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Summary record of the 3038th meeting

Topic:
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commentary should clearly explain their intended scope and the precise meaning of the terms used and that established reservations should not be regarded as an entirely new category of reservations transcending the intentions behind the Vienna Convention.

Organization of the work of the session (*continued*)

[Agenda item 1]

51. Mr. DUGARD (Chairperson of the Planning Group) said that the Planning Group would be composed of the following members: Mr. Cafilisch, Mr. Candiotti, Ms. Escarameia, Mr. Gaja, Mr. Galicki, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Valencia-Ospina, Mr. Vasciannie and Ms. Xue. Other members of the Commission would be welcome to join the Planning Group.

52. Mr. CANDIOTTI (Chairperson of the Working Group on the long-term programme of work) said that the Working Group consisted of Mr. Cafilisch, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood and Ms. Xue.

The meeting rose at 12.35 p.m.

3038th MEETING

Wednesday, 5 May 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Cafilisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

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

[Agenda item 3]

FOURTEENTH REPORT OF THE SPECIAL
RAPPOREUR³⁵ (*continued*)

1. The CHAIRPERSON invited the members of the Commission to resume the debate on draft guidelines 4.1 and 4.1.1 to 4.1.3, contained in the last chapter of the fourteenth report on reservations to treaties (paras. 176–236).

2. Mr. HMOUD commended the Special Rapporteur on his thorough analysis of articles 20 and 21 of the 1969 and 1986 Vienna Conventions and for suggesting guidelines which would either enhance the Vienna regime or fill certain gaps. That was a good approach, as long as the guidelines did not depart from or contradict those articles.

3. The concept of “establishment of a reservation” in draft guideline 4.1 came from article 21 of the Vienna Conventions. Thus, it was not artificial and constituted an appropriate basis for determining whether a reservation produced the desired legal effects. Subordinating the establishment of a reservation to three conditions—permissibility, formulation in accordance with the form and procedures, and consent of the other party—was also in conformity with article 21 and simplified the understanding and application of the Vienna regime.

4. With regard to expressly authorized reservations, draft guideline 4.1 correctly reflected the notion that such a reservation must satisfy the conditions of permissibility and consent. The line of reasoning set out in paragraphs 212 to 219 of the fourteenth report could have been made clearer, but it was right to conclude that only specified reservations with fixed content were *ipso facto* expressly authorized reservations that met the requirements for permissibility and consent. It was not certain, however, that the third paragraph of draft guideline 4.1.1 was necessary, since it merely merged the definition of reservations, already given in another draft guideline, with the requirement of the existence of an express provision. It went without saying that, to be established, such a reservation must be within the boundaries of an express provision.

5. The argument concerning the concept of treaties with “limited participation” was convincing, but there remained the question of the consent of the parties and the need to apply the treaty as a whole between all the parties as a prerequisite for each of the parties to consent to be bound. In any case, the intent of the parties must therefore be taken into account to determine whether a reservation required the consent of all the parties to the treaty in order to be established. However, the term “limited participation” was new to the Vienna Conventions, and the definition for it given in the second paragraph of draft guideline 4.1.2 did not refer to the criterion of number or even the meaning of the term, but rather to the application of the treaty in its entirety between all the parties as a condition for the consent of each of them to be bound. The draft guideline therefore needed to be reformulated; apart from that, it was acceptable on the whole.

6. Draft guideline 4.1.3 (Establishment of a reservation to a constituent instrument of an international organization) correctly reflected the tenor of article 20, paragraph 3. The only suggestion would be to add, at the end of the guideline, the words “[... if the competent organ of the organization has accepted it in conformity with guideline 2.8.7] or is presumed to have accepted it in conformity with guideline 2.8.10”.

7. In closing, he said that he was in favour of referring draft guidelines 4.1 and 4.1.1 to 4.1.3 to the Drafting Committee.

³⁵ See footnote 9 above.

8. The CHAIRPERSON said that the Special Rapporteur would summarize the comments made on the draft guidelines under subsection 4.1 at a later meeting. She invited him to introduce the draft guidelines under subsection 4.2, which were also contained in the fourteenth report.

9. Mr. PELLET (Special Rapporteur) recalled that the draft guidelines under subsection 4.1 had covered the establishment of a reservation, whereas those under subsection 4.2 concerned the effect of a reservation once it had been established, i.e. once its permissibility had been established from the point of view of form and content and at least one State had consented to be bound by it, although the reservation had been established only with regard to the consenting States. The proposed draft guidelines (4.2.1 to 4.2.7) were set out in paragraphs 237 to 290 of the report.

10. The establishment of a reservation produced two categories of effects. It enabled the author of the reservation to become a party to the treaty, and it produced effects on treaty relations which flowed from the very definition of reservations, namely the exclusion or modification of the legal effect of certain provisions of the treaty or of the treaty as a whole under certain particular aspects (article 2, paragraph 1 (*d*), of the 1969 and 1986 Vienna Conventions, reproduced in draft guidelines 1.1 and 1.1.1 of the Guide to Practice).

11. The effects of the first category were thus the following: entry into force of the treaty and status of party for the reserving State. Draft guideline 4.2.1 posed the fundamental principle, which stemmed from article 20, paragraph 4 (*a*) and (*c*), of the Vienna Conventions: “As soon as the reservation is established, its author is considered a contracting State or contracting organization to the treaty” (see paragraph 250 of the fourteenth report). That went without saying. However, the reserving State became a party only in its relations with States that had accepted its reservation, i.e. those with regard to which the reservation had been established; that was a manifestation of something which the Commission, in its commentaries of 1962³⁶ and 1966³⁷ on article 20, had called the “relative” participation in the treaty. That was made clear in draft guideline 4.2.3 (para. 243), which also specified the date of the effective entry into force—a date which did not necessarily coincide with that of consent to the reservation, particularly if the number of accessions or ratifications required for entry into force had not yet been attained. That called for a further explanation, which was provided in draft guideline 4.2.2 (para. 252): if a minimum number of accessions or ratifications was required for the entry into force of the treaty, the reserving State was included in that number once its reservation was established, a circumstance which might thus have an effect on the treaty’s entry into force.

12. Those various draft guidelines should not pose any problem, except in one respect: it emerged from all the draft guidelines on the establishment of reservations that a reservation was established *ratione temporis* if at least

one State had accepted it, either implicitly or expressly, within the time period of 12 months set in article 20, paragraph 5, of the Vienna Conventions. That rule was perfectly clear, but practice varied and in fact usually went in the opposite direction. Depositaries had a tendency to consider that the reserving State should be a party from the day of the expression of its consent to be bound by the treaty with its reservation, without waiting for the time period of 12 months set in article 20 to elapse and without waiting either for the express acceptance of a State, which was very hypothetical—he was not aware of any reservation that had ever been the subject of an express acceptance. That was the practice of the Secretary-General of the United Nations, who justified it by arguing that no State had ever made an objection to an entry into force of a treaty that included reserving States. However, if such an objection were made, from a strictly legal point of view it would have to be said that the treaty was not in force. That was also the practice of another important depositary, the Council of Europe. On the other hand, the Organization of American States and the Food and Agriculture Organization of the United Nations did not accept a reserving State among the States parties until 12 months had elapsed. The question therefore arose as to whether to enshrine predominant practice or to adhere to the letter of the Vienna Conventions. He favoured the latter course, because, as he had stated repeatedly, only very important reasons could justify calling into question a clear rule of the Vienna Conventions. In any case, practice was not sufficiently uniform to be able to conclude that a customary norm to the contrary had abolished the time limit set in article 20. Moreover, if an actual problem were to arise, one State could always step forward and expressly accept the problematic reservation. Thus, draft guidelines would leave matters as they stood.

