeping with the principle of consent. Those in favour of the positive presumption (that the author of an invalid reservation was bound by the treaty without the benefit of the reservation in the absence of a contrary intention) argued that the negative presumption ignored the equally important fact that, even though the party concerned had formulated a reservation, it had intended to be bound by the treaty.

20. Moreover, giving full effect to the author's intent did not mean allowing it to do anything it pleased. A treaty was not valid if it was contrary to *jus cogens* or if it met one of the conditions for invalidity laid down in the Vienna Conventions, and a treaty reflected the intention of at least two parties. There was no reason why the situation should be different for an invalid reservation—a unilateral act, moreover, attached to the treaty, which could be detached. Both the supporters of the positive presumption and the supporters of the negative one asserted that the presumption they favoured encouraged the reservations dialogue and invoked elements of practice to prove it. Objectively, in terms of significant practice, the point should be awarded to the advocates of the positive presumption. Not only was the practice of the human rights treaty bodies well established along those lines, but, as had been rightly observed during the debate, objections with "super-maximum" effect, which were increasingly common, had never been challenged in principle. In that

³¹² See footnote 107 above.

³¹³ See footnote 108 above.

regard he had taken due note of an older example of practice than the ones he had given in the fifteenth report, namely the objections by the United Kingdom to some reservations to the Geneva Conventions for the protection of war victims.

21. Both camps had cited the practical advantages offered by their preferred solution from the standpoint of legal certainty and the stability of treaty relations. Yet he had great difficulty in understanding how the negative presumption could be presented as contributing towards those aims. For example, a treaty to which an invalid reservation had been formulated might have been applied for 100 years until one day a problem arose and the reservation was declared invalid by a competent body. It seemed self-evident that the negative presumption, which would necessitate reviewing 100 years of treaty practice, would be considerably more destabilizing than the positive presumption, which might only require an examination of the possible effects produced by the reservation. Contrary to what one rather too conciliatory colleague had said, the match was not a draw, even in purely technical terms. He still believed that the positive presumption had much more to recommend it than the negative one, particularly since, by choosing the positive presumption, the Commission would be working towards the progressive development of the law, which would allow it to take considerations of timeliness into account, as one of his main critics had recognized. Moreover, for reasons of pragmatism, ideological and doctrinal harmony and general acceptability, the positive presumption was the more favourable solution. He would stress that it was a rebuttable presumption, provided that one could determine the contrary intention of the author of the reservation, even in the absence of a specific declaration to that effect.

22. He fully shared the views expressed by one member on the retroactive application of the “rules” contained in the Guide to Practice and the presumption that would be adopted by the plenary Commission. As had been explained, the Commission’s guidelines were not rules to be applied in the future (still less retroactively) with regard to reservations. As indicated by its title, the Guide to Practice was not a legally binding instrument; it was intended to provide guidance to decision makers, not to replace them. He recalled that the Commission had already discussed the possibility of drafting a protocol to the Vienna Conventions³¹⁴ and had dismissed it.³¹⁵ He did hope that the Guide would help to strengthen or reshape certain practices, but he had no further ambition for it. If a judge found that the presumption should not be applied for one reason or another, that position would prevail.

23. Turning to various comments on points of detail in the section on invalid reservations, he said that, apart from Mr. Gaja’s proposed amendment to draft guideline 4.5.2, draft guidelines 4.5.1 and 4.5.2 had not been the subject of major criticism. On the contrary, a number of speakers had emphasized their usefulness as a basis for what followed. He had no objection to the proposal to merge the two guidelines, which, however, should be left to the Drafting Committee to decide.

24. Regarding the proposal to add a reference to the nature of the treaty to the list of factors in the second paragraph of draft guideline 4.5.3, he was surprised at the attempts by some members to reintroduce a distinction concerning the nature of treaties, particularly human rights treaties, when it had been agreed some considerable time previously that such a distinction was not appropriate in the context of the rules on reservations. The Commission was not in the process of discussing human rights treaties as such, although the practice of the treaty bodies should be taken into consideration. That said, since there had been support for the proposal, he would not oppose it, if the majority of the Drafting Committee was in favour. Personally, he was not in favour of the proposal for two reasons: adding a reference to the nature of the treaty in a sentence that already referred to the object and purpose of the treaty would do nothing to clarify the different concepts; and he objected to the idea of the nature of the treaty being introduced surreptitiously into the text.

25. Draft guidelines 4.5.4 (Reactions to an impermissible reservation) and 3.3.3 (Effect of unilateral acceptance of an invalid reservation) had elicited few comments. He was not keen on the idea of including a reference to promoting the reservations dialogue in draft guideline 4.5.4, since he intended to submit to the sixty-third session, in addition to the revised and consolidated version of the Guide to Practice, a report dealing with the reservations dialogue, which would probably conclude with a proposal to add an annex to the Guide on the subject.

26. In connection with draft guideline 3.3.4 (Effect of collective acceptance of an invalid reservation), he had been reproached for referring to the case of the accession of Switzerland to the League of Nations in paragraph 206 [para. 496]. While he had given that example for want of something better, he maintained that it was a relevant one, since the reservation by Switzerland regarding its neutrality had clearly been contrary to the Covenant of the League of Nations, which prohibited reservations. The unanimous acceptance of the reservation had therefore neutralized its impermissibility. He had no difficulty with the proposal to replace the words “may be formulated” by the words “is deemed permissible”, which could be considered by the Drafting Committee.

27. Only two members had referred to draft guideline 4.6 (Absence of effect of a reservation on relations between contracting States and contracting organizations other than its author), each one stating a slight preference for a different version, but also a willingness to be accommodating in that regard. The choice could be left to the Drafting Committee.

28. Turning to the section of the fifteenth report which examined the legal effects of interpretative declarations and possible reactions to them, he noted that, with the exception of draft guideline 4.7.2 (Validity of an interpretative declaration in respect of its author), there had been little comment on the draft guidelines that he had proposed. He did not interpret that silence as complete approval, but more as an indication that, if there were any objections, they were editorial in nature and were a matter for the Drafting Committee, not for plenary debate.

³¹⁴ Yearbook ... 1995, vol. II (Part Two), p. 102, para. 431.

³¹⁵ *Ibid.*, p. 108, para. 487 (b) and (d).

29. In connection with draft guideline 4.7.1 (Clarification of the terms of the treaty by an interpretative declaration), while the Commission should not speak ill of the judges of the ICJ (especially as they had issued what was on the whole a noteworthy judgment), their treatment of the declaration by Romania in the case concerning *Maritime Delimitation in the Black Sea* was, if not outrageous, at least extremely cavalier and unconvincing.

