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Summary record of the 2744th meeting

Topic:

Extract from the Yearbook of the International Law Commission:-
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process had not only legal but also political and economic implications. There were systems for the allocation of liability, for example, in the fields of nuclear power, outer space, shipping and the international carriage of dangerous goods. The mechanisms provided for under such regimes could serve as a basis for the Commission's study, even if many of them were not international but regional and, in particular, European and North American. The Working Group had taken account of those regimes and of the questions which would have to be dealt with later; Mr. Gaja's comments in that regard were very constructive. Whatever form the results of the Commission's work took, the two main questions were whether those results would meet the needs and expectations of States and the international community, and to what extent States would accept them as international rules.

52. The CHAIR pointed out that the Commission had not yet officially appointed Mr. Sreenivasa Rao as Special Rapporteur for the topic of international liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) and that it still had to do so. He therefore took it that the Commission did want to appoint Mr. Sreenivasa Rao as Special Rapporteur for that topic.

It was so decided.

The meeting rose at 1 p.m.

2744th MEETING

Friday, 9 August 2002, at 10.05 a.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Mansfield, Mr. Momtaz, Mr. Niehaus, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Simma, Mr. Tomka, Ms. Xue.

from transboundary harm arising out of hazardous activities) (concluded) (A/CN.4/L.627)¹

[Agenda item 6]

REPORT OF THE WORKING GROUP (concluded)

1. The CHAIR invited Mr. Sreenivasa Rao, Chair of the Working Group on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law and Special Rapporteur, to make a clarification concerning the title of the item.

2. Mr. Sreenivasa RAO (Chair of the Working Group on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law, Special Rapporteur) said that the bracketed words "(International Liability for Failure to Prevent Loss from Transboundary Harm Arising out of Hazardous Activities)" appearing as part of the title of the report of the Working Group (A/CN.4/L.627) formed a subtitle to the item. As to the wording of the subtitle, the words "for failure to prevent" had given rise to difficulties in the Working Group particularly in the light of the Commission's wish to avoid any linkage of the item with issues of responsibility and prohibition that it had considered in the past under other agenda items. Accordingly, Mr. Gaja had suggested that those words should be replaced by the words "in case of". The new subtitle would thus read "(International Liability in Case of Loss from Transboundary Harm Arising out of Hazardous Activities)".

3. The CHAIR said that, if he heard no objection, he would take it that the proposed subtitle was acceptable to the Commission.

It was so decided.

4. Mr. CHEE said that, given the prominence environmental issues had assumed since the 1992 United Nations Conference on Environment and Development and the continuing evolution of international law in that field, he was strongly in favour of the Commission's proceeding with work on the item under consideration with a view to developing a convention.

5. Mr. AL-BAHARNA said that the subtopic of prevention of transboundary harm from hazardous activities, on which the Commission had completed work at the previous session,² would be incomplete if the question of liability for transboundary harm affecting the territory of another State was not pursued. It had been approved by the General Assembly,³ and there was no reason why the Commission should not attempt to bring it to a satisfactory conclusion in the form of draft articles that could ultimately take the form of a framework convention integrating the two subtopics of prevention and liability. The liability issue was a useful and worthwhile exer-

International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss

¹ Reproduced in *Yearbook ... 2002*, vol. II (Part Two), chap. VII, sect. C.

² See 2724th meeting, footnote 2.

³ See 2743rd meeting, footnote 4.

cise, and the report of the Working Group offered a good starting point for further work by the Commission.

6. It was not clear from paragraph 2 of the report how there could be an understanding that “failure to perform duties of prevention addressed to the State in terms of the earlier draft articles on prevention” entailed State responsibility. The draft articles should contain a specific provision to that effect; thus far, however, he could see none.

7. In paragraph 3 the verb “prove” should be in the past tense, and the word “and”, in the last sentence of the paragraph, should read “the”. In paragraph 5, the words “for example compensation” should be amended to read “such as restoration and/or compensation”, to make the paragraph consistent with paragraph 10. He agreed with the statement in paragraph 6 that harm done to the environment in the areas beyond national jurisdiction should be excluded from the topic, for the reasons given in that paragraph.

8. The words “it is understood”, in paragraph 7, should be changed to the stronger formulation “it is agreed”. Moreover, the threshold in paragraph 7 (b) should be determined in favour of significant harm, in order to be consistent with the subtopic of prevention, and so as to avoid wasting time on determining a different threshold for allocation of loss caused—a task that was likely to prove very difficult, given the difficulty the Commission had experienced in reaching an agreed conclusion on the expression “significant harm”.

9. The issue of the detailed distribution of loss between the operator and the State or States concerned, as reflected in paragraphs 10, 13, 14 and 15, was likely to prove one of the most difficult aspects of the topic. Moreover, in line with the principle of “equitable loss allocation” referred to in paragraph 14 and the principle that the innocent victim should not be left to bear the loss, proclaimed in paragraph 9, the residual State liability should definitely arise in all circumstances, not just in exceptional circumstances, as was felt by some members of the Commission.