13. The establishment of a reservation did not only have an effect on the status of the reserving State and its partners. As stated in article 21, paragraph 1 (*a*), it also modified “the provisions of the treaty to which the reservation relates to the extent of the reservation” in the relations between the reserving State and the others. In the current case, the verb “modify” should also be taken to mean “exclude”, in conformity with article 2, paragraph 1 (*d*). It should be noted that a reservation could not modify a provision, but only its effects or the ensuing obligations. Draft guideline 4.2.4 (para. 261 of the fourteenth report), in making that point, enlarged on article 21 but did not contradict it.

14. Draft guidelines 4.2.5 (para. 267) and 4.2.6 (para. 271) sought to specify the effects of an excluding reservation and of a modifying reservation; there was no need to dwell on that. There was still the question of reciprocity because, as Sir Humphrey Waldock had put it, “a reservation always works both ways”.³⁸ That was a reflection of the fundamental principle of consent in the framework of the law of treaties and in particular the regime of reservations. The 1986 Vienna Convention put it in the following manner: “A reservation established with regard to another party ... modifies [the] provisions

³⁶ *Yearbook ... 1962*, vol. II, document A/5209, pp. 176–181.

³⁷ *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 202–208, at pp. 207–208, para. (22).

³⁸ “General course on public international law”, *Collected Courses of the Hague Academy of International Law, 1962–II*, vol. 106, pp. 1–251, at p. 87.

[of the treaty to which the reservation relates] *to the same extent** for that other party in its relations with the reserving State or international organization” (art. 21, para. 1 (b)). Moreover, as Sir Humphrey had also noted, reciprocity in the application of reservations had the advantage of tempering the propensity of States to make too great use of that useful institution, which they must employ with moderation. Confirmation of that could be found in the fact that human rights treaties, in which reciprocity did not apply, were those which were the subject of the greatest number of reservations. Human rights treaties were the typical example of a treaty in which the principle of reciprocity played a limited role, a case provided for in draft guideline 4.2.7, subparagraph (b) (para. 290). In those treaties, individuals, and not the other parties, were endowed with rights and were the beneficiaries of the instrument, and reciprocity of reservations would be contrary to the international protection of human rights. However, it would be sufficient to state that the rule of reciprocity did not apply to such treaties; it was unnecessary to elaborate a special regime. At any rate, that had been his approach, and he continued to bear in mind that, if a provision was not applicable, it simply would not be applied. Draft guideline 4.2.7 provided for two other instances in which there would be no reciprocity. For example, there was the case covered under subparagraph (c), in which the object and purpose of the treaty or the nature of the obligation to which the reservation related excluded any reciprocal application of the reservation. The Drafting Committee might wish to merge that third case with the one in subparagraph (b) but, in the meantime, he had thought it wise to include it to show that the non-application of reciprocity was not limited to the areas of human rights or the environment, but could also arise, for example, in the case of a treaty providing a uniform law. Thus, a State could decide, by means of a reservation, that it would not incorporate a given provision into its domestic law, but that did not mean that the other parties could follow suit. The point was to show that certain treaties other than those relating to human rights were not conducive to reciprocity either. The idea still needed to be formulated appropriately.

15. The case contemplated in subparagraph (a) of draft guideline 4.2.7 was clearly different, because there, the impossibility of a reservation was not due to the nature of the obligation or the nature of the treaty to which the reservation was made, but to the actual wording of the reservation. That situation arose, for example, in the case of reservations purporting to limit the territorial application of a treaty (para. 282 of the report) and which were considered, in certain conditions, to be genuine reservations in draft guideline 1.1.3.

16. In closing, he said that the draft guidelines which he had just introduced came under section 4.2 of the Guide to Practice.

Organization of the work of the session (*continued*)

[Agenda item 1]

17. Mr. McRAE (Chairperson of the Drafting Committee) announced that the Drafting Committee on reservations to treaties would be composed of the following

members: Mr. Fomba, Mr. Gaja, Mr. Hmoud, Mr. Nolte, Mr. Pellet (Special Rapporteur), Mr. Vázquez-Bermúdez, Mr. Wisnumurti and Sir Michael Wood, together with Mr. Vasciannie (Rapporteur) and the Chairperson (*ex officio*).

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

[Agenda item 6]

DRAFT ARTICLES ON THE PROTECTION OF THE HUMAN RIGHTS OF PERSONS WHO HAVE BEEN OR ARE BEING EXPELLED, AS RESTRUCTURED BY THE SPECIAL RAPporteur (*continued*)³⁹

18. The CHAIRPERSON invited the Special Rapporteur, Mr. Kamto, to introduce his sixth report on the expulsion of aliens (A/CN.4/625 and Add.1–2).

19. Mr. KAMTO (Special Rapporteur) said that in his fifth report,⁴⁰ he had continued the consideration of questions relating to the protection of the human rights of persons who had been or were being expelled as a limitation on the State’s right of expulsion. Following the debate in plenary on the report, the proposed draft articles had been revised, restructured and issued. A new workplan⁴¹ had also been elaborated which provided an overview of various aspects of the topic and highlighted remaining work to be completed. The consideration of the fifth report in the Sixth Committee of the General Assembly had given rise to comments and observations by a number of Governments, which were summarized in the introduction to the sixth report. Some Governments had criticized him for relying primarily on the jurisprudence of regional bodies, such as the European Court of Human Rights and the Inter-American Court of Human Rights, as well as the Human Rights Committee of the United Nations. He had been somewhat surprised by those remarks, and he had noted that States had wanted greater importance to be attached to the study of national legislation. In his view, however, the codification and progressive development of international law were usually based more on international legal instruments and international practice—which was generally illustrated by jurisprudence—than on national legislation. That said, the role of national practice, as reflected in national legislation or even national jurisprudence, was particularly important, and had therefore been taken into account to a large degree in the elaboration of the sixth report.

20. The sixth report followed the overall workplan that he had distributed at the sixty-first session of the Commission and had introduced at the beginning of the current session (see the 3036th meeting above, paragraphs 21–43). He was also adding to the workplan, in particular in Part I of the study, on general rules. Those additional elements concerned prohibited expulsion practices and protection of the rights of persons who had been or were being expelled.

* Resumed from the 3036th meeting.

³⁹ See footnote 19 above.

⁴⁰ See footnote 26 above.

⁴¹ See footnote 24 above.

21. With regard to prohibited expulsion practices, he had reverted briefly to the question of collective expulsion in order to allay certain misgivings expressed by some Commission members. After analysing the relevant provisions of the Geneva Conventions for the protection of war victims and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) of 1977, and after examining a number of works of the Institute of International Law, he had come to the conclusion that article 7, paragraph 3, on collective expulsion, was not in contradiction with international humanitarian law; on the contrary. Accordingly, there was no need to elaborate a new draft article on the subject or even to reformulate the paragraph concerned.

22. After that clarification, he then continued the consideration of the remaining aspects of the protection of the human rights of persons who had been or were being expelled, focusing first on disguised expulsion. The term was used in a confused and even incorrect manner by persons who were not legal experts for cases which sometimes concerned ordinary expulsion, for example non-renewal of an alien's residence permit, as noted in paragraph 29 of the report. Admittedly, it was not always easy to distinguish between cases of disguised or indirect expulsion and those involving expulsion in violation of the procedural rules. In actual fact, the term "disguised expulsion" simply covered situations in which a State tolerated, or even supported, acts committed by its citizens in order to force an alien to leave its territory or to provoke the alien's departure. An analysis of such expulsion showed that it was by its nature contrary to international law. First, it violated the rights of persons so expelled and hence the substantive rules pertaining to expulsion, which linked a State's right of expulsion with the obligation to respect the human rights of expelled persons. Second, it violated the relevant procedural rules which gave expelled persons an opportunity to defend their rights. In the light of those considerations, he had proposed draft article A (para. 42 of the report), which read:

"Prohibition of disguised expulsion"

"1. Any form of disguised expulsion of an alien shall be prohibited.