30. As he had indicated at the beginning of the debate on draft guideline 4.7.2, he regarded the almost unanimous criticism of that draft article as well-founded, because its wording was too radical and too sweeping. There was therefore good reason to thoroughly amend the draft guideline, but not to abandon it completely, the solution proposed by one speaker. Another member had proposed an alternative text which read:

“The author of an interpretative declaration or a State or international organization having approved it may not invoke an interpretation contrary to that put forward in its declaration until it has officially withdrawn or amended it in conformity with guidelines 2.4.9 (Modification of an interpretative declaration) and 2.5.12 (Withdrawal of an interpretative declaration).”

31. That wording seemed to be consistent with the wishes of all the members who had spoken on that point, for the two guidelines in question offered ample opportunity for withdrawal or modification. He would not, however, have any objection to firmer wording. In that context, the Commission could also base itself on the tenth of the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, which it had adopted in 2006.³¹⁶ That principle was designed to prevent the arbitrary revocation of such declarations, especially when the declaration in question had led its addressees to rely on it.

32. In the light of the foregoing, he requested the members of the Commission to refer to the Drafting Committee draft guidelines 4.7 (Effects of an interpretative declaration), 4.7.1, 4.7.2 (which the Committee should be instructed to revise in accordance with the considerations which he had just outlined) and 4.7.3 (Effects of an interpretative declaration approved by all the contracting States and contracting organizations). At the end of his presentation, he had not suggested the referral of draft guideline 4.7.4 (Effects of a conditional interpretative declaration) and he still thought that it would serve little purpose. The draft guideline simply noted that, as far as their effects were concerned, conditional interpretative declarations were governed by the same legal rules as reservations. The Commission had agreed at the outset that the equivalence of legal rules governing all aspects of the topic covered in the Guide to Practice would be recorded in a single guideline. He therefore saw no point in wasting precious time discussing the precise wording of that draft guideline, which would quickly be put in square brackets and deleted the following year. However, he would not throw himself into Lake Geneva if members insisted on referring draft guideline 4.7.4 to the Drafting Committee.

33. Since no one had objected to the referral to the Drafting Committee of draft guidelines 3.3.3, 3.3.4, 4.5.1 to 4.5.4 and 4.6, doing so was probably a mere formality, although, as he had pointed out, some of those guidelines raised matters of principle that should not be left to the Drafting Committee to resolve, because they went far beyond mere editorial issues. Since only a minority of members had opposed draft guidelines 4.5.1, 4.5.2 and 4.5.3, the Commission could send them to the Drafting Committee and ask it to improve their wording without altering their substance or main thrust. If some members disagreed with that suggestion, he reserved the right to request an indicative or formal vote, because it was essential that the Commission meeting in plenary session take the responsibility for deciding such crucial questions. He wished to make it clear that he was not requesting a vote, as long as it was understood that referral of those guidelines to the Drafting Committee meant that it should retain their original thrust and in particular the positive rebuttable presumption contained in draft guideline 4.5.3.

34. Mr. HMOUD said that he did not object to the setting forth of a positive presumption in draft guideline 4.5.3, although he had proposed that no presumption be established and that reference be made only to the factors for determining the author’s intention which were listed by the Special Rapporteur in that draft guideline. He noted that the Special Rapporteur was not opposed to his proposal concerning the withdrawal option and he therefore hoped that the Drafting Committee would discuss it.

35. The CHAIRPERSON said that he took it that the Commission wished to refer draft guidelines 3.3.3, 3.3.4, 4.5.1, 4.5.2, 4.5.3, 4.5.4, 4.6, 4.7, 4.7.1, 4.7.2 and 4.7.3 to the Drafting Committee.

It was so decided.

36. Mr. NOLTE, referring to a letter from the Chairperson of the Human Rights Committee which concerned a recommendation from the working group on reservations of the human rights treaty bodies regarding the effects of invalid reservations, said that the letter contained the sentence: “It follows that a State will not be able to rely on such a reservation and, unless contrary intention is incontrovertibly established, will remain a party to the treaty without the benefit of the reservation.” The letter continued: “The Human Rights Committee welcomed the fact that the Special Rapporteur had proposed draft guideline 4.5.3 along these lines in May 2010.” He asked the Special Rapporteur whether he agreed with the statement that his proposal was along those lines in view of the word “incontrovertibly”.

37. Mr. HMOUD said that he objected to the circulation of the letter that morning since it amounted to direct interference by the Human Rights Committee in the Commission’s work.

38. Mr. PELLET (Special Rapporteur), replying to Mr. Hmoud, said that he had nothing to do with the circulation of the letter and that if he had been asked, he would not have agreed to it. In response to Mr. Nolte, he said that he had expressed his firm opposition to the adverb when he had discussed the position of the Human Rights Committee the previous year.

³¹⁶ See footnote 311 above.

39. He thanked the Commission for its decision to refer the draft guidelines in question to the Drafting Committee, which, he hoped, would be able to work quickly enough for a complete preliminary version of the Guide to Practice to be presented to the General Assembly that year. He regretted that, for medical reasons, he would not be present at the meeting when, as he hoped, the Commission would adopt the Drafting Committee's report, as that would represent the culmination of 16 years of effort on his part.

Protection of persons in the event of disasters (*concluded*)^{*} (A/CN.4/620 and Add.1, sect. D, A/CN.4/629, A/CN.4/L.776)

[Agenda item 8]

REPORT OF THE DRAFTING COMMITTEE

40. Mr. VÁZQUEZ-BERMÚDEZ, speaking on behalf of the Chairperson of the Drafting Committee, introduced the texts and titles of draft articles 6, 7, 8 and 9 provisionally adopted by the Drafting Committee on the topic "Protection of persons in the event of disasters", as contained in document A/CN.4/L.776.

41. The Committee had held six meetings between 5 and 8 July 2010, at which it had considered draft articles 6 to 8, as proposed by the Special Rapporteur in this third report (A/CN.4/629). The three draft articles had been referred to the Drafting Committee at the Commission's 3057th meeting. As the Drafting Committee had run out of time, it had been unable to consider paragraph 2 of draft article 8, as proposed by the Special Rapporteur, which stipulated that external assistance might be provided only with the consent of the affected State. That issue would therefore be examined by the Drafting Committee in 2011. The draft articles provisionally adopted read:

Article 6. Humanitarian principles in disaster response

Response to disasters shall take place in accordance with the principles of humanity, neutrality and impartiality, and on the basis of non-discrimination, while taking into account the needs of the particularly vulnerable.

Article 7. Human dignity

In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations shall respect and protect the inherent dignity of the human person.

Article 8. Human rights

Persons affected by disasters are entitled to respect for their human rights.