10. Mr. ADDO said that the liability topic had had a chequered history, and that at one time it had been in real danger of sinking into oblivion. Whatever the reason, it had been an unloved child for some members. Thanks, however, to the superb handling of the topic of prevention by the Special Rapporteur, the topic of liability had been resuscitated in the form now before the Commission and, as such, constituted a natural sequel to the topic of prevention. This was a welcome development. Being a realist, however, he feared that the development of the topic in its present form would lead to problems. He drew consolation from the fact that the Special Rapporteur had left the Commission in no doubt as to his capacity to travel the long and tortuous road ahead. It was also reassuring that some previous opponents of the topic had now been won over. Finally, he would lend his weight to the adoption of the report.

11. Mr. FOMBA said that, although some members advocated that the Commission should abandon its consideration of the topic, it was too late to adopt that course,

for a number of reasons: first, the request made by States in paragraph 3 of General Assembly resolution 56/82; second, the Commission’s long-term, albeit sometimes uncertain, involvement in the process of finding the best way to approach the topic; and third, the fact that work on the subtopic of prevention had been completed, together with the need to clarify the relationship between the topic and that of State responsibility. Two reactions were possible: either it could be considered that everything boiled down to the question of breach of the obligation of prevention—in which case there was nothing further to discuss; or else that view could be rejected, in which case it would be necessary to define carefully what the present topic had to offer over and above the results of the prevention subtopic. Most members of the Commission seemed to take the latter view.

12. In his opinion, the Working Group’s report offered a good basis for further reflection. The Working Group proposed some sound principles to guide the Commission’s future work on the topic. Paragraph 3 helped to delineate the boundary between the two topics of international liability and State responsibility; paragraph 4 highlighted the useful concept of allocation of loss; paragraphs 6 and 7 recommended limiting the scope of the remainder of the topic to the activities that had been covered under the topic of prevention; and paragraphs 9 to 15 set forth a number of useful principles. As to the additional issues referred to in paragraph 16, provided no insuperable technical problems arose, they, too, were worthy of consideration. All in all, the Working Group’s preliminary conclusions were a step in the right direction and struck a proper balance between the various interests involved—a balance that, however, must not be allowed to jeopardize the effectiveness of the regulatory system that was to be established. The Commission must now pursue its consideration of the topic so as to respond positively to States’ expectations.

13. Mr. DAOUDI said the report of the Working Group revealed that the topic had potential for further development, in accordance with States’ wishes, to be expressed at a later date. He would have liked to find some mention, in the introduction to the report, of the decision to treat liability for failure to prevent loss as a separate issue. Furthermore, the report dealt in depth with only one situation in which liability might arise as a result of hazardous activities, namely, the situation in which an operator and the State were involved. In that case, the liability of the State was described as residual. However, the case in which the State was itself the operator was alluded to only indirectly, in paragraph 5 and at the end of paragraph 15. That situation should have been given fuller treatment in the report. Last, the additional issues enumerated in paragraph 16 were clearly of the utmost importance. However, the direction that the Commission’s future work on the topic took would depend on the reactions of States in the Sixth Committee.

14. Mr. MOMTAZ asked the Special Rapporteur whether the property referred to in paragraph 7 (c) as “national heritage” was confined to tangible property or also included intangible property. That question was currently on the agenda of UNESCO, and the expression “national heritage” should thus be more clearly defined.

15. Mr. Sreenivasa RAO (Chair of the Working Group on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law, Special Rapporteur) said that no detailed discussion of the scope of the term had taken place in the Working Group. It had been felt, however, that the term “property” would not cover certain priceless works of art, or national treasures to which no precise economic value could be assigned.

16. Mr. BROWNLIE said it had been felt that the loss caused by transboundary harm should not be restricted to certain forms of property. The original term, “environment”, had not been entirely comprehensive; the current wording might, however, eventually need further refinement. Some movables, while not part of national territory, were part of the national heritage, and the law applicable to them was public international law. The agreement between Egypt and the United Kingdom in respect of the transport of the Tutankhamen exhibition items was one example; the Cambodian claim in the *Temple of Preah Vihear* case was another inasmuch as it also related to steles and other movables removed by the respondent State.

17. Mr. KABATSI said that, for the many reasons given by other members, with all of which he agreed, he fully supported the idea that the Commission should take up the topic on the basis of the contents of the Working Group’s report. He had always been firmly of the view that, wherever loss and/or injury ensued as a result of an activity of others, whether national or international in origin, carried out in pursuit of gain or profit, compensation to the innocent victim should, in fairness and justice, logically be expected and should follow. It should not matter that the conduct of the activity was itself lawful, as long as there was an innocent victim of the gain- or profit-seeking activity. In that spirit he supported and welcomed the report of the Working Group.

18. The CHAIR said that, in the light of the value of the debate on the report of the Working Group, the Commission might wish, as an exception to its usual procedure, to adopt the report of the Working Group in its entirety, rather than paragraph by paragraph.