"2. For the purposes of this draft article, disguised expulsion shall mean the forcible departure of an alien from a State resulting from the actions or omissions of the State, or from situations where the State supports or tolerates acts committed by its citizens with a view to provoking the departure of individuals from its territory."

23. It could be said that the draft article presented aspects both of the codification of a new inductive rule and the progressive development of international law. Although the provisions of the draft article were not based formally on existing treaty provisions or on an established rule of customary international law, they derived from two points. First, the practice of disguised expulsion undermined both the obligation to respect the general guarantees offered to aliens, in particular aliens legally present in the host State, and the procedural rules for expelling such

aliens. Second, the practice was widely criticized by civil society in the States in question.

24. The expulsion of an alien might take the form of disguised extradition. The usual procedure was for a State to refuse admission to an individual, and for him or her to be deported to another State that wished to prosecute or punish him or her. Roughly speaking, that would appear most clearly, for example, where the fugitive, a national of State A, entered the territory of State B from State C, but was deported to State D. In his view, a true "disguised extradition" was one in which the vehicle of deportation was used with the prime motive of extradition. The effect was to override the provisions of municipal law that commonly permitted the legality of extradition proceedings to be contested.

25. That notion was recognized to a certain extent in the jurisprudence of the European Court of Human Rights in two cases: in its judgement of 1986 in the case of *Bozano v. France*, in which recognition was explicit, and in its judgement of 2005 in the case of *Öcalan v. Turkey*. It was true that in the latter case the Court had considered that, in and of itself, disguised extradition did not run counter to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "European Convention on Human Rights") if it was the result of cooperation between the States involved and if the transfer was based on an arrest warrant issued by the authorities of the country of origin of the person concerned. However, despite that position taken by the Court, the facts seemed to confirm its position in the *Bozano v. France* case. It was highly likely that if the facts of the case had not been related to terrorism cases, the Court would have had no difficulty in confirming the case law set forth in *Bozano v. France*. Relevant national practice, in particular that of the courts in a number of countries, were analysed in paragraphs 62 to 69 of the sixth report. In some cases, those courts had considered the purpose of the expulsion and the intention of the States in order to issue an opinion. In any event, the practice of extradition disguised as expulsion was inconsistent with positive international law. Accordingly, rather than speaking of the codification of a clear customary rule prohibiting the practice of expulsion for extradition purposes, the rule could be established as part of the progressive development of international law.

26. On the basis of that analysis, he proposed draft article 8, entitled "Prohibition of extradition disguised as expulsion", which read: "Without prejudice to the standard extradition procedure, an alien shall not be expelled without his or her consent to a State requesting his or her extradition or to a State with a particular interest in responding favourably to such a request."

27. The grounds for expulsion were quite varied and were discussed in the report at great length (paras. 73 to 210). Based on the examination of current international conventions and international case law, there were in fact very few established grounds for the expulsion of aliens, the two principal grounds being public order and public security.

28. The question was whether those were the only two grounds for expulsion permitted under international law,

and whether they ruled out all other grounds. To answer that question, it was necessary to examine State practice. The detailed analysis of legislation on expulsion of aliens provided in the study by the Secretariat⁴² showed that various other grounds were invoked by States for the expulsion of aliens. On the basis of the distinction between the grounds established by international law and those resulting from State practice, he had sought first to define the concepts of public order and public security and noted that international jurisprudence was careful to specify its content. Explicitly or implicitly, international courts left that task to national jurisdictions. He had then considered the criteria used to assess public order grounds, relying for that purpose on regional international jurisprudence, notably that of the Court of Justice of the European Communities, several directives of the European Union, and national jurisprudence and doctrine.

29. Drawing on a comparative analysis of legislation on the question, he had then examined other grounds for expulsion, which were quite numerous: he had identified some 15. Establishing an exhaustive list of grounds for expulsion was a daunting task. The question, instead, was whether all those grounds were in conformity with international law. He had found that the late-nineteenth-century authors who had examined the issue of expulsion of aliens, as well as contemporary practice of international courts on the subject, all agreed that the State had considerable latitude in making a determination based on the circumstances. However, the State did not have a free hand. With respect to an act that affected relations between States and the international legal order, international law could not be indifferent to the manner in which the State justified expulsion. It was the reference by which the international validity of the act of expulsion would be determined.

30. Contemporary law allowed for judicial review of decisions concerning such acts. Expulsion did not fall within the scope of what some domestic laws called “governmental acts” which were not subject to any judicial review, because it involved the rules of human rights protection. Similarly, expulsion fell outside the ambit of what international law considered the exclusive jurisdiction of the State, which was not subject to international review. A judge could review the criteria that were used to determine grounds for expulsion, to verify whether they complied not only with the domestic laws of a State, but also with relevant rules of international law. In that connection, public order and public security, as had been seen, were established in domestic laws and were sanctioned in international law as legitimate grounds for the expulsion of aliens. The law of the European Community, in particular its case law, provided some clarifications, and its evaluation criteria could be of great assistance for the purposes of codification and gradual development of rules governing the grounds for expulsion of aliens. The expelling State could invoke any other grounds, provided they did not breach the rules of international law.

31. On the basis of the above analysis, he submitted to the Commission draft article 9, entitled “Grounds for expulsion”, which read:

“1. Grounds must be given for any expulsion decision.

“2. A State may, in particular, expel an alien on the grounds of public order or public security, in accordance with the law.

“3. A State may not expel an alien on a ground that is contrary to international law.

“4. The ground for expulsion must be determined in good faith and reasonably, taking into account the seriousness of the facts and the contemporary nature of the threat to which they give rise, in the light of the circumstances and of the conduct of the person in question.”

32. It was clear that the criterion for determining “in good faith and reasonably” appeared expressly and regularly in the international jurisprudence which he had examined and that grounds relating to public order and public security could not be invoked for acts which were not sufficiently serious.

33. With regard to conditions in which the person being expelled was detained, he said that, speaking from a methodological point of view, some national legislation in French-speaking countries spoke of “*rétenion*”, rather than “*détention*”, the difference being that “*rétenion*” was not a criminal sanction and was not applied in prisons, unlike “*détention*”, which was the consequence of a criminal offence that resulted in placement in a prison facility. That distinction concealed poorly the fact that, in both cases, the person concerned was being subjected to a deprivation of liberty. For that reason, he had used both terms in his report, although he had usually used the French term “*détention*” in a generic sense that also covered “*rétenion*”.

34. He had first given an overview of detention conditions that violated the rights of aliens who were being expelled, drawing on information available on detention facilities in a number of countries. It emerged that the situation of the persons concerned was truly disturbing, as shown by the examples cited in paragraphs 214 to 227 of the report.

35. He had then considered national legislation relating to the conditions of enforcement of expulsion decisions and the conditions in which aliens were detained prior to expulsion. In addition to the arbitral practice as it had emerged in the *Ben Tillett* and the *Daniel Dillon* cases, the jurisprudence of the European Court of Human Rights, notably in the *Chahal v. the United Kingdom* case, had clarified in many respects the rules on the conditions in which aliens were detained pending deportation. That case law was reaffirmed by the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, annexed to General Assembly resolution 43/173 of 9 December 1988. The report also contained a comparative study on national legislation and jurisprudence and on the duration of detention.