Article 9. Role of the affected State

1. The affected State, by virtue of its sovereignty, has the duty to ensure the protection of persons and provision of disaster relief and assistance on its territory.

2. The affected State has the primary role in the direction, control, coordination and supervision of such relief and assistance.

42. Draft article 6 (Humanitarian principles in disaster response) set out the key humanitarian principles relevant to disaster response. The provision, which was based on the draft proposed by the Special Rapporteur, comprised three elements: first, an affirmation of the three core humanitarian principles applicable to the topic; second, a reference to non-discrimination; and, third, a reference to the needs of the particularly vulnerable.

43. He wished to clarify some general points before discussing those three components. First, with regard to the placement of draft article 6, it had been suggested in the plenary debate that the content of the draft article be moved to the preamble. However, the Drafting Committee had thought it more appropriate to reflect the above-mentioned principles in the body of the draft articles, given their significance in the context of disaster relief and assistance. During the plenary debate, it had further been suggested that the three principles should be split and that each should be made the subject of and defined in a separate article. That suggestion had not been followed, since it had not been considered necessary to redefine what were generally accepted humanitarian principles recognized by international law. Instead, a mere reference to the principles had been deemed sufficient. It had also been decided that the best way to reflect the principle of sovereignty was to deal with it in the provision on the primary role of the affected State.

44. As for the principles themselves, while there was general agreement on the inclusion of a reference to those of humanity and impartiality, some doubts had been expressed as to the pertinence of including the principle of neutrality, since it connoted a context of armed conflict and was commonly considered to be a principle of international humanitarian law. Nonetheless, the fact that the principle of neutrality had originated in a specific branch of international law did not make it inapplicable to other fields of the law. The principle of neutrality was commonly referred to in instruments pertaining to disaster relief and assistance and, even though it shared the same origin as the general concept of neutrality, it had acquired a more specific meaning in the context of such assistance. It was in the latter sense that the principle was referred to in draft article 6. The Drafting Committee had considered a proposal to make that clearer in the text by qualifying the principles as "humanitarian" principles. However, on balance it had been considered infelicitous to refer to the "humanitarian principle of humanity". The Committee had also preferred to avoid the inference that those principles alone would be applicable to disaster response, to the exclusion of others such as sovereignty. While in the end the qualifier had not been included, the reference to "humanitarian" in the title of draft article 6 served to circumscribe the nature of the principles listed therein. The commentary would, in defining their content, make it clear that the principles in question were not general principles of international law, but humanitarian principles underpinning disaster relief and assistance.

45. The Drafting Committee had recalled the proposal put forward during the plenary debate that an express reference be made to the principle of non-discrimination because it could not simply be inferred from the principle of impartiality. The Committee had noted that such

* Resumed from the 3057th meeting.

a provision had been included in the resolution entitled “Humanitarian Assistance” which the Institute of International Law had adopted at the 2003 Bruges session³¹⁷ and that the 2007 Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance of the IFRC referred in paragraph 4 (2) (b) to disaster relief and initial recovery assistance being provided without “adverse distinction”.³¹⁸ There had been general agreement in the Committee as to the importance of including such a reference in the draft articles. It had proceeded accordingly on the basis of a proposal from the Special Rapporteur that incorporated a reference to the principle of non-discrimination.

46. At first, the Committee had considered the possibility of placing the reference to non-discrimination in a second paragraph of draft article 6, but had then decided to retain it in the same paragraph in order to avoid the implication that non-discrimination was secondary to the other three principles. The Special Rapporteur’s proposal had further drawn on the Bruges resolution by including a reference to the qualification that in applying the principle of non-discrimination “the needs of the most vulnerable groups” ought to be taken into account. In principle, the Drafting Committee had accepted the inclusion of such a qualification in the context of the current topic on the understanding that “positive discrimination” in favour of vulnerable groups did not violate the principle of non-discrimination. It had also taken note of the fact that the qualification appeared in the 2007 IFRC Guidelines. The word “while” had been introduced in order to balance the principle and the qualification thereto and avoid the perception that the principle was contradicted by the qualifier.

47. The Drafting Committee had been concerned about the reference to “groups”, which might be interpreted as excluding individuals. It had considered a reference to “persons”, but in the end it had settled for a more neutral reference to “the vulnerable”. The Committee had also discussed whether to qualify “vulnerable” with “most”, as did the Bruges resolution. There had been a feeling that some qualifier was necessary since victims of disasters were, by definition, “vulnerable”. The Committee had accordingly agreed on the phrase “particularly vulnerable”, which was used in the 2007 IFRC Guidelines. The title of draft article 6 was unchanged.

48. Draft article 7 (Human dignity) recognized the importance of respecting and protecting the inherent human dignity of persons during the disaster response process. The Committee had initially considered beginning the draft article with the more neutral phrase “For the purposes of the present draft articles”, but had settled on the formulation “In responding to disasters”, because it provided a more substantive indication of the context in which the provision applied. The expression “responding to” had been chosen rather than the more generic “in their response” in order to convey a sense of the continuing nature of the obligation to respect and protect the human dignity of affected persons throughout the response period.

49. The reference to “States, competent intergovernmental organizations and relevant non-governmental organizations” indicated the actors to which the provision was addressed. It recognized the reality that a vast amount of disaster relief assistance was provided by assisting States and non-State actors such as international organizations and NGOs. The Drafting Committee had initially considered, in addition to the mention of States, a more general reference to “other relevant actors”, but it had settled for the current formulation for the sake of consistency with the wording adopted in draft article 5 (Obligation to cooperate).³¹⁹ Views had differed in the Committee as to whether the reference to NGOs would also cover multinational corporations. The feeling in the Committee was that any decision on that issue would have to apply to the entire set of draft articles and that, if such entities were to be included, it would be only in respect of their actions to provide disaster relief and assistance. That would be reflected in the commentary.

50. The formula “shall respect and protect” indicated the action required. The Drafting Committee had initially considered restricting the reference to “respect”, but it had subsequently recognized that the combination “respect and protect” was a relatively common formulation which accorded with contemporary doctrine and jurisprudence in international human rights law. The term “respect” indicated a negative obligation to refrain from doing something and the term “protect” a positive obligation to take action. The dual duty to “respect and protect” human dignity was particularly important in the context of disaster relief and assistance. Furthermore, the duty to protect required States to adopt legislation proscribing the activities of third parties involved in situations which raised concerns about the violation of the principle of respect for human dignity. It was implicit in the reference to the duty to “protect” that the duty would be commensurate with the legal obligations borne by the different actors mentioned in the provision and that, by definition (and as would be confirmed in draft article 9), it would be the affected State that would bear the primary obligation to protect. Nonetheless, concern had been expressed in the Committee that the reference to a positive obligation to “protect” would impose too great a burden on States during a crisis brought about by a disaster.