It was so decided.

The report of the Working Group, as a whole, was adopted.

19. Mr. Sreenivasa RAO (Chair of the Working Group on International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law, Special Rapporteur) said that, following the adoption of the Working Group’s report, he wished to thank all who had participated in the discussion. Very useful comments had been made: the difficulties of pursuing the subject had been identified, and the dangers of setting unduly high expectations signalled. Although much more work could be done, essentially there was a consensus that providing the necessary relief, expeditious justice and appropriate compensation to innocent victims of hazardous activities in a transboundary context should be given high priority.

20. The topic certainly involved considerations of policy development, economics and the quantification of claims, entirely aside from the issues of jurisdictions and forums. There were limits on the extent to which the Commission could pursue many of those matters, given the fact that it was a legal body with its own mandate and did not have the requisite expertise in certain areas. Even without having a specialist’s knowledge of science, economics or mathematics, however, a lawyer could still successfully speak about them in pleading a case before a court.

21. There was much room for collective thinking: the work on the topic was by no means the responsibility of the Special Rapporteur alone. He would welcome every suggestion, as long as it was made in a constructive spirit, all the more so as the topic had been around for over 25 years and had been plagued the entire time by crossed connections and needless expectations. The many suggestions made on substance could be taken into account in good time. Procedural matters would play a crucial role as well, but the Working Group’s view had been that since substantive issues had been intermingled with procedural ones for so long, they had first to be sorted out before the work could go further. That was exactly what had been done.

22. He was sure that, after the matter was discussed in the General Assembly, the scheme for further work would be fully developed, with a view to discharging the Commission’s mandate.

Programme, procedures and working methods of the Commission, and its documentation (A/CN.4/L.629)

[Agenda item 10]

REPORT OF THE PLANNING GROUP

23. Mr. CANDIOTI (Chair of the Planning Group), introducing the report of the Planning Group (A/CN.4/L.629), said it was divided into five sections dealing with the main issues on the Planning Group’s agenda. He drew attention to editing changes to the French and Spanish versions of paragraph 10 and to the titles of certain topics listed in the work programme for the period 2003–2006, annexed to the document. Last, he thanked all the members of the Planning Group for their efforts and the Secretariat for its assistance.

24. Mr. GAJA said that, in the title and text of paragraph 10, “honorarium” should read “honoraria”. In the last sentence of the text in that paragraph recommended for inclusion in the Commission’s report to the General Assembly on the work of its fifty-fourth session, the words “The members of” should be inserted before “The Commission”, since the members, not the Commission, received the symbolic honorarium mentioned there.

It was so decided.

25. Mr. MANSFIELD said that the Planning Group's report was satisfactory and that, without wishing to reopen debate, he wanted merely to offer a suggestion. The third sentence of paragraph 7 referred to a proposal made in the Planning Group by Mr. Pellet and Ms. Escarameia, one aspect of which had related to more balanced gender representation among Commission members. While he understood the reasons why it had not been adopted, it might nonetheless be appropriate to insert some form of language, in paragraph 7 or elsewhere, to reflect the spirit of the proposal. Such a text might read: "The Commission welcomed the fact that, for the first time, its membership included two women, and it noted with appreciation the contribution they had made at this first session of the new quinquennium. The Commission was further pleased to note that the number of women of recognized competence in international law was increasing all the time. It considered that this development was likely to be reflected in the nomination and election process for the next and subsequent quinquennia." The proposal contained nothing substantive. It was merely a series of statements of fact which, he thought, would reflect the sentiment in the Commission.

26. Mr. Sreenivasa RAO said that, while welcoming and supporting the proposal, he did not believe the Commission should single out its two women members for commendation. They had joined the Commission on their own merits, and their participation had provided added value in the Commission's work. An increase in the number of women on the Commission would be a welcome development.

27. Mr. KABATSI said he supported Mr. Mansfield's proposal, which was factually correct. He too thought it was important to acknowledge the entry of women into the ranks of the Commission and the contribution they had made.

28. Mr. SIMMA said he strongly supported the timely proposal by Mr. Mansfield. On the other hand, he agreed with the Chair of the Working Group that a separate commendation of the women members might have a slightly patronizing overtone. That part of the text proposed by Mr. Mansfield should perhaps be deleted.

29. Mr. KATEKA, commending Mr. Mansfield for drawing attention to issues raised by Mr. Pellet and Ms. Escarameia, said that he too had made a proposal, on the rotation of geographical distribution of seats on the Bureau, that was likewise reflected in paragraph 7 of the Planning Group's report. There seemed to be no basis in logic for the fact that, at the start of every quinquennium, the Chair of the Commission came from a specific regional group, and at the end, from another specific group. No support had been given for his proposal, a conservative stance that he had accepted.