36. Draft article B, which in his sixth report was entitled “Obligation to respect the human rights of aliens who

⁴² A/CN.4/565 and Corr.1 (mimeographed; available on the Commission’s website, documents of the fifty-eighth session).

are being expelled or are being detained pending expulsion”, had been amended (see the document distributed at the meeting). In rereading it, he had realized that its title was identical with that of draft article 8 and that its paragraph 1 duplicated article 8, paragraph 1, as well as part of draft article 9. The title of draft article B had thus been reformulated to read: “Obligation to respect the human rights of aliens who are being detained pending expulsion”, and the old paragraph 1 had been deleted. The new paragraph 1 (a) read:

“The detention of an alien pending expulsion must be carried out in an appropriate place other than a facility in which persons sentenced to penalties involving deprivation of liberty are detained; it must respect the human rights of the person concerned.”

37. Paragraph 1 (b) read:

“The detention of an alien who has been or is being expelled must not be punitive in nature.”

38. Paragraph 1 (b) was clearly explained in the sixth report: the detention was non-punitive. Doctrine and jurisprudence were very clear on that point.

39. Paragraph 2 (a) read:

“The duration of the detention may not be unrestricted. It must be limited to such period of time as is reasonably necessary for the expulsion decision to be carried out. All detention of excessive duration is prohibited.”

40. That wording was a result of both the analysis of jurisprudence and the comparative study of national legislation.

41. Paragraph 2 (b) read:

“The extension of the duration of the detention may be decided upon only by a court or a person authorized to exercise judicial power.”

42. The point was that the control of the duration of detention must not be left to the administration.

43. Paragraph 3 (a) read:

“The decision to place an alien in detention must be reviewed periodically at given intervals on the basis of specific criteria established by law.”

44. The aim was to ensure, for the duration of detention, effective protection of a detainee pending expulsion. The provision stemmed from both jurisdiction and a comparison of national legislation. Needless to say, national legislations were not uniform, and he had drawn on the main trends which he had identified.

45. Paragraph 3 (b) read:

“Detention shall end when the expulsion decision cannot be carried out for reasons that are not attributable to the person concerned.”

46. That provision followed from the preceding provisions of draft article B.

47. In deleting paragraph 1 of the original draft article B, he did not want to lose the benefit of the ideas contained therein; they might well find use in the commentary to draft article 8, which enunciated the general rule of the protection of the human rights of a person who had been or was being expelled.

48. The sixth report completed the first part of the study on general rules, and he would submit another report to the sixty-second session of the Commission on the two remaining parts, namely “Expulsion procedures” and “Legal consequences of expulsion”. He hoped that in 2010 the Commission would complete its consideration of all his reports on the topic and, if it decided to refer the proposed draft articles to the Drafting Committee, that the latter would complete its work either in the current session or at the beginning of the sixty-third session so that the Commission could adopt all the draft articles on first reading in 2011.

Statement by the Under-Secretary-General for Legal Affairs, United Nations Legal Counsel

49. The CHAIRPERSON welcomed Ms. O’Brien, Under-Secretary-General for Legal Affairs, United Nations Legal Counsel, and invited her to take the floor.

50. Ms. O’BRIEN (Under-Secretary-General for Legal Affairs, United Nations Legal Counsel) said that, by its work and debates, the Commission exemplified the importance which the United Nations attached to international law. It also testified to the need to reconcile the common practice of international relations with conceptual reflections.

51. In its resolution 64/114 of 16 December 2009, the General Assembly had expressed its appreciation to the Commission for the work accomplished at its sixty-first session, in particular for the completion, on first reading, of the draft articles on the topic “Responsibility of international organizations”.⁴³ It had drawn the attention of Governments to the importance for the Commission of having their comments and observations on the topic by 1 January 2011. The General Assembly had also invited Governments to provide information regarding practice in respect of the topic “Expulsion of aliens”. Taking note of the report of the Secretary-General on assistance to special rapporteurs of the Commission submitted at its sixty-fourth session,⁴⁴ the General Assembly had requested him to present at its sixty-fifth session options regarding additional support for the work of special rapporteurs.

52. The promotion of the rule of law at the national and international levels continued to be one of the most topical items on the agenda of the General Assembly. At its sixty-fourth session, the debate in the Sixth Committee had focused on the promotion of the rule of law at the international level, and some delegations had placed emphasis on the central role played by the International Law Commission in that regard. In its resolution 64/116

⁴³ See footnote 1 above.

⁴⁴ See footnote 2 above.

of 16 December 2009, the General Assembly had again reaffirmed its role in encouraging the progressive development of international law and its codification, and invited the Commission once again to continue to comment, in its annual report, on its current role in promoting the rule of law. At the sixty-fifth session of the General Assembly in 2010, the Sixth Committee would continue its consideration of the sub-item entitled “Laws and practices of Member States in implementing international law”.

53. At the sixty-fourth session, the Sixth Committee had considered a new item, entitled “The scope and application of the principle of universal jurisdiction”. While most delegations who had intervened in the debate had affirmed that the principle of universal jurisdiction was enshrined in international law and constituted an important tool in the fight against impunity for serious international crimes, it had also been observed that caution should be exercised in addressing the topic. Delegations had expressed differing views as to the scope of universal jurisdiction and on the question of whether it had become part of customary international law.

54. Some delegations had observed that the principle of universal jurisdiction was related to the topics “Immunity of State officials from foreign criminal jurisdiction” and “Obligation to extradite or prosecute (*aut dedere aut judicare*)”, which were under consideration by the Commission. Some delegations had suggested that the topic be referred to the Commission for further consideration. By resolution 64/117 of 16 December 2009, the General Assembly had invited the Secretary-General to submit a report based on information and observations on the topic received from Member States. The General Assembly had also decided that the Sixth Committee should continue its consideration of the item, which was included in the provisional agenda of the sixty-fifth session, without prejudice to the consideration of related issues in other forums of the United Nations (an implicit reference, in particular, to the work of the Commission).

55. The United Nations had been at the centre of the efforts of the international community to build an international consensus on combating international terrorism. Indeed, the topic “Measures to eliminate international terrorism” was a major item on the agenda of the Sixth Committee. Since 2001, efforts had been exerted to resolve issues standing in the way of concluding a draft comprehensive convention against international terrorism.⁴⁵ Those issues related principally to the exclusionary elements concerning the scope of application of the convention. In 2009, in the context of a working group of the Sixth Committee, and in April 2010 within an *ad hoc* committee on the subject, both chaired by Mr. Perera, member of the Commission, Member States had continued to reflect on the 2007 elements of a package⁴⁶ submitted by the coordinator of the draft comprehensive convention. The elements aimed, first, at further clarifying the distinction between what was covered within the scope of the draft convention and what was

covered by international humanitarian law, in such a way that the integrity of international humanitarian law was not prejudiced. Secondly, the elements aimed at ensuring that no impunity for military forces of a State was intended by any exclusion. Differences continued to prevail, and a working group of the Sixth Committee would again be convened to make further attempts to bridge the gaps existing between delegations.

56. Concerning criminal accountability of United Nations officials and experts on mission, an item that had been on the agenda of the General Assembly since 2006, in 2009 the General Assembly had adopted resolution 64/110 of 16 December 2009, reiterating all the measures envisaged in resolutions 62/63 of 6 December 2007 and 63/119 of 11 December 2008 and also preserving the reporting mechanisms provided for therein. In particular, States were strongly urged to establish jurisdiction over crimes of a serious nature committed by their nationals while serving as United Nations officials or experts on mission. Furthermore, a number of measures were envisaged with a view to enhancing cooperation among States and between States and the United Nations in order to ensure the criminal accountability of United Nations officials and experts on mission. Those measures concerned, *inter alia*, mutual assistance in criminal investigations and criminal or extradition proceedings, including with regard to evidence; the facilitation of the use, in criminal proceedings, of information and material obtained from the United Nations; effective protection of witnesses; and the enhancement of the investigative capacity of the host State. While including the item in the provisional agenda of its sixty-fifth session, the General Assembly had decided that it would continue its consideration of the substantive aspects of the topic during its sixty-seventh session (2012), within the framework of a working group of the Sixth Committee. The possibility of elaborating a legally binding instrument on the matter remained open.