51. In adopting the concluding phrase “the inherent dignity of the human person”, the Drafting Committee had been inspired by its work on a similar provision currently before the Committee under the topic “Expulsion of aliens”, which, in turn, was based on the formulation of article 10, paragraph 1, of the International Covenant on Civil and Political Rights.

52. The Drafting Committee had initially considered a proposal by the Special Rapporteur, following a suggestion made in the plenary debate, to include a reference to respect for the human rights of the persons concerned as set out in relevant international instruments. In the Committee’s view, human dignity and human rights existed at different levels of generality: human dignity was not a human right, but a principle underlying all human rights. After considering the possibility of dealing with compliance with human

³¹⁷ See footnote 187 above.

³¹⁸ See footnote 198 above.

³¹⁹ A/CN.4/L.758 (see footnote 179 above). See also Yearbook ... 2009, vol. I, 3029th meeting, paras. 1–33.

rights obligations in a second paragraph of draft article 7, the Committee had eventually preferred to include the issue in a separate draft article, draft article 8.

53. Draft article 8 (Human rights) dealt with the obligation to respect the human rights of persons affected by disasters. As he had just said, the provision had its origins in the work on draft article 7 on human dignity. Initially, the Drafting Committee had contemplated the inclusion of a reference to the respect of human rights in the original provision on the primary responsibility of the affected State (which had become draft article 9), but it had been felt that doing so would render the draft article unnecessarily complex. The Committee had instead opted for a separate provision on human rights to be located immediately after draft article 7 in order to indicate the linkage between the two provisions.

54. The key issue considered by the Drafting Committee had been how properly to disaggregate the differing human rights obligations of the various actors falling within the scope *ratione personae* of the draft articles. It had appreciated that the extent of the affected State's obligation to respect the human rights of persons affected by disasters would not be the same as that of the obligations of assisting States, which might be involved in the assistance effort to varying degrees. Their obligations would, in turn, be different from the obligations under international law, if any, of other assisting actors, including international organizations and NGOs. The Committee had initially considered several proposals attempting to reflect such differing obligations. However, none of the formulations had met with general approval, partly because of a difference of opinion within the Committee regarding the extent of NGOs' human rights obligations. That difficulty had been compounded by the existence of multiple views as to whether the category "non-governmental organizations" would include the activities of other non-State actors, such as multinational corporations, an issue to which he had already alluded.

55. An early proposal had included the qualification that the human rights obligations in question were those "as set out in the relevant international agreements". However, the Drafting Committee had decided not to include such a reference in case it might prove too restrictive, since it excluded States' human rights obligations under customary international law and could not easily be made to cover the best practices for the protection of human rights set forth in non-binding texts, a relatively large number of which were relevant to disaster relief and assistance. The Committee had also considered other formulas, such as "as applicable", "in accordance with applicable rules of national and international law" and "as recognized in national and international law", but none had obtained sufficient support in the Committee.

56. In the end, the Committee had opted for a simpler formulation affirming the entitlement of persons affected by disasters to have their rights respected. It was implicit that there was a corresponding obligation to respect such rights. In choosing that formulation, the Committee had been inspired by its work on a similar provision under the topic "Expulsion of aliens". Draft article 8 had therefore been included as a general indication of the existence of

human rights obligations, without any attempt to specify what those obligations were, or to add to or qualify them. The reference at the beginning of the draft article to "persons affected by disasters" reaffirmed the context in which the draft articles applied and did not signify that persons unaffected by a disaster did not similarly enjoy such rights. It was also understood that the reference to "human rights" encompassed both substantive rights and limitations thereto (such as the possibility of derogation) as recognized by existing international human rights law.

57. Draft article 9 (Role of the affected State) corresponded to the Special Rapporteur's proposed draft article 8, paragraph 1. The Drafting Committee had decided, for the sake of clarity, to deal with the obligation of the affected State to protect persons and provide disaster relief assistance in one paragraph and to affirm the primary role of the affected State in directing, controlling, coordinating and supervising disaster relief and assistance activities on its territory in another paragraph.

58. There was a third element in the Special Rapporteur's proposed draft article 8, namely the requirement of the affected State's consent to the provision of external assistance and the extent to which that requirement of consent might be qualified. The Drafting Committee had not had sufficient time to consider that aspect and would return to it in 2011 in a separate draft article 10.

59. One of the issues that had arisen during the discussion was the meaning of the term "affected State". Since the issue was pertinent to the entire set of draft articles, it had been agreed that there would eventually be a provision on "use of terms" which would include a definition of "affected State". It was therefore unnecessary to include such a specification in draft article 9.

60. Draft article 9, paragraph 1, dealt with the duty to ensure the protection of persons as well as to provide disaster relief and assistance. A key issue debated had been whether it was necessary to include a description of the origin of the duty. During the plenary debate, several members had spoken in favour of a reference to the principle of sovereignty. Although the Special Rapporteur's intention had been to deal with sovereignty in the context of consent, and some members of the Drafting Committee had felt that a reference to sovereignty in paragraph 1 was not strictly necessary, the Committee had decided to include such a reference as a reminder that sovereignty not only established rights but also implied the existence of obligations; such a reference was common to texts concerning disaster relief and assistance and would not be out of place. The Committee had considered several options on how best to reflect the concept, including the phrases "in the exercise of its sovereignty" and "in the exercise of its sovereign rights and duties", but had settled on the current formulation.

61. The Special Rapporteur's version of the paragraph had referred to the "primary responsibility" of the affected State. The Committee recognized that this was a common expression in many of the texts applicable to disaster relief and assistance. Nonetheless, it had decided to refer to the "duty" of the affected State out of concern for the confusion that might arise owing to the use of the term "responsibility", both because it was a term of art

that typically had a different connotation and because of the need to avoid any connection with the concept of “responsibility to protect”. The paragraph had been aligned with the language used in draft articles already adopted through the use of the formula “provision of disaster relief and assistance”.

62. Paragraph 2 expressed the idea that the affected State not only had the duty to protect and provide assistance but also had the primary role in overseeing the provision of such assistance. Further to the decision to replace the reference to “responsibility” in paragraph 1 with a reference to an obligation (“duty”), the placement of paragraph 2 implied that the “primary role” of the affected State was a consequence of the duty identified in the first paragraph. The use of the word “role” in paragraph 2 had been inspired by General Assembly resolution 46/182 and was intended to allow the affected State a margin of appreciation, since it might prefer (or might only be able) to take on a more limited role of overall coordination. Any language suggesting an obligation to direct, control, coordinate and supervise would have been too restrictive and would not necessarily accord with the options available to the affected State in the context of a disaster.

