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Summary record of the 2904th meeting

Topic:
Cooperation with other bodies

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59. Mr. ECONOMIDES said there was no reason to make a distinction between States on the continents and island States. What mattered was that almost all States with land borders, whether States on the continents or island States, had transboundary groundwaters. He therefore proposed that the phrase “on the continents and even island States” should be deleted.

60. Mr. KABATSI and Mr. MOMTAZ endorsed the proposal by Mr. Economides.

61. The CHAIRPERSON said that the sentence would then read “It has been ascertained that almost all States with land borders may also have transboundary groundwaters with their neighbours.”

Paragraph (6), as amended, was adopted.

The general commentary to the law of transboundary aquifers as a whole, as amended, was adopted.

Commentary to draft article 1 (Scope)

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted.

Paragraph (7)

62. Mr. PELLET said that paragraph (7), and in particular the sentence “The decision on the threshold will be left to later substantive draft articles”, was worded so as to imply that the text had not been completed. It would be preferable to specify the draft articles in question.

63. Mr. GAJA said that the last five sentences seemed to suggest that measurements should be taken both prior to and after the impact in order to ascertain whether an impact had occurred. In a way, that contradicted the idea of an obligation of prevention set forth in draft article 6. In his view, an impact could be asserted even before the event took place. The last three sentences should therefore be deleted, in order not to void the obligation of prevention by stating that the event first had to take place before it could be ascertained whether there had been any impact.

64. Mr. PELLET, agreeing with Mr. Gaja, said that if his own proposal was endorsed, it would be possible to see clearly what was involved from the draft articles to which reference would be made; it was unwise to try to anticipate events in a manner which, after all, was vague and questionable.

65. Mr. YAMADA (Special Rapporteur) said he had no objection to the proposals by Mr. Gaja and Mr. Pellet.

Paragraph (7), as amended, was adopted.

The commentary to draft article 1, as amended, was adopted.

The meeting rose at 1.10 p.m.

2904th MEETING

Thursday, 3 August 2006, at 10 a.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

Cooperation with other bodies (concluded)*

[Agenda item 13]

DECLARATION BY REPRESENTATIVES OF THE COUNCIL OF EUROPE

1. The CHAIRPERSON welcomed Mr. De Vel, Director-General of Legal Affairs of the Council of Europe, and invited him to address the Commission.

2. Mr. DE VEL (Director-General of Legal Affairs, Council of Europe) said that the Council of Europe’s political life over the past year had been marked by the follow-up to the third Summit of Heads of State and Government, held in Warsaw on 16 and 17 May 2005. The Summit, which had endeavoured to define the Council of Europe’s place in the European and international institutional landscape with a view to giving it a precise political mandate for the years to come, had culminated in the adoption of an Action Plan and a final declaration: the Warsaw Declaration, in which the Heads of State and Government of the member States had noted that Europe was guided by a political philosophy of inclusion and complementarity and by a common commitment to multilateralism based on international law. They had committed themselves to enhancing the cooperation and complementarity of the Council of Europe and the other organizations involved in building a democratic and secure Europe by proposing to define a new framework for cooperation. To that end, they had instructed the Prime Minister of Luxembourg, Mr. Jean-Claude Juncker, to prepare, in his personal capacity, a report on relations between the Council of Europe and the European Union, taking into account the importance of the human dimension in building Europe. In the report he had submitted in April 2006, Mr. Juncker had concluded that there was a high degree of complementarity between the Council of Europe and the European Union in their fields of activity and experiences and had formulated a number of recommendations. In his view, the Governments of the member States of the European Union should immediately open the door to European Union accession to the European Convention on Human Rights. The European Union bodies should recognize the Council of Europe as the Europe-wide reference source for human rights. The Commissioner for

* Resumed from the 2899th meeting.

Human Rights should become the institution to which the European Union, like all the Council of Europe's member States, could refer all human rights problems that were not covered by the existing community machinery. The two institutions should establish a joint platform for the assessment of legal and judicial standards and, when appropriate, adopt each other's standards. The European Union's European Neighbourhood Policy should focus on the Council of Europe's member States and Belarus by increasing the number of joint programmes planned together. Lastly, States must ensure that the Council of Europe, as a major partner of the European Union, had the resources it required. To achieve those objectives, a memorandum of understanding was to be signed between the Council of Europe and the European Union in order to define relations between the two organizations.

3. In the Warsaw Declaration, the Heads of State and Government had also undertaken to foster cooperation between the Council of Europe and the United Nations and to achieve the Millennium Development Goals³⁵⁹ on the European continent. The texts adopted at the third Summit had alluded to the European Convention on Human Rights and the most appropriate means of guaranteeing its long-term effectiveness. To that end, a "group of wise persons" had been established to consider the issue of the long-term effectiveness of the Convention's monitoring mechanism, including the effects of Protocol No. 14 to the Convention. That group had submitted additional proposals going beyond the measures already taken, "while preserving the basic philosophy underlying the Convention". An interim report on the group's work had been submitted to the most recent session of the Committee of Ministers of the Council of Europe, held in May 2006. Protocol No. 14 to the European Convention on Human Rights, amending the monitoring system of the European Court of Human Rights with a view to reducing the Court's backlog of cases, had now been ratified by 42 States and should enter into force by the end of 2006.