30. While endorsing Mr. Mansfield's proposal, he would prefer to see it speak not of "two women" but of "some women", in keeping with the general United Nations practice of not citing the number of speakers in favour of or against a proposal. The proposal might also be expanded

to indicate that the addition of women to the Commission's membership was a first step towards gender mainstreaming to reflect the realities of the contemporary world.

31. Mr. OPERTTI BADAN said that, without wishing to detract from the merits of Mr. Mansfield's proposal, he agreed with the remarks made by the Chair of the Working Group and Mr. Simma. It was rather patronizing and indeed absurd to congratulate the women members of the Commission on anything other than their merits as jurists. Their presence should be presented as a new development, nothing more.

32. Mr. PELLET said that the second sentence of Mr. Mansfield's proposal was indeed condescending and paternalistic. As to the remainder of the text, there was good reason for the Commission to welcome the presence of women among its members, but he was not sure the report of the Planning Group was really the best place to express those sentiments. Paragraph 7 of the Group's report should be retained unchanged and Mr. Mansfield's proposal incorporated elsewhere in the Commission's report to the General Assembly on the work of its fifty-fourth session.

33. Regrettably, the Planning Group had failed to take up not only his proposal on balanced gender representation but also his proposal on partial renewal of the Commission's membership. He continued to believe that partial renewal would be preferable to the present full renewal, which seemed, incidentally, to have created problems at the present session.

34. Mr. KAMTO said he supported the idea of expressing the Commission's appreciation for the participation in its work of its two women members and of saying that it was to be hoped that their election would be the start of a new trend. The text proposed went a bit too far, however, and could have an adverse impact. Nominating women as candidates fell within the sovereign rights of States, and it was not for the Commission to meddle in their choices of candidates.

35. Mr. BROWNLIE said that he was not strongly opposed to Mr. Mansfield's proposal but fully agreed with Mr. Kamto that it sounded somewhat patronizing. The report should simply indicate that the Commission had noted with satisfaction the participation of women in its work and urged Governments to take account of that new development when nominating candidates in the future.

36. Mr. GALICKI said he supported the substance of Mr. Mansfield's proposal but thought the form was slightly inadequate. It was not the Planning Group but the Commission that should express satisfaction at the involvement of women in its work. He accordingly agreed with Mr. Pellet that the text should be inserted elsewhere in the Commission's report to the General Assembly on the work of its fifty-fourth session, perhaps under "Other matters".

37. Mr. AL-BAHARNA said he agreed with Mr. Galicki and Mr. Pellet that the report of the Planning Group was not the proper place to include the text of Mr. Mansfield's

proposal. He endorsed the first sentence but would prefer the last two sentences not to be incorporated. Again, it would be remembered that the presence of women on the Commission had been welcomed at the very start of the session.

38. Ms. ESCARAMEIA said that, having been one of the few to have supported Mr. Pellet's proposal, obliquely mentioned in paragraph 7, which had been withdrawn for lack of support, and having subsequently tried to introduce an amendment to article 8 of the Commission's statute to urge electors to bear in mind a number of criteria for nomination to the Commission, including gender balance, she warmly welcomed Mr. Mansfield's proposal. Some fault could, however, be found with the wording: the reference to the contribution by the new women members might not be endorsed by all members, and in any case the sentiment might appear patronizing, implying that the Commission was primarily a body of men that had welcomed, as outsiders, two women, whom the men were assessing. The reference in the second sentence to the fact that the number of women of recognized competence in international law was increasing was not necessarily accurate: there had probably always been as many such women, but they had not been given access to the positions in which they had had the opportunity to be nominated for the Commission by Governments. By far the most important sentence was the last, which said that the increasing role of women was likely to be reflected in the nomination and election process for the next and subsequent quinquennia. It was not a revolutionary remark but a mere statement of fact, she hoped. In a world where women in fact outnumbered men, the Commission should keep pace with developments. She drew attention to the rules for the election of judges to the International Criminal Court, in which it would be compulsory to vote for six women when there were a certain minimum number of female candidates. As for where in the report Mr. Mansfield's amended proposal should appear, she agreed that some more appropriate place could be found, perhaps among the conclusions. She truly appreciated Mr. Mansfield's efforts and commended him for them.

39. Mr. KEMICHA commended the wisdom and dignity with which Ms. Escarameia had spoken. For his part, he was glad that the Commission included women, but he saw no need for the report to dwell on the fact. The two women were simply members like the rest, playing an appropriate role within the Commission. To lay too much stress on their role would come across as patronizing. It was a fact of life—one which he welcomed—that an increasing number of women were active in international bodies, and the Commission should accept that for the normal development that it was. He therefore endorsed Ms. Escarameia's comments.

40. Mr. PAMBOU-TCHIVOUNDA pointed out that the two women members had not sought any special favours or recognition. They should be treated, as they were entitled, as nothing more or less than members of the Commission. He found Mr. Mansfield's proposal thoroughly inappropriate and would be unable to support its adoption. The feeling within the Commission would be represented far more faithfully if the following phrase were added at

the end of the third sentence of paragraph 7: "as an extension of the trend initiated when the membership of the Commission was renewed at the election in 2001".