63. The original reference to “primary responsibility” had given rise to a difference of views in the Committee, some members being concerned that it implied a “secondary” or even “tertiary” responsibility. The issue had been resolved once the Committee had replaced the word “responsibility” with “role”, as there was no disagreement that the affected State had the primary role. That had, in fact, been anticipated in draft article 5 on the duty to cooperate, which had been adopted by the Committee in 2009 on the understanding that there would be a “balancing” provision laying out the primary role of the affected State. The Committee had also considered using the phrase “first and foremost”, as in resolution 46/182, but that proposal did not garner general support. The original version of the paragraph had made reference to the source of the primary role as being “under its national law”. That phrase had been deleted, however, since it was not always the case that internal law existed to regulate the matter nor that such law always covered all of the relevant aspects.

64. The Drafting Committee had also considered the formulation “direction, control, coordination and supervision”, based on the Special Rapporteur’s proposal. It was recognized that, while there existed other formulations for the actions taken by the affected State, the proposed formulation was used in the Tampere Convention and seemed to be gaining general currency in the field of disaster relief and assistance. The Committee had considered an alternative formulation of “initiation, organization, coordination and implementation”, as in resolution 46/182, but had decided to retain the Tampere version as being more contemporary.

65. In conclusion, he expressed the hope that the Commission would be in a position to take note of the draft articles presented.

The Commission took note of the report of the Drafting Committee on protection of persons in the event of disasters, contained in document A/CN.4/L.776.

Cooperation with other bodies (*concluded*)*

[Agenda item 14]

STATEMENT BY THE DIRECTOR OF LEGAL ADVICE AND PUBLIC INTERNATIONAL LAW OF THE COUNCIL OF EUROPE

66. The CHAIRPERSON welcomed the representatives of the Council of Europe: Mr. Lezertua, Director of Legal Advice and Public International Law (Jurisconsult); Mr. Fife, Chairperson of the Committee of Legal Advisers on Public International Law (CAHDI); and Ms. Salina de Frias, Legal Adviser, Public International Law and Anti-Terrorism Division of the Council of Europe. He invited Mr. Lezertua to address the Commission.

67. Mr. LEZERTUA (Director of Legal Advice and Public International Law, Council of Europe; Jurisconsult) said that a major event during the Swiss Chairpersonship of the Committee of Ministers, from November 2009 to May 2010, had been the election of the Council’s new Secretary-General, Mr. Jagland of Norway. In the run-up to the election, an intensive political dialogue had been instituted between the Committee, through its Chairperson, and the Parliamentary Assembly. On 14 September 2009, agreement had been reached on a set of measures aimed at strengthening cooperation between the Assembly and the Committee, the two decision-making bodies of the Council of Europe, including review of the procedures for future elections of the Secretary-General.

68. Switzerland had then focused on the future of the European Court of Human Rights, concerning which a High-level Conference had been held from 18 to 19 February 2010 in Interlaken, Switzerland. The Interlaken Declaration adopted unanimously at the conference had set a clearly defined timetable for short-, medium- and long-term reforms of the Court.³²⁰ Switzerland had also pointed to the abolition of the death penalty in Belarus, among other countries, as facilitating a rapprochement between that State and the Council.

69. The former Yugoslav Republic of Macedonia had assumed the chairpersonship of the Committee, which it would hold through November 2010, and intended to stress the need for a strategy on cooperation in the defence of various rights and for coordination of the numerous monitoring mechanisms in the institutions of the Council of Europe with a view to consolidating the handling of human rights issues.

70. In the past year, a number of high-level meetings had been held, including the 120th session of the Committee of Ministers in May 2010, at which the participants, Foreign Ministers of States members of the Council of Europe, had adopted a declaration on relations between the Council and the European Union. Other important conferences included the sixteenth session of the Council of Europe Conference of Ministers responsible for Local and Regional Government on the theme “Good local and regional governance in turbulent times: the challenge of

* Resumed from the 3064th meeting.

³²⁰ Available from the website of the Council of Europe (www.echr.coe.int), *Reform of the European Court of Human Rights*.

change”; the seventh Conference of Ministers responsible for Equality between women and men, on the theme “Gender equality: bridging the gap between *de jure* and *de facto* equality”; the twenty-third session of the Standing Conference of European Ministers of Education, one of the themes of which had been teacher competencies for diverse democratic societies; and the fifteenth session of the Conference of Ministers responsible for Spatial/Regional Planning (CEMAT), held in July 2010 in Moscow. In October 2009, as part of the sixty-fourth session of the General Assembly, Slovenia and Spain had co-sponsored the launching event of the joint Council of Europe/United Nations study on trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs.

71. The most important activity undertaken by the Council, however, involved the consolidation of its relations with the European Union. The twenty-ninth Quadripartite meeting between the Council of Europe and the European Union had been held in Luxembourg on 27 October 2009. The participants had recalled that ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (Treaty of Lisbon) would make accession by the European Union to the European Convention on Human Rights possible. They had expressed their support for an early start of the accession process, since accession represented an important step towards better human rights protection for everyone in Europe. The Secretary-General of the Council had often emphasized the importance of such a step. Immediately upon the entry into force of the Treaty of Lisbon, informal contacts had led to the adoption by the Council of the European Union of a negotiation mandate. An informal group just set up by the Council of Europe’s Steering Committee for Human Rights had held its first meeting in July 2010. That had been preceded by a high-level meeting between the Council of Europe’s Secretary-General, Mr. Jagland, and the Vice-President of the European Commission, Ms. Reding, who had stressed the European Union’s desire to move the process forward swiftly. It had been pointed out that the European Union wished to join the system set up by the Convention as it stood, even though some of the European Union’s specific features would have to be taken into account. Negotiations were set to speed up after September 2010, with the possibly optimistic objective of producing an accession agreement by early 2011. The form of the instrument had already been agreed upon, although additional legal instruments might be needed to solve problems that could not be covered in an accession agreement, such as the financial contributions to be made by the European Union and some procedural details relating to the European Court of Human Rights. The formulation of reservations by the European Union had also been discussed, with the European Union being of the view that it should be possible, while some member States, such as the Netherlands, considered that negotiations should be held on that subject and that it should be covered in the accession agreement.

72. Turning to the current legal activities of the Council of Europe, he said that, in the past year, the Treaty Office’s work had revolved around the entry into force of two conventions and the opening for signature of three new ones.