4. Following the referendum organized in Montenegro on 21 May 2006 and the declaration of independence of the Republic of Montenegro on 3 June 2006, the Committee of Ministers of the Council of Europe had taken note with satisfaction of the request for accession of the Republic of Montenegro to the Council of Europe and had transmitted it, in accordance with the usual procedure, to the Parliamentary Assembly for opinion. The Committee of Ministers had welcomed the intention expressed by the authorities of the Republic of Montenegro to respect and implement the obligations and commitments contracted by the State Union of Serbia and Montenegro as a member State of the Council of Europe and expressed its determination to intensify cooperation with the Republic of Montenegro to that end.

5. During the past year, the legal efforts of the Council of Europe had been largely devoted to measures to counter terrorism. The Council of Europe had striven, on the one hand, to strengthen legal action against terrorism and its sources of financing and, on the other, to safeguard fundamental European values, in other words,

to ensure effective implementation of the standards adopted and to strengthen the capacity of States to take effective measures to combat terrorism while respecting human rights. The Council of Europe Convention on the Prevention of Terrorism, adopted in May 2005, had been followed in September of the same year by the adoption by United Nations Security Council resolution 1624 (2005) of 14 September 2005, which was based on the Convention. The Convention, which had been signed by 35 countries and would enter into force once it had been ratified by six of them, was designed to bridge gaps in legislation and secure international action to combat terrorism by a variety of means. It classified as criminal offences various types of conduct likely to lead to the commission of acts of terrorism, such as public provocation and recruitment and training for terrorism. Cooperation to prevent terrorism had been strengthened both at the national level, through the definition of national policies, and at the international level. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism had been signed by 22 countries and would also enter into force once it had been ratified by six of them. Two States had announced their intention to ratify it soon. The two Conventions were open to signature, subject to certain conditions, by States not members of the Council of Europe. The process of signature and ratification was also continuing with regard to the other Council of Europe instruments to combat terrorism. For example, six States intended to ratify the Protocol amending the European Convention on the Suppression of Terrorism, which had been signed by 44 States and ratified by 22.

6. The Council of Europe's Committee of Experts on Terrorism (CODEXTER) was continuing with the elaboration of country profiles on legislative and institutional counter-terrorism capacity, 20 of which had already been issued and were being widely used by States, academic institutions and the Counter-Terrorism Committee of the United Nations Security Council as part of the evaluation of follow-up to Security Council resolution 1373 (2001). Cooperation between the Council of Europe and the United Nations with a view to the implementation of Security Council resolutions 1373 (2001) and 1624 (2005) could be observed at the operational level: experts from the Council of Europe took part in the evaluation visits of the Counter-Terrorism Committee to States Members of the United Nations that were also members of the Council of Europe. At the same time, CODEXTER was working to identify existing gaps in international law and anti-terrorism activities. In that connection, the questions of Internet use for terrorist purposes and cyberterrorism were being viewed with special interest.

7. The Council of Europe's legal arsenal had been supplemented in June 2006 by a new recommendation from the Committee of Ministers to member States on assistance to crime victims, adding to the three recommendations adopted in 2005 on special investigation techniques, the protection of witnesses and collaborators of justice, and identity and travel documents.

8. Lastly, mention must be made of recent developments following the allegations brought to light in 2005 by the

³⁵⁹ See the United Nations Millennium Declaration, adopted by the General Assembly in its resolution 55/2 of 8 September 2000.

Washington Post and the non-governmental organization Human Rights Watch concerning the existence of secret CIA detention centres in member States of the Council of Europe. An inquiry had been opened up on 1 November 2005 by the Parliamentary Assembly and the Secretary General of the Council of Europe had taken action under article 52 of the European Convention on Human Rights. The initial result of those efforts was the publication of a report by the Secretary General based on an analysis of official replies received from 46 States members of the Council of Europe. The analysis of the replies revealed that the procedures in place for determining who and what transited through European airports and air space did not provide adequate safeguards against abuse. It appeared that no member State had set up any procedures to verify whether civil aircraft was used for purposes incompatible with internationally recognized human rights standards.

9. The Secretary General of the Council of Europe had further stated that existing rules on State immunity often seriously hampered the effective prosecution of foreign officials, that immunity was not synonymous with impunity and that the exceptions to State immunity already allowed for, where torture was concerned, should be extended to serious human rights abuses such as enforced disappearance. In 2006, the Secretary General would submit proposals to the Committee of Ministers on specific steps to overcome failings identified in three specific areas: the introduction of mechanisms to monitor the activities of foreign intelligence services in Europe; the regulation of international air traffic; and exceptions to State immunity, areas which should be of particular interest to the Commission.

10. The Council of Europe Convention on Action against Trafficking in Human Beings had already been signed by 30 States and ratified by one, and would enter into force after six ratifications. Its purpose was to prevent and combat trafficking in human beings, whether national or transnational and whether or not connected with organized crime, while paying particular attention to the protection of victims.