41. Mr. SIMMA expressed a strong preference for retaining Mr. Mansfield's proposal, as amended, rather than that just proposed by Mr. Pambou-Tchivounda. He himself was exercised about where it should appear. The report of the Planning Group was clearly an inappropriate place, but he would be reluctant to see the text buried under the anonymous heading of "Other business". The issue was of sufficient importance to merit a separate entry.

42. The CHAIR said that it might appear under a sub-heading of agenda item 13 (Other business), which would respect the logic of where it was located but would not trivialize the issue.

43. Ms. XUE said that the discussion should end forthwith: the more she heard, the more she felt herself to be in a man's world. The question was surely not that the Commission was "welcoming" women members; rather, the women carried out their work as people, without a constant awareness that they were women among men. They had been elected not for their gender but for their competence. The wording of paragraph 7, as it stood, was unfortunate, since it did not identify precisely what measures to achieve more balanced gender representation had been put forward; women's groups would be dismayed by such phrases as "extremely difficult to implement in practical terms". She therefore warmly welcomed Mr. Mansfield's proposal, although she would prefer to have the complimentary reference to the women's performance omitted: the two women members were, like other members of the Commission, simply doing their duty.

44. The CHAIR, supported by Mr. TOMKA, said that he detected a large measure of agreement within the Commission that Mr. Mansfield's proposal should be adopted, in an amended form, but should appear in another part of the Commission's report. He suggested that Mr. Mansfield should make the suggested amendments and consider where his text would be best placed.

45. Mr. KAMTO, referring to the second sentence of paragraph 8, said it was not entirely accurate from the historical point of view to say that the "mini-debates" were an innovation in the Commission's working methods. Summaries of its discussions on the law of treaties in the 1950s showed that the practice had existed even then.

46. The CHAIR said the term "innovation" was acceptable because the mini-debates had been a departure from the previous practice in which statements were programmed in advance. They enabled members to respond rapidly to a specific part of a statement, to bring up facts, issues or questions relating to a single point immediately after it was made rather than waiting for all other speakers on an item to have spoken.

47. Mr. KAMTO said that, with all due respect, he had documentary evidence that bore out the historical point he had made.

48. Mr. PELLET said that, to flesh out the bare bones of paragraph 6, he would favour an additional sentence along the following lines: “At this stage, the work was of a purely preliminary nature.” Otherwise, the Working Group had very little to show in the way of progress. Paragraph 7 he would retain without amendment. As for the “mini-debates” mentioned in paragraph 8, Mr. Kamto was correct up to a point: in the remote past, when the Commission had had only 11 members, “mini-debates” had taken place. The practice had, however, lapsed completely. It was therefore fair to call it innovative in paragraph 8. Regarding paragraph 10, he supported Mr. Gaja’s comment that the last paragraph of the text drafted by the Planning Group should read “The members of the Commission, concerned...”. The issue of the plural of “honorarium” did not arise in French, but since the honorarium amounted to only US\$ 1, it might be more appropriate to use the word in the singular.

49. Mr. KAMTO suggested that, in the interests of complete accuracy, the word “recent” could be inserted before the phrase “working methods of the Commission” in paragraph 8.

50. Mr. CANDIOTI (Chair of the Planning Group) said that the English text of paragraph 6 already met the concern expressed by Mr. Pellet, for it used the phrase “progress report”. He endorsed the suggestion that the first words of the last phrase of the proposed text in paragraph 10 should be reworded to read “the members of the Commission”.

51. Mr. SIMMA expressed concern that the annex had reproduced abbreviations, such as IL for “international legal”, that he had jotted down for later typing; and his handwritten word “treaties” had been misread and mistyped as “notices”.

52. The CHAIR, after confirming that such items could be regarded as minor editing changes and that Mr. Simma could make them without further reference to the Commission, said that he took it that the Commission wished to adopt the report of the Planning Group, as amended.

The report of the Planning Group, as amended, was adopted.

Cooperation with other bodies (concluded)*

[Agenda item 11]

STATEMENT BY THE OBSERVER FOR THE
COUNCIL OF EUROPE

53. The CHAIR extended a warm welcome to Mr. Rafael Benítez, Secretary of the Ad Hoc Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe, and invited him to address the Commission.

54. Mr. BENÍTEZ (Observer for the Council of Europe), after expressing his pleasure at appearing before the newly appointed Commission, men and women alike, drew attention to the Council of Europe booklet that had been distributed to members, *Working Together to Build Europe on the Rule of Law*, which contained an overview of the Council’s wide-ranging activities in the legal field. Documents could also be found on the Council of Europe’s Internet site, www.coe.int.