On 1 June 2010, Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, with a view to more efficient operation of the European Court of Human Rights, had entered into force. It made changes to the Convention in a number of areas. Inadmissibility decisions on clearly inadmissible cases, now taken by a committee of three judges, would be adopted by a single judge, assisted by non-judicial rapporteurs. The idea was to increase the Court’s capacity to filter out “hopeless” cases. Regarding repetitive cases where the case was one of a series deriving from the same structural defect at national level, the Protocol provided that it could be declared admissible and decided by a committee of three judges, instead of a seven-judge Chamber under the current system, with a simplified summary procedure. New admissibility criteria had been introduced with a view to allowing the Court a greater degree of flexibility. In addition to existing conditions such as exhaustion of domestic remedies and the six-month time limit, under the new admissibility criteria, the Court could declare inadmissible applications where the applicant had not suffered a significant disadvantage, provided that respect for human rights did not require it to go fully into the case and examine its merits. In addition, a case could not be rejected on grounds of inadmissibility if there was no remedy available in the country concerned. The Committee of Ministers would also be empowered, if it so decided by a two-thirds majority, to bring proceedings before the Court when a State refused to comply with a judgement. It would have the new power to ask the Court for an interpretation of a judgement so as to assist the Committee in its task of supervising the execution of judgements. 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, with transitional measures for judges already serving, and a provision envisaging the European Union’s possible accession to the Convention.

73. On 1 July 2010, the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse had entered into force. It was the first instrument to establish the various forms of sexual abuse of children as criminal offences, including such abuse committed in the home or family, with the use of force, coercion or threats. In addition to the usual offences in that field—sexual abuse, child prostitution, child pornography, forcible participation in pornographic shows—the text dealt with “grooming” and child sex tourism. Its adoption was part of the three-year programme run by the Council of Europe on building a Europe for and with children.

74. Protocol No. 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euroregional Co-operation Groupings (ECGs) had been opened for signature in Utrecht on 16 November 2009. It contained provisions on the legal status, establishment and operation of “Euroregional Cooperation Groupings”. Another instrument opened for signature on 16 November 2009 was the Additional Protocol to the European Charter of Local Self-Government on the right to participate in the affairs of a local authority.

75. On 27 May 2010, the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters had been opened for signature in Paris. It had been agreed upon by the Organisation for Economic Co-operation and Development (OECD) and the Council of Europe as an update to an international treaty that aimed to help Governments enforce their tax laws as part of the worldwide drive to combat cross-border tax evasion. On 7 July 2010, the Committee of Ministers had adopted the Third Additional Protocol to the European Convention on Extradition, which aimed to accelerate the extradition procedure when the person sought consented to extradition. Negotiations were continuing, including with the participation of non-members of the Council, on the final text of a draft Council of Europe convention on the counterfeiting of medical products and similar crimes involving threats to public health.

76. He had received the Commission's request for comments on the draft articles on responsibility of international organizations, and work had already begun to ensure that the Council's experience in that area would be shared with the Commission. The two institutions had, in the past year, devoted their efforts to similar concerns and had worked to provide answers to legal problems that arose in the life of the international community. The values common to the members of the Council of Europe—human rights, democracy and the rule of law—were firmly anchored in the work of that institution.

**STATEMENT BY THE CHAIRPERSON OF THE COMMITTEE OF
LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW OF THE
COUNCIL OF EUROPE**

77. Mr. FIFE (Chairperson of the Committee of Legal Advisers on Public International Law) said that CAHDI was responsible for the coordination of activities and the provision of advice to the Committee of Ministers of the Council of Europe and regularly prepared comments and recommendations at the Committee's request. Since 1991, it had operated as an independent body, not subordinated to any other institution of the Council of Europe. It was currently the only pan-European forum bringing together numerous legal advisers, both from Ministries for Foreign Affairs of the member States of the Council of Europe and from a significant number of observer States and organizations. That high-level participation in its work made it a credible multidisciplinary forum. Its strength in coordination efforts was derived from the exchange of information on national practice in public international law: for example, on how States organized the legal activities of their ministries. Many of the issues discussed by CAHDI were highly contemporary in nature, and that enhanced its ability to provide guidance to the legal advisers of States. The need for a coordinated approach to issues of public international law was illustrated by the discussion by CAHDI on how legal advisers followed the handling by national courts of cases relating to the immunity of States and international organizations. CAHDI was also working on how United Nations sanctions were implemented and the impact on fundamental rights.

78. CAHDI functioned as European Observatory of Reservations to International Treaties, in which capacity it enabled member States to discuss whether to object to

a given reservation and to provide other States with clarifications on reservations they had formulated, thereby ensuring a healthy and constructive reservations dialogue. CAHDI followed with particular interest the work of the Council of Europe and other international organizations on measures to combat terrorism; it updated the list of potentially problematic reservations to anti-terrorism instruments.

79. With respect to the development of international justice, CAHDI was particularly attentive to issues relating to the peaceful settlement of disputes, including the jurisdiction of the International Criminal Court. It was continuing with its work on the follow-up to Recommendation CM/Rec(2008)9, stressing the importance of regular updates by member States of the Council of Europe of lists of arbitrators and conciliators. It kept abreast of the work of a number of international legal bodies such as the international tribunals for Cambodia, Lebanon, Rwanda, Sierra Leone and the former Yugoslavia, and exchanged information about the decisions handed down by the European Court of Human Rights in the field of public international law.

80. Every year, CAHDI held an exchange of views on the Commission's work. He thanked all the members of the Commission who had reported on that work, most recently Mr. Nolte, exchanges that had enriched discussions by CAHDI on a wide range of issues, from the fragmentation of international law to the expulsion of aliens, including the responsibility of international organizations and reservations to treaties.

81. Apart from its coordination function, which legal advisers of member States had found particularly useful, in the past year, CAHDI had also served as a think tank and advisory body. For example, it had assumed a particularly constructive role in discussions relating to the implementation of Protocol No. 14 bis to the Convention for the Protection of Human Rights and Fundamental Freedoms, which had been adopted in May 2009, and whose aim had been to allow for the immediate entry into force—for States ratifying it—of the new procedural provisions contained in Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, in particular those relating to the possibility of the Court to sit in single-judge formation and committees of three judges. CAHDI welcomed the entry into force of Protocol No. 14 on 1 June 2010.

82. In view of the fact that Protocol No. 14 provided for the European Union's accession to the European Convention on Human Rights, CAHDI had exchanged views with the President of the European Court of Human Rights in order to be ready to contribute to the *dénouement* of that complex but promising legal event.

83. The members of CAHDI would continue to reflect on the question of the European Union's accession to the European Convention on Human Rights at the forthcoming plenary meeting of CAHDI in September 2010. At that time, CAHDI would have the pleasure of welcoming for an exchange of information the Chairperson of the Council of Europe Steering Committee for Human

Rights Informal Working Group on the Accession of the European Union to the European Convention on Human Rights and the Deputy Director-General of the Council of the European Union. A representative of the European Court of Human Rights would also participate in discussions under that agenda item.