11. Turning to action to combat corruption, he said that, in the Group of States against Corruption (GRECO), the Council of Europe possessed an integrated and fully operational monitoring system which might serve as a model for worldwide action. A number of bodies were examining the idea of a follow-up to the United Nations Convention against Corruption. If that idea was accepted, it would be necessary to examine how to coordinate that follow-up with other monitoring processes and systems in order to avoid duplication and the overlapping of activities and guarantee that the various monitoring procedures reinforced one another. That was all the more important since follow-up was often a heavy burden on the countries concerned and there were signs of monitoring fatigue which should not be treated lightly. GRECO was continuing the evaluation of its 41 members, using methods that had proved their worth. It was on the point of completing its second round of evaluations on the proceeds of corruption, corruption in public administration and the use of legal persons to shield corruption offences. The third round of GRECO evaluations, to be launched in early 2007, would be devoted to transparency in the funding

of political parties and to the incrimination of offences provided for in the Council of Europe's Criminal Law Convention on Corruption and its Additional Protocol of 2003.

12. Fighting cybercrime was another key area of the Council of Europe's action. It was energetically pushing for the widest possible ratification of the Convention on cybercrime, which had entered into force on 1 July 2004, and its Additional Protocol concerning the criminalisation of acts of a racist or xenophobic nature committed through computer systems, which had entered into force on 1 March 2006.

13. The Council of Europe Convention on the avoidance of statelessness in relation to State succession had been opened for signature on 19 May 2006 and signed that very day by Ukraine. In order to enter into force, it had to be ratified by three States. Drafted in response to a Committee of Ministers recommendation to member States on the avoidance and reduction of statelessness (1999), it was based on a number of countries' recent practical experience. It also took account of the Convention on the reduction of statelessness, the Venice Commission's Declaration on the Consequences of State Succession for the Nationality of Natural Persons³⁶⁰ and the International Law Commission's draft articles on nationality of natural persons in relation to the succession of States.³⁶¹

14. The revision of the European Convention on the adoption of children, a key activity in the area of family law and the law of the child, had been entrusted to the Working Party on Adoption. The revised Convention was to be adopted in 2007.

15. The Council of Europe had launched a programme to combat counterfeit medicines and pharmaceutical crime which had begun with a seminar in September 2005 and was now being pursued through, *inter alia*, the preparation by a Council of Europe expert of a feasibility study on the drafting of a legal instrument, to be finalized by the end of 2007.

16. Over the years, the Council of Europe Committee of Legal Advisers on Public International Law (CAHDI) had become a particularly close associate of the Commission. A new publication entitled *State Practice Regarding State Immunities*³⁶² had been issued. It was the outgrowth of a pilot project of the Council of Europe on State practice regarding the immunities of States and their property and contained an analytical report compiled by three research institutes at the request of CAHDI. New databases on State practice regarding State immunities and the organization and functions of the Office of the Legal Adviser in the Ministry for Foreign Affairs had been brought online.

17. A major portion of the work of CAHDI was devoted to its role as European observatory for reservations to international treaties, its activities in that respect having broadened over the years and extended into the

³⁶⁰ Council of Europe, Strasbourg, 10 February 1997, doc. CDL-INF(97)1, pp. 3–6.

³⁶¹ See footnote 156 above.

³⁶² G. Hafner *et al.* (eds.), Leyden, Martinus Nijhoff, 2006.

field of reservations to international treaties against terrorism, regardless of whether an objection could be entered to such reservations. CAHDI had made a list of “possibly problematic” reservations of that nature and, at its recommendation, the Committee of Ministers of the Council of Europe, through the good offices of the Council’s Secretary General, had initiated a collective *démarche* which supplemented its approach to individual States with a view to persuading them to withdraw those reservations. A dialogue had thus been established between CAHDI and reserving States, regardless of whether they were members of the Council of Europe.

18. Another area on which CAHDI had been focusing since 2005 and which had aroused much public interest of late was United Nations sanctions. CAHDI was studying their implementation at the national level and the repercussions they could have on respect for human rights. A database on the situation in member States had been created and a report drawn up by Professor Iain Cameron and published recently³⁶³ now supplemented the one that the United Nations Office of Legal Affairs had asked Professor Bardo Fassbender to prepare.³⁶⁴

19. The next meeting of CAHDI, to be held in September 2006 in Athens, would be followed by the fourth multilateral consultation meeting on the International Criminal Court. Since 2000, the Council of Europe had organized three consultation meetings open to member States and to observer States and international organizations aimed at facilitating the exchange of views on legal problems faced in the ratification process and the models drawn up in certain countries to cope with those problems. The conclusions adopted during those meetings had been sent to Governments. The fourth consultation meeting would address interaction between the International Criminal Court and national courts and agreements on witnesses and on the execution of the decisions of the Court.

20. With regard to the Council of Europe’s activities in the field of constitutional and electoral law, the Venice Commission had recently adopted some important opinions on constitutional reform in Armenia and Ukraine, on draft amendments to the electoral codes of Armenia and Georgia, and on draft legislation on churches and religious organizations in Serbia. It had also adopted a report on the participation of political parties in elections and a declaration on the participation of women in elections. The extension of its activities beyond the confines of the European continent could be observed in its cooperation with South Africa.

21. The Council of Europe was also cooperating with the United Nations Interim Administration Mission in Kosovo on the application in Kosovo of the Framework Convention for the Protection of National Minorities and the European Convention for the prevention of torture and inhuman or degrading treatment or punishment. Two

agreements had been signed with United Nations Interim Administration Mission in Kosovo to that end in 2004.