55. A number of recent developments might be of interest to the Commission. Bosnia and Herzegovina had acceded to the Council of Europe on 24 April 2002, thus becoming the forty-fourth member State. Monaco and the Federal Republic of Yugoslavia were also applying for membership; fairly rapid progress was being made on the latter’s application, and it was hoped that accession would follow shortly. Another development had been the opening for signature at Vilnius in May 2002 of Protocol No. 13 to the European Convention on Human Rights, concerning the abolition of the death penalty in all circumstances; 33 members had signed and 3 had ratified the Protocol on the first day. The Committee of Ministers had adopted the Convention on Contact Concerning Children, which would be opened for signature at the forthcoming European Conference on family law in October 2002. Also worth noting was the successful international conference on the contribution by the Council of Europe to the European Union’s Community *acquis*, held in Santiago de Compostela, Spain, on 3 and 4 June 2002.

56. CAHDI, which was chaired by a member of the Commission, Mr. Tomka, brought together the legal advisers to the foreign ministries of the 44 member States of the Council of Europe, together with a significant number of representatives from observer States and international organizations. One of its tasks was to act as the European observatory of reservations to international treaties. The work had proved extremely valuable. It had helped to establish dialogue with the States concerned—in the case of reservations to treaties that could include both members and non-members—and, in some cases, to understand the reasons behind a given reservation. On occasion, the need to raise an objection had been avoided, or the reservation had been changed or withdrawn. The exercise was followed with considerable interest not only by the academic community but by Governments and, more recently, a number of Council of Europe intergovernmental committees, including the one responsible for monitoring the implementation of the Council’s instruments in the human rights field. The Committee of Ministers had issued special terms of reference to CAHDI to help the fight against terrorism via the observatory.

57. In 2001, CAHDI had started work on a pilot project on State practice regarding State immunity. The first step was to gather details of State practices, including court decisions, executive decisions and pieces of legislation. It was hoped that the initial phase would be completed by the end of 2002. Work had also been done on the immunities of Heads of State and Government, as well as certain categories of high officials. It had been decided, however, following the ruling of ICJ in the *Arrest Warrant* case, to halt the discussions because some of the relevant

* Resumed from the 2739th meeting.

issues had been resolved; the study would be resumed in due course. CAHDI also kept developments in the International Criminal Court, the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda under constant review, along with the question of the problems of the victims of armed conflict. Last, CAHDI greatly valued its relationship with the Commission. The mutual benefits were illustrated by the participation of members of each body in the work of the other. It was to be hoped that the relationship would continue.

58. Among the more general activities of the Council of Europe, the fight against corruption was of particular significance. The Group of States against Corruption (GRECO), an enlarged partial agreement open to both member and non-member States, was constantly expanding; the membership had reached 34 following the accession of Malta, the Netherlands and Portugal. It would be noted, in that context, that the United States was also a member. Accessions to international instruments in the field were constantly increasing. The Criminal Law Convention on Corruption had 28 signatures and 13 ratifications, while the Civil Law Convention on Corruption had 25 signatures and 6 ratifications. In the field of bioethics, the Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine (Convention on Human Rights and Biomedicine) had been signed by 18 member States and ratified by 12. Its Additional Protocol on the Prohibition of Cloning Human Beings had been signed by 19 States and ratified by 10. A second protocol to the Convention, concerning the transplanting of organs and tissues of human origin, had been opened for signature in January 2002 and had already been signed by seven States. The Convention and its first Additional Protocol—which were, to date, the only international instruments in the field of bioethics—had entered into force on 1 December 2000 and 1 March 2001, respectively.

59. Recent developments on the other side of the Atlantic had shown that the legal cooperation activities of the Council of Europe were fully in tune with the major questions of world society. One example—also unique in its field—was the Convention on Cybercrime, which had been opened for signature in November 2001 and had already been signed by 32 States, including 4 non-member States which had been closely involved in negotiating the text. There was in fact an increasing tendency for the Council's international instruments to be open for membership by non-members of the Council. A draft additional protocol to the Convention, relating to the criminalization of acts of a racist or xenophobic nature committed via computer networks, had also been adopted by the relevant working bodies and was currently before the Committee of Ministers. It was hoped that the protocol would be adopted by the end of 2002.

60. The Council of Europe had continued its activities in the fight against the sexual exploitation of children, and the Committee of Ministers had adopted recommendation (2001) 16 on the protection of children against sexual exploitation on 31 October 2001, updating recommendation (91) 11 of 1991, which took into account the provisions of the Convention on Cybercrime relating to child por-

nography. The Council had also taken an active part in the second World Congress against Commercial Sexual Exploitation of Children, held in Yokohama, Japan, from 17 to 20 December 2001.

61. The twenty-fourth Conference of European Ministers of Justice, held in Moscow on 4 and 5 October 2001, had looked at the implementation of judicial decisions in conformity with European standards. In the light of the events of 11 September 2001, the agenda had been expanded to include discussions on how to enhance cooperation to combat international terrorism. That had resulted in the adoption of three significant resolutions: Resolution No. 1 on combating international terrorism, Resolution No. 2 on the implementation of long-term sentences, and Resolution No. 3 on general approaches to and means of achieving the effective enforcement of judicial decisions.