84. The Committee of Ministers of the Council of Europe regularly approached CAHDI to request its opinion. The Council's decision-making body had relied on the expertise of CAHDI regarding the issue of the so-called "disconnection clause" and, in particular, had given a favourable reception in 2008 to its report on the subject.

85. During the past year, CAHDI had regularly prepared commentaries to documents referred to it by the Committee of Ministers. So far in 2010, it had adopted its commentary to Recommendation 1888 (2009) of the Parliamentary Assembly of the Council of Europe entitled "Towards a new ocean governance", which emphasized the fundamental importance of the 1982 United Nations Convention on the Law of the Sea. It had also taken note of Recommendation 1870 (2009) entitled "Protecting financial aid granted by Council of Europe member States to poor countries against financial funds known as 'vulture funds'", Recommendation 1871 (2009) entitled "Ban on cluster munitions" and Recommendation 1865 (2009) entitled "The protection of human rights in emergency situations".

86. The number of requests made of CADHI by the Committee of Ministers remained steady, and at its next meeting, CADHI would consider two recommendations that had been referred to it by that body, namely Recommendation 1920 (2010) entitled "Reinforcing the effectiveness of Council of Europe treaty law" and Recommendation 1913 (2010) entitled "Necessity to take additional international legal steps to deal with sea piracy". CAHDI would also consider proposals formulated by the Venice Commission in its report on private military and security firms and erosion of the State monopoly on the use of force.

87. Furthermore, in an effort to engage in a constructive analysis of various issues of public international law, CAHDI continued to strengthen its relations with other actors in the international legal community. In addition to the exchange of views with Mr. Nolte, at its last two meetings CAHDI had also held an exchange of views with the President of the European Commission for Democracy through Law (Venice Commission) and the Director of the Legal Department of the International Monetary Fund. The fortieth meeting of CAHDI would be held in Tromsø, Norway, at the invitation of the Norwegian authorities on 16 and 17 September 2010.

88. As could be seen from the foregoing, the expertise of CAHDI had been called on regularly over the course of the past year, and the agenda for its forthcoming meeting was a full one. CAHDI was gratified at that demonstration of increased interest in issues of public international law. Accordingly, it hoped to continue its privileged cooperation with the International Law Commission in continuing to promote respect for international law and the peaceful settlement of international disputes.

89. The CHAIRPERSON thanked the Director of Legal Advice and Public International Law, Council of Europe (Jurisconsult), and the Chairperson of CAHDI for the valuable information provided in their statements and invited members of the Commission to put questions to them.

90. Sir Michael WOOD said that it was significant that CAHDI, which was a regional body, was making an important contribution to the development of universal public international law. He wondered whether it had made progress in developing cooperation with other regional bodies in the same field. The Secretary-General of AALCO, who had recently spoken to the Commission, had expressed great interest in developing working relationships with CAHDI and other bodies. He would be interested to know whether cooperation might also be developed with, for example, the newly established African Union Commission on International Law and the Organization of the Islamic Conference.

91. He expressed the hope that, when CAHDI considered the report of the International Law Commission, as it did each year in September, it would look favourably on the Commission's work on reservations to treaties, and, in particular, the important decision taken by the Commission that morning to refer a key provision to the Drafting Committee—one that was based to some degree on the work of CAHDI on reservations to treaties. It would be helpful to have the endorsement of bodies such as the Council of Europe regarding that provision.

92. He asked whether the European Court of Human Rights would be in a position to reduce its backlog of cases, even given the important changes that had been made to enhance its efficient operation.

93. Mr. FIFE (CAHDI) said that he was aware of the potential for strengthening relations with other regional legal consultative bodies and was very much interested in doing so. If CAHDI had not yet contacted representatives of regional bodies, such as the ones mentioned by Sir Michael, it was only because it had been required to attend to other important and time-consuming priorities, such as the question of Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, and the need to consider and draft opinions in that respect. One possible scenario would be for CAHDI to strengthen its ties with other bodies on an informal basis initially and thereafter on a formal basis. CAHDI knew, from its experience as part of a pan-European forum that provided for the broad participation of observers, that there were genuine advantages to be had from cross-fertilization and from exchanges of information and views. Such input was highly important to the development of policies and practices aimed at strengthening compliance with international legal obligations and the role of international law in the formulation of foreign policy. The value of such cross-fertilization could only be heightened if it was sought from representatives of other regional forums. He would be sure to discuss that important point with the other members of CAHDI on his return to Strasbourg. CAHDI also believed that the kind of cross-regional dialogue that took place each autumn among the large number of legal advisers from around the world, in the context

of the Sixth Committee of the General Assembly and during international law week, was highly beneficial to the work of the United Nations.

94. The members of CAHDI would await with great anticipation and interest the outcome of the Commission's work on reservations to treaties. He assured the Commission that the draft guidelines and commentaries that it submitted to the Sixth Committee would be examined very carefully at the forthcoming session of CAHDI.

95. Mr. LEZERTUA (Director of Legal Advice and Public International Law, Council of Europe; Jurisconsult) said that it would be difficult to eliminate completely the current backlog of 120,000 cases pending before the European Court of Human Rights, but that, according to the Court's estimates, some 30 per cent of the backlog could be reduced before the entry into force of the new procedures established as a result of the adoption in 2009 of Protocol No. 14 *bis* to the Convention for the Protection of Human Rights and Fundamental Freedoms. Those procedures, which related, in particular, to the possibility of the Court to sit in single-judge formation and in three-judge committees to decide on the merits of certain cases, were already operational in respect of countries that had ratified the Protocol. However, the countries that had ratified Protocol No. 14 *bis* to the Convention for the Protection of Human Rights and Fundamental Freedoms were not the ones in respect of which the highest number of cases had been brought: nearly 50 per cent of pending cases were from four countries that had not ratified that Protocol. The recent entry into force of Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, would entail the application of the same system to all High Contracting Parties, thereby extending the experience of a few countries to all States members of the Council of Europe.

96. Prior to the entry into force of Protocol No. 14, the High-level Conference on the Future of the European Court of Human Rights had been held in Interlaken at the initiative of the Swiss Chairpersonship of the Committee of Ministers of the Council of Europe. The Conference, in its outcome document, the Interlaken Declaration, had unanimously adopted a number of proposals aimed at simplifying the procedure even further.³²¹ The Committee of Ministers was committed to pushing the Interlaken Declaration forward quickly and had created a special working group to track monthly progress in its implementation. Protocol No. 14 alone was therefore not considered sufficient, and new measures were being prepared. The Secretary-General of the Council of Europe had established a 2020 group whose task was to envision the Council of Europe of 2020 and one of whose main objectives was to ensure the efficient functioning of the Court by that year. The first effects of Protocol No. 14 would soon be felt, and, together with the additional measures being prepared, would, it was hoped, enable the Council of Europe to solve the dramatic problem of the backlog in the work of the European Court of Human Rights.