22. Lastly, two high-level conferences were planned towards the end of 2006. The twenty-seventh Conference of European Ministers of Justice was to be held from 12 to 13 October 2006 in Yerevan on the topic of “Victims: place, rights and assistance” and the Ministers of Justice and the Interior were to meet in Moscow in November 2006 to discuss improving European cooperation in the criminal justice field.

23. In conclusion, he said that the Council of Europe was engaging in intensive action aimed at promoting the building of a Europe without dividing lines, based on the common values embodied in the Statute of the Council of Europe: democracy, human rights and the rule of law.

24. Mr. MELESCANU said that the most important development of late had been the creation of a certain “division of labour” between the European Union and the Council of Europe. The Council would probably be called on to play a key role in ensuring respect for some of the fundamental values on which Europe had been built. With regard to very serious problems such as terrorism, money laundering, transboundary crime and cybercrime, some countries had a tendency to create a hierarchy of priorities and to place respect for human rights in second place; the Council of Europe’s main task must accordingly be to ensure that the struggle of its member States and of the entire international community to overcome those scourges was waged with the greatest possible respect for human rights and fundamental freedoms.

25. Referring to the question of allegations about the existence of secret CIA detention centres in member States of the Council of Europe, he endorsed the idea that one of the main problems was the regulation of international air traffic. As a member of the Romanian Senate commission responsible for verifying such allegations, he had observed that, even though the identities of the pilot and of passengers were communicated to the authorities of the country of transit, they had no means of requesting additional information if the individual had not deplaned or boarded in their national territory. The authorities of transit countries, at least within Europe, should be given the means to fulfil the responsibilities that were to be entrusted to them. The Council of Europe might also request or recommend that national intelligence services should be placed under the control of parliament and not of the executive, since parliamentary control was the best means of guaranteeing respect for democracy and human rights.

26. Lastly, he requested Mr. De Vel to get in touch with the Commission’s Secretariat to enable the members of the Commission to consult the documentation on State immunity prepared by the Council of Europe.

27. Mr. GALICKI said Mr. De Vel’s remarks clearly showed that the Council of Europe’s activities in recent years had been largely focused on terrorism. He welcomed the adoption in 2005 of the first convention to be aimed not at combating the phenomenon, but rather at preventing it, and asked whether the Council planned soon to draft

³⁶³ *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions*, 6 February 2006 (available on the website of the Council of Europe).

³⁶⁴ *Targeted Sanctions and Due Process*, 20 March 2006.

other legal instruments designed to prevent and combat terrorism. He welcomed the adoption of the Council of Europe Convention on the avoidance of statelessness in relation to State succession, but regretted the fact that the Committee of Experts on Nationality had suddenly and unexpectedly disappeared. As a result, the many recommendations formulated for that Committee by the third European Conference on Nationality in 2004 had been left without effect, particularly the recommendations on the nationality of children, a matter that deserved further consideration. It was regrettable that the website of the Committee of Experts on Nationality had also been abolished; the extensive documentation it had contained should have been saved. The third Summit of Heads of State and Government of the Council of Europe, held in Warsaw in 2005, had confirmed the importance of issues relating to nationality and recommended that the Council of Europe should give them further consideration. In that connection, he asked whether consideration had also been given to solutions to fill the gap left by the disappearance of the Committee of Experts on Nationality.

28. Mr. GAJA said that he welcomed the useful information Mr. De Vel had provided to the members of the Commission on the Council of Europe's recent work. Given that, in 2005, the General Assembly had adopted the United Nations Convention on Jurisdictional Immunities of States and their Property, he wondered whether that could have or had had consequences for regional instruments, specifically the 1972 European Convention on State Immunity, known as the Basel Convention. In many cases, the Council of Europe, like other international organizations, adopted new conventions to face new problems, but States should consider whether to resort to universal texts when they were adopted. He would like to hear the position of the Council of Europe and CAHDI on that matter. Mr. De Vel had referred to a statement by the Council's Secretary General that existing rules on State immunity could hamper action to combat the risks involved in extraordinary renditions and the establishment of secret detention centres. In that connection, he drew attention to the fact that the Commission had recently included the topic of jurisdictional immunity of State officials in its long-term programme of work.

29. Mr. MOMTAZ said he welcomed the fact that the question of compatibility with international human rights law of the sanctions imposed by various United Nations bodies, particularly the Security Council, was now on the CAHDI agenda. He wished to know whether CAHDI was simply going to identify and take note of cases of incompatibility or whether it planned to adopt the necessary measures in such cases.

30. Mr. ECONOMIDES thanked Mr. De Vel for his remarks and reminded him of the extreme gravity of the events now occurring in Lebanon, the theatre of a shocking humanitarian crisis and gross human rights violations. He asked whether the Council of Europe, whose main concern was to protect human rights, had already reacted to that situation or intended to do so.

31. Mr. De VEL (Director-General of Legal Affairs, Council of Europe), replying to the questions raised by the members of the Commission, said that he welcomed

Mr. Melescanu's comments on the division of labour between the European Union and the Council of Europe and that, in his report on the relations between those two institutions, Mr. Jean-Claude Juncker, Prime Minister of Luxembourg, had found that it was in the legal field that the two organizations cooperated the best. With regard to the need to respect human rights in the context of action to combat crime in general and terrorism in particular, he recalled that, since the 1950s, the Council of Europe had been taking that principle into account and that that concern was reflected, *inter alia*, in the 1957 European Convention on Extradition and the 1959 European Convention on Mutual Assistance in Criminal Matters. In more recent texts such as the 2001 Convention on cybercrime, the need to reconcile freedom of expression and action against computer crime was duly taken into account. In combating terrorism in general, States must never lose sight of the fact that the primary human right was the right to life.