57. Concerning the new administration of justice system, on 1 July 2009 the United Nations Dispute Tribunal and the United Nations Appeals Tribunal had been established, and on 31 December 2009 the United Nations Administrative Tribunal had closed its doors after 60 years. To date, the Dispute Tribunal had issued more than 160 judgements. In its emerging jurisprudence, fundamental questions that had long been settled by the Administrative Tribunal—such as the scope of the Secretary-General’s discretionary authority to appoint and administer staff, the role of judicial review and the relevance of national jurisprudence—were being re-examined. A number of those issues had been raised in appeals before the Appeals Tribunal. The General Assembly was also scheduled to assess the operations of the new administration of justice system during its sixty-fifth session.

58. To conclude that cluster of issues, it should be recalled that the General Assembly had taken note of the document entitled “Introduction and implementation of sanctions imposed by the United Nations”, adopted by the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, on the basis of a proposal by the Russian Federation, and that it had decided to annex it to its resolution 64/115 of 16 December 2009.

⁴⁵ See General Assembly resolution 56/88 of 12 December 2001, paragraph 15.

⁴⁶ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 37 (A/62/37)*, Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996, eleventh session (5, 6 and 15 February 2007).

59. The Under-Secretary-General for Legal Affairs, United Nations Legal Counsel, turning to the recent activities of the Office of the Legal Counsel, said that the concept of responsibility to protect was relatively new and, despite its endorsement by the heads of State and Government at the 2005 World Summit⁴⁷ and subsequent reaffirmation by the Security Council in 2006, it was still fragile. In July 2009, the General Assembly had discussed the Secretary-General's report entitled "Implementing the responsibility to protect",⁴⁸ in which most States had endorsed the formulation of the following three-pillar strategy: (a) States were under an obligation to protect their population from genocide, war crimes, ethnic cleansing and crimes against humanity; (b) the international community had a responsibility to assist States in that regard and to use all appropriate peaceful means in pursuit of that protective role; and (c) States had a responsibility to respond in a timely and decisive manner when a State was failing to provide protection.

60. On 14 September 2009, the General Assembly had adopted resolution 63/308, in which it had recalled the 2005 World Summit Outcome and decided to continue its consideration of the concept.

61. In the Secretariat, the Special Adviser of the Secretary-General on the Prevention of Genocide and the Special Adviser on the Responsibility to Protect would complete their work to establish an Office on Genocide Prevention and the Responsibility to Protect. This joint Office would provide early warning to the Secretary-General and, through him, to the Security Council and other relevant intergovernmental bodies.⁴⁹

62. Working with interested Member States, the Special Advisers would encourage the President of the General Assembly to schedule an informal, thematic dialogue during the current session of the General Assembly on the early-warning and assessment roles of the Secretariat, intergovernmental bodies, Member States, other United Nations entities and regional and subregional arrangements. A similar dialogue could be convened during the next General Assembly session on regional and subregional approaches to implementing the responsibility to protect.

63. On the question of international criminal tribunals and their residual mechanisms, she recalled that those bodies, which had been established to ensure accountability for genocide, war crimes and crimes against humanity, had made remarkable contributions to national reconciliation processes and to the restoration and maintenance of peace. They had reaffirmed, and continued to reaffirm, the central principle established long ago in Nuremberg: that those who committed, or authorized the commission, of war crimes and other serious violations of international humanitarian law were individually accountable for their crimes and would be brought to justice in accordance with the due process of law.

⁴⁷ See the 2005 World Summit Outcome, General Assembly resolution 60/1 of 16 September 2005, paras. 138–139.

⁴⁸ A/63/677, para. 11.

⁴⁹ See the Secretary-General's report on early warning, assessment and the responsibility to protect (A/64/864), paras. 17–18.

64. The International Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone were completing their work and were preparing to close. However, it was essential that some of their functions continued post-closure. Those included witness protection, sentence enforcement, review of sentences and contempt proceedings. It was generally accepted that those functions would be carried out by small and efficient international residual mechanisms. In coming years, the United Nations and its Member States would seek to set up unprecedented structures in the architecture of international criminal justice. The Office of Legal Affairs had the privilege of being involved in that work.

65. The Security Council Informal Working Group on Tribunals was engaged in discussions on the establishment of a residual mechanism for the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. The Office of Legal Affairs served as the secretariat for the Working Group and provided advice on substantive issues. The report of the Secretary-General of May 2009, which had been largely prepared by the Office of Legal Affairs for the attention of the Working Group, had suggested that there be one residual mechanism with two branches, one in Europe for the International Tribunal for the Former Yugoslavia and the other in Africa for the International Criminal Tribunal for Rwanda, and that the residual mechanism have the capacity to try fugitives or refer their cases to competent national jurisdictions, among other things.

66. The Office of Legal Affairs had drafted a statute for the residual mechanism at the request of the Chairperson of the Informal Working Group on Tribunals. The statute and a draft resolution establishing the residual mechanism (prepared by the Office and the Chairperson) were under active negotiation in the Working Group.

67. Inevitably, there were competing political approaches to the issue. A broad approach would favour honouring the purposes for which the Tribunals had been established, as set out in the original Security Council resolutions, namely to bring perpetrators to justice in accordance with fair procedures and to promote peace, security and reconciliation in the affected countries. That approach tended to support the view that the residual mechanism should be a "downsized" tribunal.

68. The competing approach was that the Tribunals had always been meant to be temporary, that they had been established in circumstances in which the countries concerned had been unable or unwilling to prosecute cases themselves, and that 16 or 17 years later, things had evolved, the Tribunals should be closed, and as many of the residual functions as possible should be transferred to the countries concerned rather than to a residual mechanism. According to that approach, the residual mechanism should be a small and efficient new institution, not a downsized continuation of the former Tribunals.

69. Regardless of the approach adopted, one of the main challenges from a legal perspective was to ensure a watertight continuity of jurisdiction from the existing tribunals to the residual mechanism.

70. Unlike the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone was a treaty-based international court that would be closed by agreement between the parties.⁵⁰ Similarly, its residual mechanism would be established by an agreement between the United Nations and the Government of Sierra Leone. There again, the key legal challenge was to ensure continuity of jurisdiction, rights, obligations and the necessary functions from the Special Court to the residual mechanism. The Office of Legal Affairs had drafted the agreement for the establishment of the residual mechanism and a statute, which would be discussed with the Government of Sierra Leone.

71. With regard to the commissions of inquiry set up by the Secretary-General to investigate serious violations of human rights and international humanitarian law, the International Commission against Impunity in Guatemala (CICIG), established by agreement between the United Nations and the Government of Guatemala, had the legal status of a treaty-based organ.⁵¹ The CICIG conducted criminal investigations in cooperation with the Guatemalan Prosecutor and, under Guatemalan law, could join him in the prosecution of those responsible for organized transnational crimes. Its activities were ongoing.