62. On 12 September 2001, the Committee of Ministers of the Council of Europe had issued a declaration in which it condemned the terrorist attacks with the utmost force and expressed its solidarity with the victims. It had also begun to examine the specific actions it could take within its area of expertise, building on its own know-how and on the efforts of other international organizations, including the establishment of a specific body to deal with the issue. Owing to its own multidisciplinary nature, there was broad consensus that, in order to solve the problems posed by the new forms of terrorism, a holistic approach was needed that covered issues in the fields of criminal, civil, commercial and administrative law, and all other legal matters. Thus a multidisciplinary group, which would also take into consideration the activities of other relevant bodies, was the best way of addressing the urgent and fundamental task. Accordingly, on 8 November 2001, the Committee of Ministers had decided to take steps to increase the effectiveness of the existing international instruments of the Council of Europe that were relevant to the fight against terrorism and to establish the Multidisciplinary Group on International Action against Terrorism, adopting its terms of reference. One of the members of the Commission, Mr. Galicki, was also a member of the Multidisciplinary Group.

63. The two main tasks of the Multidisciplinary Group were to review the operation of, and examine the possibility of updating the Council of Europe's instruments relating to the fight against terrorism, in particular the European Convention on the Suppression of Terrorism: and to prepare a progress report on actions the Council could usefully carry out in order to contribute to the fight against terrorism, taking into account the work of the European Union.

64. The report had been presented to the Committee of Ministers at its 110th session, held in Vilnius on 2 and 3 May 2002, and had resulted in the identification of various questions to be looked at in greater detail, including substantive criminal law, special investigative techniques, funding of terrorism, protection of witnesses, international law-enforcement cooperation to improve mutual assistance, and protection of victims, by revising the functioning of the European Convention on the Compensation of Victims of Violent Crimes.

65. With regard to the review of the relevant Council of Europe treaties, the Multidisciplinary Group had reviewed the European Convention on the Suppression of Terrorism and, in May 2002, had received a formal mandate to prepare a draft amending protocol, which should be adopted at the next meeting of the Group in October 2002, submitted to the Committee of Ministers of the Council of Europe in November, and open to signature by the end of the year.

66. Mr. MOMTAZ, thanking the Observer for the Council of Europe for his very comprehensive report on the work of the Council and congratulating the Council for the wide variety of its activities, said that he was concerned about the question of the immunity of Heads of State. He understood that the matter had been on CAHDI's agenda, but that work had been suspended pending the decision of ICJ in the *Arrest Warrant* case. He would be interested to know whether CAHDI had resumed work and whether the suspension had been decided in order to avoid a possible contradiction between the general trend within CAHDI and the conclusions of ICJ concerning the immunity of ministers of foreign affairs in the performance of their duties.

67. Mr. SIMMA, referring to jurisdictional immunity, asked whether there was any coordination between the project of the Council of Europe on the compilation of State practice on immunity and the work being pursued at the United Nations. Also, with regard to the Council's efforts to fight terrorism, he observed that the Council was the guardian of respect for human rights in member States and, in particular, of the European Convention on Human Rights. He had the impression that some ministers of the interior had taken advantage of the events of 11 September 2001 to implement legislation that affected the fundamental rights of citizens and foreigners in their countries, and he would be interested to know whether there was any mechanism in place in the Council of Europe, apart from the organs of the European Convention on Human Rights, which, at the more political level, monitored the conformity of actions taken by member States with regard to that Convention. More specifically, did the Council take the view that not all its members had acted in accordance with article 15 in connection with the measures they had taken against terrorism?

68. Mr. CHEE said that it would be useful to know whether the Criminal Law Convention on Corruption, the Civil Law Convention on Corruption and the Convention on Long-range Transboundary Air Pollution had been successfully implemented and whether their provisions were being enforced. Again, had there been any cases where there had been a conflict between obligations under the European conventions and the Charter of the United Nations, a matter covered by Article 103 of the Charter?

69. Mr. BENÍTEZ (Observer for the Council of Europe), responding to Mr. Momtaz, said that about two years previously CAHDI had begun discussing the question of immunity, based on contributions from States. Subsequently, ICJ had delivered its judgement in the *Arrest Warrant* case, which had resolved some of the matters that CAHDI had been discussing. CAHDI had therefore decided to take note of the Court's decision and suspend considera-

tion of the question, even though it did not exclude the possibility of taking it up again at a future date.

70. Regarding the question of jurisdictional immunity raised by Mr. Simma, one of the purposes of CAHDI activities was to make a practical contribution to the work of the United Nations, and great importance was attached to effective coordination. In that respect, there had been an informal exchange of views with Mr. Hafner in 2001, when CAHDI was designing its programme, and Mr. Hafner had been invited to the September meeting of CAHDI, where information would be provided on the first stage of that programme (collection of material).