32. He acknowledged that the recent problems of secret flights and the construction of secret detention centres imperilled democracy and human rights. Those issues would be given in-depth consideration by the Council of Europe, but the results of the work of experts on the subject must not be prejudged. In his view, the particular case of the problem of the identification of passengers on secret flights should be taken up by the Council of Europe: the Secretary General would make a proposal in that regard in September 2006. On the surveillance of intelligence services, he said that a committee set up several years before to study the issue at the express request of the five principal member States of the Council of Europe had suggested that the Committee of Ministers should adopt a recommendation on the subject, but that had unfortunately not been deemed a priority. The question would nevertheless be addressed by the Secretary General of the Council of Europe in September 2006.

33. With regard to the preparation of new instruments on action to combat terrorism, he said that there was some reticence on the part of member States, and enthusiasm for the proposal to draft an instrument on the prevention of terrorism now seemed to be lacking. A number of States were nevertheless in favour of preparing a cyberterrorism convention focusing primarily on terrorist attacks on essential infrastructure. When taken together with the Convention on cybercrime, the 2005 Council of Europe Convention on the Prevention of Terrorism, which covered incitement to terrorism, was already helping to combat certain types of computer crime. In any event, the matter would be discussed and he hoped it would be possible to arrive at an instrument that would fill the existing gaps in international law.

34. Referring to the abolition of the Committee of Experts on Nationality, he explained that recent budget cuts had made its re-establishment or replacement by a similar body highly unlikely. Issues relating to nationality would nevertheless continue to be discussed by the European Committee on Legal Co-operation, which had called for a number of reports to be drawn up, including on the nationality of children. He had been unaware that the web pages on nationality had been removed and that seemed unjustified, especially as a number of instruments

on nationality such as the Council of Europe Convention on the avoidance of statelessness in relation to State succession had not yet been ratified by all member States. With regard to the question on State immunity raised by Mr. Gaja, he said that the member States of the Council of Europe were aware of the existence of the United Nations Convention on Jurisdictional Immunities of States and their Property. In his view, some measures could be adopted at the regional level, for example, to deal with secret flights or detention centres, without making the Convention obsolete. The adoption of a binding instrument was not yet under consideration, however, since the experts would begin their work only towards the end of 2006. The question of immunity of national officials was on the agenda of CAHDI and would be discussed both by CAHDI and by the experts responsible for follow-up to the report of the Secretary General on the use of his powers under article 52 of the European Convention on Human Rights.

35. In response to Mr. Momtaz's question about compatibility between international human rights law and the sanctions imposed by various United Nations bodies, including the Security Council, he said that CAHDI had ordered a study on the subject and that was being done in parallel with the one being carried out by the United Nations. CAHDI would resume consideration of the issue in September 2006. He was not in a position to say what approach it would adopt if it found the list of sanctions proposed by the United Nations to be incompatible with the obligations of States in respect of human rights. Without ruling out the possibility that directives might be adopted, he did not wish to prejudge the response of CAHDI to those questions, the sensitive nature of which had been rightly emphasized by Mr. Momtaz.

36. Replying to the question by Mr. Economides on the current situation in Lebanon, he said that the Council of Europe was following events in the Middle East very closely and that its highest officials had taken a position on the matter. At its next session, the Parliamentary Assembly would discuss the crisis, which, in view of its extreme gravity, could certainly not be ignored.

37. Mr. BENÍTEZ (Secretary, Committee of Legal Advisers on Public International Law (CAHDI)), providing further replies to the questions raised by the members of the Commission, said that CAHDI had set up a database that was accessible on the Internet and contained updated information on legislation and practice in respect of State immunity. It had been working on the topic of the immunity of State officials since 2004, but had decided to bring that work to an end, since some of the issues being considered had been resolved by the ICJ. With regard to the possible or actual implications of the recent United Nations Convention on Jurisdictional Immunities of States and their Property for the 1972 European Convention on State Immunity, he said that, at its March 2006 session, CAHDI had organized an informal meeting of the States parties to the European Convention on State Immunity, the results of which could be viewed on its website. Some delegations had expressed doubts about the usefulness of that Convention, while others thought it remained useful and that the interaction between the two texts should be looked at in greater depth. A second informal meeting was

to be organized in Athens in September 2006 with a view to concluding an agreement between the States parties to the European Convention on State Immunity to deal in a concerted manner with the question of the interaction between the two instruments. As to the compatibility with human rights of sanctions adopted by the United Nations, the members of CAHDI had concluded that it was for the United Nations to make a determination and that CAHDI itself was competent only to consider the implications of the sanctions imposed under Chapter VII of the Charter of the United Nations for the obligations undertaken by the member States of the Council of Europe in ratifying the European Convention on Human Rights. A database had been set up in order to enable member States to exchange information on problems arising out of the need to comply with Security Council decisions while respecting the human rights obligations they had assumed.