72. At the request of Pakistan, in the summer of 2009 the Secretary-General had set up a commission of inquiry in connection with the assassination of former Prime Minister of Pakistan, Mohartma Benazir Bhutto, on 27 December 2007. Unlike the CICIG, however, the commission of inquiry had no mandate to conduct a criminal investigation within Pakistan. In its report submitted to the Secretary-General on 15 April 2010,⁵² the Commission had concluded that Ms. Bhutto's assassination could have been prevented if adequate security measures had been taken and that responsibility for Ms. Bhutto's security on the day of her assassination had rested with the federal, regional and district authorities of Pakistan. It had concluded further that the investigation into the assassination had been flawed in many ways and that it remained the responsibility of the authorities of Pakistan to carry out a serious, credible criminal investigation to determine who had conceived, ordered and executed the crime, with a view to bringing those responsible to justice. Doing so, the Commission believed, would constitute a major step towards ending impunity for political crimes in Pakistan.

73. In October 2009, the Secretary-General, at the request of members of the Security Council and the Economic Community of West African States (ECOWAS), had established the Commission of Inquiry for Guinea to investigate the events of 28 September 2009 in Conakry,⁵³ where 156 persons had been killed, at least 109 women

had been raped and scores of others had been injured. It was a "traditional" commission of inquiry mandated to determine the facts, qualify the crimes, identify those responsible and make recommendations. Set up several weeks after the events, the Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea had submitted its report before the end of 2009.⁵⁴ In it, the Commission had recommended that the Government of Guinea prosecute those responsible and—as the Commission considered that crimes against humanity had been committed—that the case against the individuals concerned be referred to the International Criminal Court.

74. On 3 December 2009, the President of Guinea, Dadis Camara, had been shot and had been airlifted to Morocco for treatment. Soon thereafter, an interim Head of State had been selected, and a consensus Prime Minister had been appointed from civil society. While the Secretary-General continued to maintain pressure on the Government to bring those responsible to account, the case of Guinea was a reminder, if one was needed, of the complexities of bringing a message of accountability to societies in turmoil. It was also a reminder that calls for accountability and justice, followed by real action, could help to stabilize the situation in a country.

75. For the Office of Legal Affairs, the establishment of commissions of inquiry had raised a number of important issues. They included, in particular, the need for, or propriety of, a mandate from any of the United Nations governing bodies; the authority of the Secretary-General to establish a commission of inquiry in the absence of a mandate; and the drafting of commission-specific terms of reference adapted to the circumstances of each case.

76. During 2008 and 2009, the question as to how the United Nations should respond to unconstitutional changes of Government had arisen in the light of *coups d'état* in Mauritania (August 2008), Guinea (December 2008), Madagascar (March 2009), Honduras (June 2009), Niger (February 2010) and Kyrgyzstan (April 2010). The Secretary-General had taken the view that, to the extent possible, the Organization should adopt a unified and consistent approach to such situations. The Policy Committee of the Secretary-General had recently published papers on Guinea, Madagascar and Niger, prepared by the Secretariat in conjunction with United Nations offices, funds and programmes and approved by the United Nations Senior Management Group.⁵⁵ For the Office of Legal Affairs, "one size does not fit all", and each situation required a unique approach based on the realities on the ground and an assessment of how the United Nations could be most helpful in restoring constitutional order. In providing advice on issues that arose within the context of unconstitutional changes of Government, such as questions of representation and accreditation with intergovernmental bodies and interaction between the United Nations and *de facto* authorities, the Office had drawn attention to a number of points. In the first instance, it had always emphasized that the United Nations never engaged in acts of recognition of

⁵⁰ Agreement between the United Nations and the Government of Sierra Leone on the establishment of a Special Court for Sierra Leone (Freetown, 16 January 2002), United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137.

⁵¹ Agreement between the United Nations and the State of Guatemala on the establishment of an International Commission against Impunity in Guatemala ("CICIG") (New York, 12 December 2006), *ibid.*, vol. 2472, No. 44373, p. 47.

⁵² S/2010/191, para. 259.

⁵³ S/2009/556.

⁵⁴ S/2009/693, annex.

⁵⁵ Documents with distribution limited to the Senior Management Group.

Governments, which was for the Member States of the Organization to do. Thus, should the United Nations interact with *de facto* authorities for purposes of implementing its funds and programmes on the ground or through mediation efforts to restore constitutional order, that did not in any way constitute “recognition” by the United Nations. Such engagement could however, depending on the circumstances, confer in a political sense a certain “legitimacy” on the authority in question.

77. The Office of Legal Affairs also pointed out that questions concerning the accreditation and representation of *de facto* authorities for purposes of their participation in the intergovernmental process were for the General Assembly to decide. As the General Assembly had taken no decision barring the representatives of the *de facto* authorities in Guinea, Madagascar, Mauritania and Niger, their representatives continued to have the right to participate in the work of the United Nations and that of intergovernmental bodies with the same rights and privileges as the representatives of all other Member States.

78. An important exception was Honduras. By its resolution 63/301 of 30 June 2009, the General Assembly had demanded the restoration of the Constitutional Government of President Zelaya, who had been overthrown in a coup, and had called upon States to recognize no other Government. The Office of Legal Affairs had advised that for the duration of President Zelaya’s constitutional term, only those delegates from Honduras who could formally confirm that they were the duly authorized representatives of President Zelaya’s Government could participate in the work of the General Assembly and its subsidiary bodies.

79. The Office of Legal Affairs also stressed that, while *de facto* authorities might have the right to participate in the work of the General Assembly, that did not affect any position that the Secretary-General might wish to take with respect to a *de facto* authority for purposes of implementing mandated activities and his own good offices. The Secretary-General was free to decide whether or not to have high-level contacts with the representatives of a *de facto* authority. A decision could also be taken to interact at a working or official level while avoiding contacts with the political appointees of a *de facto* authority. However, those were political rather than legal questions, where the Department of Political Affairs and the Executive Office of the Secretary-General took the lead.

80. On matters relating to oceans and the law of the sea, in particular the current tasks performed by the Division for Ocean Affairs and the Law of the Sea, she said that the Office of Legal Affairs, through that Division, continued to support the uniform and consistent application of the United Nations Convention on the Law of the Sea, its implementing agreements and other relevant agreements and instruments. It also assisted the General Assembly in its annual review and evaluation of the implementation of the United Nations Convention on the Law of the Sea and of other developments relating to ocean affairs and the law of the sea. During its twenty-fourth session, in 2009, the Commission on the Limits of the Continental Shelf had adopted recommendations regarding the submission made by France in respect of the areas of French Guiana and New Caledonia, bringing the total number of

recommendations adopted by the Commission to nine. So far, the Secretary-General had received 51 submissions to the Commission by coastal States, individually or jointly, pursuant to article 76 of the Convention. In addition, he had received 43 sets of preliminary information. In view of the large number of submissions, the nineteenth Meeting of States Parties to the Convention held in June 2009 had considered the issue of its workload and decided to continue to address the question and funding for members attending the sessions of the Commission, as well as ways and means of expeditiously examining the submissions as a matter of priority. The current term of the members of the Commission ended in June 2012, and a new Commission would be elected by the Meeting of States Parties that same year.

81. The Secretary-General had continued to perform his depositary functions under the Convention with regard to the deposit of charts or lists of geographical coordinates of points, specifying the geodetic datum, in relation to straight baselines and archipelagic baselines as well as the outer limits of the territorial sea, the exclusive economic zone and the continental shelf. Since April 2009, there had been deposits by Cuba, France, Grenada, India, the Philippines, Saudi Arabia and Seychelles. Furthermore, under article 76, paragraph 9, of the United Nations Convention on the Law of the Sea, coastal States were required to deposit with the Secretary-General charts and relevant information permanently describing the outer limits of the continental shelf extending beyond 200 nautical miles. In that case, due publicity was to be given by the Secretary-General. The first deposits of that kind had been made by Mexico in relation to the Western Polygon in the Gulf of Mexico and by Ireland for Porcupine Abyssal Plain, both based on the recommendations of the Commission. The Secretary-General had given due publicity to those deposits by circulating Maritime Zone Notifications. The Division for Ocean Affairs and the Law of the Sea continued to support the work of the General Assembly by monitoring and reporting on developments in oceans and the law of the sea and by backing the work of the processes set up to discuss ocean issues. A recent example was the Ad Hoc Working Group of the Whole of the General Assembly on the Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socio-economic Aspects, which had met for the first time in 2009 to recommend a course of action to the General Assembly.