71. In implementing its activities in the fight against terrorism, the Council of Europe was building on the work of all international organizations and other relevant bodies of the Council, particularly the European Court of Human Rights and, at the intergovernmental level, the Steering Committee on Human Rights, attached to the Committee of Ministers and responsible for implementing the Council's activities in that field. After 11 September 2001, the Committee of Ministers had decided to set up a group of experts on terrorism and human rights entrusted with the task of drafting guidelines on how to combat terrorism while respecting the Council's standards on the protection of human rights. Those guidelines had been adopted by the Committee of Ministers in July 2002 and were already being used by the Multidisciplinary Group on International Action against Terrorism. The Group was also taking into account inputs from other Council committees, for example, the Committee of Experts on Data Protection. The Council periodically monitored possible suspension by member States of provisions of the European Convention on Human Rights, and CAHDI itself periodically examined outstanding reservations to international treaties, including reservations to European conventions. In that context, CAHDI had discussed recent reservations made by member States from the standpoint of the need to adopt new legislation. The Committee of Ministers, composed of the ministers for foreign affairs of member States, dealt with the more political questions.

72. Mr. Chee had posed various questions about the absence of monitoring or enforcement mechanisms in the conventions adopted by the Council of Europe. That was indeed a problem, and the Council had acknowledged that there was little point in continuing to produce international treaties if they did not include specific mechanisms for monitoring respect by States for their commitments. Nevertheless, several Council of Europe conventions provided for specific monitoring mechanisms. The most important example was the European Convention on Human Rights and its 13 protocols, which were monitored by the European Court of Human Rights. An effort was being made to provide for such specific mechanisms when new European conventions were drafted.

73. The issue of corruption lay at the heart of State operations. The activities of the Council of Europe in that area were relatively recent, dating from 1992. Since then, the Council had adopted two international conventions, the Criminal Law Convention on Corruption and the Civil Law Convention on Corruption, as well as resolution (97) 24 with 20 guiding principles for the fight against

corruption and recommendation (2000) 10 on codes of conduct for public officials. The monitoring mechanism for that effort was GRECO, which supervised the extent to which signatories of the agreement respected the guiding principles and the relevant conventions. The endeavour seemed to be effective, particularly in view of the significant attention paid by civil society to the evaluation rounds carried out by GRECO in member States.

74. Mr. KAMTO said that he would be interested to know whether GRECO had compiled specific elements on national practice and whether it had identified cases of corruption within the European Union or elsewhere (involving companies, for example) which had been prosecuted in the national jurisdiction. The international press had exposed cases of corruption involving Heads of State in some countries.

75. Mr. BENÍTEZ (Observer for the Council of Europe) said that GRECO was not mandated to consider specific cases of corruption within the national jurisdiction. It examined to what extent national legislation, its implementation, and all the administrative and judicial bodies could respond effectively to the phenomenon of corruption. Each year, GRECO chose some of the 20 guiding principles and examined whether States had legislation or systems that allowed them to be implemented. For example, the first evaluation cycle had looked at the system of public prosecutors in GRECO member States to see whether they had sufficient independence to ensure that cases of corruption could be prosecuted effectively and without interference from the political authorities, particularly when the individuals concerned occupied important public positions. Parliamentary immunity had also been examined to see whether it was an obstacle to prosecuting certain persons accused of acts of corruption.

76. The CHAIR thanked the Observer for the Council of Europe for an extremely interesting report.

The meeting rose at 1 p.m.

2745th MEETING

Monday, 12 August 2002, at 3 p.m.

Chair: Mr. Robert ROSENSTOCK

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemi-cha, Mr. Koskenniemi, Mr. Mansfield, Mr. Momtaz, Mr.

Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Simma, Mr. Tomka, Mr. Yamada.

Draft report of the Commission on the work of its fifty-fourth session

CHAPTER V. *Diplomatic protection* (A/CN.4/L.619 and Add.1–6)

1. The CHAIR invited the members of the Commission to start their consideration of the draft report with chapter V on diplomatic protection. He suggested that the Commission should first consider section C of that chapter.

C. *Text of articles 1 to 7 of the draft articles on diplomatic protection with commentaries thereto provisionally adopted by the Commission* (A/CN.4/L.619/Add. 2–5)

Paragraphs 1 and 2 (A/CN.4/L.619/Add.2)

Paragraphs 1 and 2 were adopted.

Part One: General provisions

Article 1 (Definition and scope)

Article 1 was adopted.

Commentary to article 1

Paragraphs (1) to (5)

Paragraphs (1) to (5) were adopted.

Paragraph (6)

2. Mr. GAJA proposed that the words “Although analogous to diplomatic protection” should be deleted and that the rest of the sentence should be amended accordingly in order not to give the impression that States could not also be concerned by functional protection. Non-nationals could be employed by the State, in the armed forces, for example.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

3. Mr. DAOUDI said that, during the informal consultations, the Special Rapporteur had submitted a document on the diplomatic protection of ships’ crews, but he was not sure whether the last two sentences of paragraph (8) accurately reflected the conclusions of the informal consultations on that point.