38. The report by Professor Cameron, *The European Convention on Human Rights, Due Process and United Nations Security Council Counter-Terrorism Sanctions*, which had been prepared independently and reflected solely the views of its author, had been intended to fuel the thinking of CAHDI on the subject and was a contribution by the Council of Europe to the ongoing discussions in the United Nations. That was why it had been published almost simultaneously with the report by Professor Fassbender, *Targeted Sanctions and Due Process*. CAHDI in no way wished to set itself up as an adjudicating body—and, in any event, there was an institution, the European Court of Human Rights, that was responsible for monitoring the implementation of the European Convention on Human Rights. It saw itself rather as a forum where countries could share their experiences and discuss their problems, collect information on the difficulties they faced domestically and identify best practices.

39. In his comments on the Council of Europe's activities in the field of terrorism, Mr. Galicki appeared to be thinking of the well-known challenges encountered by the United Nations, particularly with regard to the drafting of a comprehensive convention on international terrorism, a matter that was not on the Council of Europe's agenda because of its sensitive nature. The Council of Europe's plan was, rather, to progress in technical areas and to continue to identify gaps in international practice and legislation, for example, regarding large-scale terrorist-motivated attacks against critical infrastructure, as mentioned by Mr. Galicki. That question was to be taken up by CODEXTER of the Council of Europe, which was also to pursue activities to ensure the full implementation of the standards already adopted and the exchange of best practices through country profiles.

STATEMENT OF THE REPRESENTATIVE OF THE
INTER-AMERICAN JURIDICAL COMMITTEE

40. The CHAIRPERSON welcomed Mr. Hubert, Vice-Chairperson of the Inter-American Juridical Committee, and invited him to address the Commission.

41. Mr. HUBERT (Vice-Chairperson, Inter-American Juridical Committee) said that the role and functions of the Commission and the Inter-American Juridical Committee

were both similar and dissimilar: the Commission had a mandate for the progressive development and codification of international law at the universal level, whereas the Inter-American Juridical Committee pursued the same objectives, but in relation to the specific problems, legal tradition and interests and priorities of the region of the Americas. Serving as the legal advisory body of the OAS, it was tasked under the Charter of the Organization of American States with studying and analysing legal obstacles to the integration of the developing countries of the Americas, as well as options for the harmonization of legislation. Those differences in competence and approach could only help enhance the importance of dialogue between the Inter-American Juridical Committee and the Commission.

42. Describing the history of the Inter-American Juridical Committee, which was celebrating its centennial in 2006, and basing his remarks on a statement made by the Committee's Chairperson, Mr. Herdocia Sacasa, at a special session of the OAS Permanent Council held in Washington, D.C., in March 2006, he said that the significant contributions the Inter-American Juridical Committee had made to international law throughout its existence included the system of peace in the Americas, which had resulted in the adoption in 1948 of the American Treaty on Pacific Settlement (Pact of Bogota), and the Committee's work in such areas as non-intervention and legal equality among States; fundamental rights, with the adoption of the American Convention on Human Rights or "Pact of San José"; the law of the sea, with the concept of the exclusive economic zone; and the "democratic architecture" of the inter-American system, as reflected in the Inter-American Democratic Charter, which had been adopted in 2001 and proclaimed the existence in the Americas of a "right to democracy".

43. Turning to the topics considered recently by the Inter-American Juridical Committee, he said that, at its sixty-seventh regular session, held in Rio de Janeiro, Brazil, in August 2005, the Committee had endorsed the inclusion in its agenda of a topic relating to the promotion of the International Criminal Court following a resolution in which the OAS General Assembly had requested it to draw up a questionnaire to be submitted to all OAS member States on how their laws allowed for cooperation with the International Criminal Court. Of the 139 signatories of the Rome Statute of the International Criminal Court, 25 belonged to the inter-American system and, of those 25, 22 had ratified or acceded to the Statute. The questionnaire, which had been approved by the Inter-American Juridical Committee and sent to all member States, whether or not they were parties to the Rome Statute of the International Criminal Court, covered such issues as whether the national legislation of States provided for the crimes of genocide, war crimes and crimes against humanity covered by the Statute and, if so, what their definitions and elements were; whether States had found any obligations in the Statute to be inconsistent with the provisions of their constitution and, if so, which obligations and in what respect; and whether their legislation provided for procedures applicable to all the forms of cooperation referred to in part 9 (International Cooperation and Judicial Assistance) and part 10 (Enforcement) of the Statute. States parties to the

Rome Statute of the International Criminal Court that did not have such cooperation procedures were asked to indicate whether they were prepared to amend their legislation so as to allow for that type of cooperation with the International Criminal Court. States that were not parties to the Statute were asked whether they had taken or intended to take domestic legal steps to allow them to ratify or accede to the Statute and whether there were any impediments of a legal nature to their cooperation with the International Criminal Court in the cases provided for in the Statute relating to a State that was not a party.