82. With regard to sustainable fisheries, the Division for Ocean Affairs and the Law of the Sea was preparing for the resumed Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, to be convened in late May. The meeting would provide an opportunity for delegations to assess the effectiveness of the Agreement in securing the conservation and management of straddling fish stocks and highly migratory fish stocks, with a view to adopting recommendations to further strengthen the implementation of the Agreement, where necessary. In early February, the Division had serviced the third meeting of the Ad hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological

diversity beyond areas of national jurisdiction. A comprehensive report had been prepared for the meeting. The Working Group had adopted recommendations for consideration by the General Assembly.⁵⁶ Of particular interest was the recommendation that the General Assembly urge States to make progress in the discussion on the relevant legal regime on, and implementation gaps in, the conservation and sustainable use of marine genetic resources in areas beyond national jurisdiction in accordance with international law, and in particular the United Nations Convention on the Law of the Sea, taking into account the views of States on parts VII and XI of the Convention. At its tenth meeting, held in June 2009, the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea had focused its discussions on the implementation of the outcomes of the Informal Consultative Process, including a review of its achievements and shortcomings in its first nine meetings.⁵⁷ The Informal Consultative Process had been recognized as a unique forum for comprehensive discussions on issues related to oceans and the law of the sea. The eleventh meeting of the Informal Consultative Process, in June 2010, would consider the topic "Capacity-building in ocean affairs and the law of the sea, including marine science".⁵⁸

83. One key issue that had been at the centre of international attention and had been addressed by the General Assembly and the Security Council was piracy off the coast of Somalia. The measures that the international community had put into place to combat the problem had demonstrated the strengths of the legal regime established under the United Nations Convention on the Law of the Sea, but also the regime's reliance on States with the capacity and political will to fully implement its provisions. A number of entities within the United Nations and the International Maritime Organization had assisted States in addressing the legal issues that emerged from the apprehension, detention and prosecution of suspected pirates. The Office of Legal Affairs provided the working group on legal issues of the Contact Group on Piracy off the Coast of Somalia with information regarding international tribunals and human rights considerations arising from the repression of piracy. The Office advised States on the uniform and consistent application of the relevant provisions of the United Nations Convention on the Law of the Sea. Pursuant to Security Council resolution 1918 (2010) adopted on 27 April 2010, the Office of Legal Affairs, in cooperation with the United Nations Office on Drugs and Crime, was preparing a report of the Secretary-General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia. In particular, the report would include options for creating special domestic chambers, possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements.

⁵⁶ Letter dated 16 March 2010 from the Co-Chairpersons of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly (A/65/68).

⁵⁷ Letter dated 10 July 2009 from the Co-Chairpersons of the Consultative Process addressed to the President of the General Assembly (A/64/131).

⁵⁸ Letter dated 22 July 2010 from the Co-Chairpersons of the Consultative Process to the President of the General Assembly (A/65/164).

84. The International Trade Law Division served as the substantive secretariat of the United Nations Commission on International Trade Law (UNCITRAL). The mandate of UNCITRAL included the enhancement of international trade and development by the promotion of legal certainty in international commercial transactions, in particular through the promulgation and dissemination of international trade norms and standards. The forty-third session of UNCITRAL would take place in New York from 21 June to 9 July 2010. Three important texts involving various fields of international trade law and reflecting recent developments were expected to be adopted. First, the Commission was expected to adopt a revised version of one of the most successful instruments of a contractual nature in the field of arbitration, the UNCITRAL Arbitration Rules, adopted in 1976⁵⁹ and amended for the first time to take into account developments in arbitration practice over the past years. Second, a supplement to the UNCITRAL Legislative Guide on Secured Transactions adopted in 2007⁶⁰ was expected to be adopted relating to issues related to security rights in intellectual property.⁶¹ Third, in the area of insolvency, the UNCITRAL Legislative Guide on Insolvency Law would be further developed by adding a Part III dealing with the treatment of enterprise groups in insolvency.⁶² UNCITRAL was also currently engaged in the revision of its 1994 Model Law on Procurement of Goods, Construction and Services⁶³ and in the consideration of its possible future work in the areas of e-commerce, security interests, insolvency law and microfinance and its role in promoting the rule of law at national and international levels. In addition to assisting UNCITRAL in fulfilling its legislative mandate, the International Trade Law Division was carrying out work towards the promotion of UNCITRAL legal texts, and ways and means of ensuring their uniform interpretation and application, in particular through technical assistance and cooperation activities, the system of collection and dissemination of case law on UNCITRAL texts and the publication of digests of case law. The Division also assisted UNCITRAL in coordinating activities with relevant international organizations, undertaking a comprehensive review of its working methods and monitoring the implementation of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

85. With regard to the dissemination of international law, the Codification Division had continued to expand the United Nations Audiovisual Library of International Law.⁶⁴ Since its launch in October 2008, the Library had been accessed in more than 190 countries and territories around the world. In addition, it had received the 2009

⁵⁹ *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17)*, chap. V, sect. C, p. 22. For the version revised in 2010, *ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, annex I.

⁶⁰ *Ibid.*, *Sixty-second Session, Supplement No. 17 (A/62/17)*, Part II; adopted by the General Assembly in its resolution 63/121 of 11 December 2008.

⁶¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, chap. IV, sect. C, p. 41.

⁶² *Ibid.*, chap. V, p. 43. UNCITRAL, *Legislative Guide on Insolvency Law* (United Nations publication, Sales No. E.05.V.10).

⁶³ *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 and corrigendum (A/49/17 and Corr.1)*, annex I.

⁶⁴ www.un.org/law/avl/.

Website Award of the International Association of Law Libraries. The Codification Division had also continued to prepare *ad hoc* and regular mandated publications. In recent months, the 2006 and 2007 editions of the *Juridical Yearbook* had been issued. The *Juridical Yearbook 2008* was in the final stages of desktop publishing and would be submitted to the Print Section in May 2010; the *Juridical Yearbook 2009* was scheduled to be completed and submitted for printing by the end of 2010. As to the *Reports of International Arbitral Awards*, volume XXVI was now available, and work was in progress on volumes XXIX, XXX and XXXI.

86. As part of efforts to achieve a “greener” United Nations, the Treaty Section had announced the discontinuation of the distribution of paper copies of a number of its publications. The distribution of paper copies of the Depository Notifications, of which an average of 900 copies had been printed and distributed daily, had been discontinued as of 1 April 2010. All Depository Notifications were available on the Treaty Section’s website⁶⁵ and could also be obtained electronically by subscription, which involved no fee. States and international organizations had welcomed that measure, to which the increasing number of subscribers testified. The most recent *Multilateral Treaties Deposited with the Secretary-General*, an annual publication, covered the status as of 1 April 2009.⁶⁶ The publication had become so voluminous (consisting of three volumes) that it would no longer be issued in print. It was available on the Treaty Section’s website, where future volumes would continue to be made available. The status of each treaty deposited with the Secretary-General was updated on the website with each new treaty action. On 1 April 2010, the monthly distribution of paper copies of the *Statement of Treaties and International Agreements registered or filed and recorded with the Secretariat* had been brought to an end. The publication, of which 1,150 copies had been printed and distributed in the past, was now sent to Member States and others electronically by free subscription. It was also available on the Treaty Section’s website. As announced in 2009, additional efforts were under way to make the texts of treaties registered with the Secretariat electronically available on the Treaty Section’s website shortly after their registration. While currently treaties were published electronically in their authentic languages, the goal was to publish the translations online in English and French as soon as they were received from the United Nations translation services. That would ensure prompt electronic publication of individual treaties registered with the Secretariat. The Treaty Section was considering ways of maximizing the opportunities provided by new technology to reduce the number of copies of the *United Nations Treaty Series* printed on paper and to make them available on the Treaty Section’s website as early as possible. It was worth recalling that nearly all publications issued by the Office of Legal Affairs were available through HeinOnline,⁶⁷ a well-known Internet source to which many libraries were subscribed.