97. Mr. MURASE said that, during his visit to the Commission the previous week, the Secretary-General of AALCO had been enthusiastic about establishing co-operation with the International Law Commission and other bodies, notably with CAHDI. He had been impressed with the work of CAHDI as a think tank and advisory body, and was of the view that his organization had much to learn from the experience and practice of CAHDI. As he himself would be attending a meeting of AALCO the following month, he would appreciate knowing what type of ongoing cooperative relationship between the two bodies might be envisaged by CAHDI.

98. Mr. WAKO said that, in his view, the activities carried out by CAHDI should be emulated by other regional groups, since cross-regional dialogue was essential to the harmonious development of international law. He had a particular interest in the issue of piracy, having prosecuted more than 100 pirates, the majority of whom had been involved in cases concerning his home region of East Africa. He wished to know what progress CAHDI had made in examining the particular issue of piracy and wondered whether, in its future work on the topic, CAHDI might consider seeking the participation of experts with experience in the prosecution of modern-day pirates.

99. Mr. HASSOUNA said that the relationship between the Council of Europe and the International Law Commission should be characterized by mutual exchanges. Accordingly, it would be useful, not only to receive the reactions of the Council of Europe to the Commission's work but also to have suggestions from it concerning, for example, which topics it considered suitable for codification by the Commission.

100. He strongly supported the involvement of more regional actors, whether States or organizations, in the work of CAHDI. Noting that the meetings of CAHDI often included discussions of general issues of international law, he asked whether the outcome of such discussions was published or whether there were other means by which members of the Commission could be informed of their conclusions. He was concerned that, because there seemed to be few African or Asian representatives among the States and organizations taking part in those discussions, their outcome might be oriented too heavily towards the views of participating States. He suggested that consideration might be given to enlarging the scope of such discussions in order to ensure that the rules developed thereupon were of relevance and interest to the entire international community and not only to a small group of States.

101. Mr. LEZERTUA (Director of Legal Advice and Public International Law, Council of Europe; Jurisconsult) said that the Council of Europe and the European Union had concluded a new memorandum of understanding in 2009, which provided the framework for their relationship. The European Union had designated an ambassador to the Council of Europe whose office would be staffed with an adequate number of officials to accommodate the deepening relationship between the two bodies. The general feeling was that the memorandum of understanding should not be modified for the time being, but that there were a number of issues, particularly in the area of treaty-making, in

³²¹ See footnote 320 above.

respect of which the application of the Treaty of Lisbon might alter their relations and which needed to be explored in greater detail by both bodies. Such exploration might result, for example, in a requirement for consultations between the two bodies to take place at an early stage, even before a decision was made to begin negotiations on the drafting of a treaty. Another issue that was being debated related to the participation of the European Union in the control bodies of existing treaties that provided for those bodies to address issues that fell under the exclusive competence of the European Union.

102. For the time being, however, priority was being placed on the accession of the European Union to the European Convention on Human Rights: a list of issues, resulting from the terms of the Treaty of Lisbon, had already been identified. One such issue concerned the establishment of a “co-defendant mechanism”, allowing for the joint participation of the European Union and the European Union member State concerned as defendants, in cases before the European Court of Human Rights or in those in which a defendant, being both a contracting party to the European Convention on Human Rights and a member State of the European Union, was thus legally required to apply European Union law. Another issue concerned how to handle cases referred to the European Court of Human Rights of a kind which, owing to the distribution of institutional and jurisdictional powers within the European Union, had never before been considered or encountered by the Court; the requirement to exhaust domestic remedies could be a particularly difficult issue. Another challenging issue was that relating to the establishment of a mechanism for the entry into force of the Treaty on European Union that would be less onerous than the one requiring signature and ratification by all 47 States members of the Council of Europe, which could create delays and deprive the whole process of momentum.

103. The European Commission took the view that, until the European Union became a party to the European Convention on Human Rights, any process leading to its accession to other treaties (given that most of the recent Council of Europe treaties contained clauses enabling the European Union’s accession) would be suspended. The opinion of the European Parliament on the issue of European Union accession was that the European Union should accede not only to the European Convention on Human Rights but also to the European Social Charter; however, its accession to the latter was not currently considered a top priority.

104. Concerning the cooperation of the Council of Europe with States outside the European continent, the law-making practice in the Council of Europe had evolved since the early days, when it tended to draft closed treaties to which only member States could become contracting parties: it now drafted open conventions, to which States not members of the Council of Europe could, at the Council’s invitation, accede. Currently, there were even clauses stipulating that non-member States participating in treaty negotiations could accede to a treaty under the same terms as member States. Moreover, proposals had been made to allow non-member States not participating in treaty negotiations also to sign and ratify a treaty under the same terms as member States.

105. Mr. FIFE (CAHDI) said that many of the comments made by members of the Commission had confirmed the importance of regional action in reinforcing the development of and international compliance with international law. He recalled that CAHDI was not a standing committee with an ongoing programme of work, but rather a body that held two-day meetings only twice a year and whose success depended on high-level but short bursts of activity. Members’ comments relating to the role of AALCO and other regional organizations confirmed the view taken by CAHDI that relations with such organizations should be pursued. The main purpose of such action would be to avoid the fragmentation of international law and to promote its concertation with a view to reinforcing global action, not to emphasize regional particularities or exceptions.

The meeting rose at 1.10 p.m.

3068th MEETING

Friday, 23 July 2010, at 10.05 a.m.

Chairperson: Mr. Nugroho WISNUMURTI

Present: Mr. Caflisch, Mr. Candioti, Mr. Comisário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrić, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Sir Michael Wood.

Organization of the work of the session (*concluded*)^{*}

[Agenda item 1]

1. The CHAIRPERSON announced that the draft programme of work for the following two weeks had been distributed. If he heard no objections, he would take it that the members of the Commission approved it.

It was so decided.

Expulsion of aliens (*concluded*) (A/CN.4/620 and Add.1, sect. C, A/CN.4/625 and Add.1–2, A/CN.4/628 and Add.1)**

[Agenda item 6]

REPORT OF THE DRAFTING COMMITTEE

2. The CHAIRPERSON invited the Chairperson of the Drafting Committee to present the Drafting Committee’s progress report on the expulsion of aliens.

^{*} Resumed from the 3062nd meeting.

^{**} Resumed from the 3066th meeting.