44. By the time the Inter-American Juridical Committee had held its most recent session in March 2006, 17 countries, of which 11 were parties to the Rome Statute of the International Criminal Court, had answered the questionnaire. Four of the conclusions arrived at by the Rapporteur after having analysed the replies were: the OAS member States had shown a strong interest in cooperation with the International Criminal Court; not all the countries had incorporated the crimes provided for in the Rome Statute of the International Criminal Court in their national legislation, but their replies showed that most were working to integrate the Statute's definitions into such legislation; a number of States parties to the Statute that had answered the questionnaire had regulations to enable them to cooperate with the Court and, for some, the lack of specific laws did not necessarily seem to prevent them from complying with the Court's requests for cooperation; to settle problems of a constitutional clash caused by the Statute, some States had recourse to mechanisms that were worth consideration by those States that were not yet parties to the Statute. As suggested by the Rapporteur, the Inter-American Juridical Committee had adopted a resolution (CJI/RES.105(LXVIII)), which, among other things, requested member States that had not yet done so to complete the questionnaire; asked those States parties to the Rome Statute of the International Criminal Court that had undertaken legislative approval processes to implement parts 9 and 10 of the Statute on cooperation with the Court to include the types of crime covered by the Statute in their national legislation or to modify their legislation to that effect and to provide the Inter-American Juridical Committee with updated information; and requested States parties to the Statute to inform the Committee of any other reform that enabled them to cooperate with the International Criminal Court. The Inter-American Juridical Committee remained seized of that topic.

45. At its thirty-fourth regular session held in 2004, the OAS General Assembly had, in its resolution 2042 (XXXIV-O/04), requested the Inter-American Juridical Committee to analyse, in the light of the provisions of chapter III of the Inter-American Democratic Charter, legal aspects of the interdependence between democracy and economic and social development, specifying that the Committee was to carry out that study in the context of its agenda item "Application of the Inter-American Democratic Charter".³⁶⁵ The Inter-American Juridical

³⁶⁵ *Proceedings of the Thirty-Fourth Regular Session of the Organization of American States General Assembly*, Quito, 6–8 June 2004, vol. I, p. 307.

Committee had considered the matter at its four subsequent sessions and had adopted a resolution on it in March 2006³⁶⁶ after having considered and approved a substantive study by the Rapporteur on many issues underlying the mandate of the OAS General Assembly. Those included the exact legal nature and purview of the Inter-American Democratic Charter, adopted as a “declaration”, viewed from the angle of the progressive development of international law; whether or not reference could be made to the existence of a “right to democracy” and/or a “right to development” in international law generally and in the international law of the Americas in particular and, if so, who exactly the beneficiaries of such rights were and what obligations they created; what the relationship was between democracy and social and economic development, on the one hand, and human rights, on the other; and what the order of priorities between democracy and development was: could one be seen as a precondition for the other?

46. While acknowledging that democracy and socio-economic development were interdependent, the Inter-American Juridical Committee had felt that the legal aspects that might be attached to such interdependence were not immediately discernible. It was also aware that the question was not devoid of political considerations. The Rapporteur had arrived at the following conclusions, largely reproduced by the Inter-American Juridical Committee in its resolution of March 2006: the Inter-American Democratic Charter clearly established that peoples had a right to democracy and that the OAS member States were required to promote and defend that right; those States must also counteract all causes capable of undermining democracy, such as lack of development; the absence or lack of development could imperil democracy, but could not serve as a justification for suppressing or limiting it; and the OAS member States had an obligation to collaborate with one another to promote and achieve development. An analysis of the possible legal aspects of the interdependence between democracy and economic and social development nevertheless revealed fundamental differences, at least as far as the inter-American system was concerned. The members of OAS had assumed an “obligation of democracy”, the breach of which carried immediate political and legal consequences. In other words, they could be sanctioned for not being democratic. But they did not have a similar “obligation of development”. Under OAS instruments, they were called upon to cooperate for development, but could incur no sanctions for a breach of that obligation. The Rapporteur had concluded that existing OAS instruments, specifically its Charter and the Inter-American Democratic Charter, already established the rights and obligations of member States, as well as of the OAS itself and its bodies, with regard to democracy, on the one hand, and development, on the other. He had nevertheless suggested that the adoption of a new instrument that better addressed the interdependence between democracy and development might contribute to better understanding, implementation and effective application of those rights and obligations.

³⁶⁶ *Annual Report of the Inter-American Juridical Committee to the General Assembly*, 69th regular session, document OEA/Ser.Q/VI.37-CJI/doc.237/06, resolution CJI/RES/106 (LXVIII O/06), p. 37.

47. For lack of time, he would refer only very briefly to the other topics considered by the Inter-American Juridical Committee. He invited members who wished to learn more to read the relevant report. The first topic, and by far not the easiest, was the codification and standardization of international law in the Americas. The Committee had, for example, tried to find out why so many conventions within the inter-American system had not been ratified by the member States. Another topic under consideration for many years was the Inter-American Specialized Conference on Private International Law. Six such conferences had already been held; they played a key role in the development of international law in the region. The Inter-American Juridical Committee had considered whether, instead of working on new conventions, the Conference would not do better to try to adopt model legislation that member States could then use for changing their legal systems. Such laws were likely better to promote the harmonization of private international law in the Americas. Another topic, recently included in the Inter-American Juridical Committee’s agenda, was the preparation of a draft inter-American convention against racism and any kind of discrimination and intolerance. OAS saw the need to have an instrument of that nature in the light of current trends at the international level. Lastly, the list of the Committee’s activities would not be complete without reference to the Course on International Law which was organized every year in Rio de Janeiro, Brazil, and, in 2006, had been on the topic of “Democracy and Social and Economic Development in the Americas”.