⁶⁵ <https://treaties.un.org>.

⁶⁶ ST/LEG/SER.E/26 (United Nations publication, Sales No. E.09.V.3).

⁶⁷ <http://home.heinonline.org>.

87. The annual Treaty Event would take place from 21 to 23 and 27 to 28 September during the general debate of the sixty-fifth session of the General Assembly. As in previous years, the Event provided a distinct opportunity for States to participate in the multilateral treaty framework.

88. In closing, she stressed that most, if not all, of the issues which she had addressed had a bearing on the work of the Commission. She would ensure that the results of the debates of the Commission would have the echo that they deserved in the Office of Legal Affairs.

89. The CHAIRPERSON thanked the Legal Counsel and asked Commission members, in view of the limited time remaining, to confine themselves to one or two questions, to which the Legal Counsel could then reply once all questions had been posed.

90. Mr. HASSOUNA, noting that the Commission had shown increased interest in the question of customary law, asked what role, in the view of the Legal Counsel, the United Nations played in the formation of customary law, and in particular the resolutions of the Security Council and the resolutions and decisions of the General Assembly. With regard to the Special Tribunal for Lebanon, which had not been mentioned, he had the impression that the delays in conducting investigations were having an adverse effect on that body’s credibility. He sought her opinion in that regard.

91. Mr. KAMTO, referring to the question of universal jurisdiction as exercised in the *Hissène Habré* case, enquired whether there had been any cooperation between the United Nations and the African Union on combating impunity. He would also like to have an update on the proceedings instituted by the International Criminal Court against the Head of State of Sudan. Concerning the responsibility to protect, pursuant to which States must ensure that crimes were not committed, he asked whether that principle could be applied to cases in which the United Nations had ordered an investigation, such as the *Bhutto* case or the *Hariri* case.

92. Ms. JACOBSSON, noting that it was not the first time that the United Nations had faced unconstitutional changes of Government, wondered whether it had now decided to elaborate policy papers on the subject because of the development of human rights law, the law on the protection of persons and democracy and whether such papers were available.

93. Mr. PELLET expressed appreciation that the Treaty Series website was free of charge, but said that, despite some improvements, the website was hopelessly user-unfriendly and continued to be a real nightmare for all researchers who liked to work fast. He thanked the Legal Counsel for her very complete statement and hoped that at the next session it would be possible to set aside an entire meeting for that traditional encounter so that the exchange of views between the Legal Counsel and the members of the Commission was not reduced to a minimum for lack of time.

94. Ms. O’BRIEN (Under-Secretary-General for Legal Affairs, the Legal Counsel) agreed with Mr. Pellet

that it would be useful to devote more time to such dialogues and was prepared to do so at the next session. Replying to Mr. Hassouna, she said that, clearly, there could be no serious, comprehensive review of international customary law without a consideration of the resolutions of the Security Council and the resolutions and decisions of the General Assembly. Recently, she had tended to leave out the Special Tribunal for Lebanon intentionally, not because of its supposed lack of activity, but because it was often conflated with the other tribunals that had been established to deal with war crimes, crimes against humanity and genocide, whereas the Special Tribunal for Lebanon had been set up specifically to investigate the assassination of Rafiq Hariri and others. With respect to the fact that there had been no tangible activity in the criminal prosecution, it was true that there was no indication of an imminent indictment, although very recently there had been signs of action possibly being taken at the end of 2010 or the beginning of 2011. Irrespective of the lack of tangible activity as such, she stressed, on behalf of the Secretary-General, that the Tribunal, by its very existence, had functioned as a catalyst for the rule of law in Lebanon, a circumstance which its detractors should bear in mind. The United Nations and the Secretary-General respected the independence of the Tribunal and avoided questioning the activity of the prosecutor.

95. With regard to the very difficult and delicate issue of universal jurisdiction, in the course of discussions it had become evident that sensitivities concerned, in particular, the issue in relation to international criminal justice, and especially the fact that the international tribunal prosecuted in jurisdictions with no link to the place of the commission of the offence, which of course was the very principle of universal jurisdiction. It would take some time before a consensus was achieved in the General Assembly on how to move forward with the issue. At the moment, the Secretariat was awaiting input from Member States on how they saw their rights and obligations in the area. In respect of the International Criminal Court, the Office of Legal Affairs was regularly consulted on the difficult issue of what relations the Secretary-General should have with heads of State who were being prosecuted by the Court. Clearly, it was important for the Secretariat not to undermine the Court's activities in any way or give the impression that it was doing so. In the case of Sudan, account must be taken of the pursuit of peace and justice, on the one hand, and the recent re-election of the Head of State and the prospect of a referendum in 2011, on the other; clearly, that was a very difficult issue. However, the Secretary-General was personally very sensitive to those questions, and the international community could have no doubt as to the profound respect which he had for international criminal justice and the work of the International Criminal Court. As for the right to protect and the application of that principle to the *Bhutto* case in particular, she was grateful to Mr. Kamto for raising the question, to which she had given some thought. Given that the principle of the responsibility to protect was at the stage of operationalization, it was difficult to communicate on the issue as long as the situations in which the principle applied had not been clearly identified. Although in retrospect the principle of the responsibility to protect might have applied

to the post-election violence in Kenya, she did not think that that was true for the *Bhutto* case, which involved the specific case of the assassination of a former Prime Minister. However, as time went by, if acceptance of the principle of the responsibility to protect progressed in a manner that the Secretariat hoped and was committed to, then the situation of Guinea might become the first case in which the responsibility to protect might be invoked, because the second pillar of the principle was the obligation of States and the international community to assist a State when war crimes, crimes against humanity or genocide were imminent or where there was a risk that they would be committed. The African Union, ECOWAS, regional groups, the Secretariat and other groups concerned had come together and had decided to act. Very quickly, just two weeks after the events, the United Nations had set up a commission of inquiry and, with the help of its partners, had succeeded in restoring a degree of stability, although there had been a high risk that the situation might deteriorate. That said, the Organization was following the situation closely.

96. The policy papers on unconstitutional changes of Government were not available because they served to define the policy of the United Nations and were meant only for officials of the Organization who were working in that area. It was reassuring from a legal perspective that the Legal Counsel took part in those discussions, because it showed that the Secretary-General was convinced that international law must be at the centre of the development of United Nations policy. It was the Secretary-General who had decided that such situations were arising too frequently for the Secretariat not to assess how to respond, for example with regard to accreditation or when the Organization was called upon by States not to recognize a Government, although it was not competent to react. The fact that the Secretariat had a consistent approach could also help ameliorate such situations.

97. The Treaty Section had brought in a consultant to identify problems posed by the use of its website, which the Secretariat would try to improve in the near future.

The meeting rose at 1.15 p.m.

3039th MEETING

Thursday, 6 May 2010, at 10.15 a.m.

Chairperson: Ms. Hanqin XUE

Present: Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. McRae, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vas-ciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.