48. Mr. CANDIOTI, speaking on behalf of the members of the Commission from the Americas, thanked the Vice-Chairperson of the Inter-American Juridical Committee for his statement. He hoped that the Inter-American Juridical Committee and the Commission would continue their dialogue with a view to exchanging not only information on their respective work, but also comments and ideas.

49. The CHAIRPERSON, speaking as a member of the Commission, said that OAS and the United Nations had similar approaches to the interdependence of democracy and social and economic development. Mr. Boutros Boutros-Ghali had attached particular importance to that issue, first when he had been Secretary-General of the United Nations and then as Secretary General of the International Organization of la Francophonie. Those approaches were based on the premises that States bore primary responsibility for handling the relationship between development and democracy and that they must cooperate in such a way that the weakest benefited from the assistance of the strongest.

50. Because it was located between two oceans, OAS was open both to Africa and to Asia, two continents grappling with the relationship between democracy and development. He wondered whether it took account of the African and Asian approaches in its thinking on that two-pronged issue.

51. Mr. HUBERT (Vice-Chairperson, Inter-American Juridical Committee) said that OAS did not take account of specifically African or Asian problems in its discussions of the issue, but rather viewed it as a universal problem.

52. The inter-American system had gone a very long way in proclaiming the right to democracy. The countries of the Americas had made signal efforts to institute democracy where it had not existed previously and to preserve it where it did exist, not always without difficulty. When democracy was under threat, OAS acted immediately, something which in the past would have been considered interference. In practice, however, it was not easy for a country in the grips of poverty to remain democratic. Democracy and development were interdependent. Hence the dilemma referred to by some OAS members: the Charter of the Organization of American States obligated States to be democratic, but it also called on them to cooperate for development. The problem was to determine to what extent a State could be obligated to cooperate for development and what sanctions could be imposed on it for not respecting that obligation. That was the question being considered by the Inter-American Juridical Committee. Even if the question was resolved through legal measures, such as the adoption of an inter-American social charter, however, the true response would, as always, be fundamentally political.

53. Mr. PELLET, referring to cooperation between the members of OAS and the International Criminal Court, asked whether the Inter-American Juridical Committee had tried to find ways of resisting the pressure brought to bear by the United States for the conclusion of bilateral agreements to enable its nationals to escape the Court's jurisdiction.

54. Mr. HUBERT (Vice-Chairperson, Inter-American Juridical Committee) said that the question had been raised, but only very discretely. Members of the Inter-American Juridical Committee were elected in their personal capacity and so—theoretically—they did not represent their countries. The Committee considered that such bilateral agreements were contrary to the development of international law and the universal will that had been the basis for the establishment of the International Criminal Court, but its position on the matter had not yet been definitively stated.

55. Mr. Sreenivasa RAO paid a tribute to the Inter-American Juridical Committee for the work it had done during a century of existence. The legal traditions of the countries of the Americas were a source of inspiration and encouragement for the countries of Africa and Asia, which were confronted with the same problems of poverty and the struggle for democracy. It was to be hoped that, together, those countries would be able to give the relationship between democracy and development a specific colour and content which would promote a more just world order.

56. Mr. HUBERT (Vice-Chairperson, Inter-American Juridical Committee) said it was gratifying to learn that the Inter-American Juridical Committee's efforts were appreciated. In an increasingly smaller world, whatever each isolated individual did affected all others and, when those effects were positive—something that was unfortunately not always the case—then that was very much to be welcomed.

57. Mr. CHEE, referring to the interdependence between democracy and development, said it must be kept in

mind that democracy was weakened by economic crises and war and that the rule of law was needed to back up democracy. Often, it was the weakest Governments that had the longest constitutional texts, whereas one of the greatest democracies in the world, Great Britain, had no written constitution at all.

58. Mr. HUBERT (Vice-Chairperson, Inter-American Juridical Committee) said it was indeed true that democracy lay not in a constitution or a set of laws, but in the constant interrelationship between a people and its leaders, who must serve the people, and not themselves. Nor was there one single model of democracy. It was not enough for a State to proclaim itself democratic and, conversely, some countries that might be considered totalitarian might argue that their populations enjoyed a certain well-being and standard of development. The basic principle was nevertheless that the people must decide and be able to change the Government if it was unsuitable.

The meeting rose at 1.05 p.m.

2905th MEETING

Thursday, 3 August 2006, at 3 p.m.

Chairperson: Mr. Guillaume PAMBOU-TCHIVOUNDA

Present: Mr. Addo, Mr. Baena Soares, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Niehaus, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Valencia-Ospina, Ms. Xue, Mr. Yamada.

Draft report of the International Law Commission on the work of its fifty-eighth session (*continued*)^{*}

CHAPTER VI. *Shared natural resources (continued)*^{*}

C. *Text of the draft articles on the law of transboundary aquifers adopted by the Commission on first reading (continued) (A/CN.4/L.694/Add.1 and Corr.1)*

2. *TEXT OF THE DRAFT ARTICLES WITH COMMENTARIES THERETO (continued)*

Commentary to draft article 2 (Use of terms)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Paragraph (2) was adopted with a minor editing amendment suggested by Mr. Brownlie.

^{*} Resumed from the 2903rd meeting.