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Summary record of the 3177th meeting

Topic:
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report, such as the temporary evacuation of people and property, effective deterrence of threats of disaster and the need to take preventive and necessary measures when a natural hazard was “clearly identifiable”, the latter threshold being more stringent than the Special Rapporteur’s “foreseeability requirement”. Draft article 16 might also include a more explicit reference to an obligation to adopt national legislation in order to give effect to the duty to prevent. Lastly, something should be added about the regime for the duty to prevent: what constituted a violation of that duty and what the consequences might be in terms of the State’s responsibility. Although the Special Rapporteur touched on the matter briefly in paragraph 161 of his report, it merited fuller consideration. The questions that might be raised included what constituted a causal link in the event of a disaster, whether a State could be blamed for not having foreseen or prevented a disaster and what type of reparation might be envisaged. Although certain Commission members and States preferred to focus on cooperation, if the duty to prevent was to be defined rigorously, those questions needed to be answered.

45. In principle, he had no problem with draft article 5 *ter*. However, the text was not specific about the kinds of measures that States must take to reduce the risk of disasters, and he questioned whether risk reduction was entirely synonymous with prevention. The fact that mitigation had not been covered in either draft article 5 *bis* or 5 *ter* was undoubtedly a gap that needed to be filled.

46. In conclusion, he pointed out the potential inconsistency in the fact that draft articles 6, on humanitarian principles in disaster response, and 7, on human dignity, were currently formulated solely in terms of disaster response, and not of prevention.

47. With those comments, he supported the referral of the two draft articles to the Drafting Committee.

48. Mr. TLADI said that he had some doubts concerning the grounds on which Mr. Forteau was advocating a single standard for both natural and human-made disasters, namely that this was consistent with the Commission’s previous work on the topic and with general international law. He was not convinced that that was indeed the case.

The meeting rose at 1.05 p.m.

3177th MEETING

Wednesday, 10 July 2013, at 10.05 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma,

Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies (*continued*)

[Agenda item 13]

STATEMENT BY THE REPRESENTATIVES
OF THE COUNCIL OF EUROPE

1. The CHAIRPERSON welcomed the representatives of the Council of Europe, Ms. Lijnzaad, Chairperson of the Committee of Legal Advisers on Public International Law (CAHDI), and Ms. Olsen, Secretary of CAHDI. He said that the Commission attached great importance to its cooperation with the Council of Europe, particularly with CAHDI, and he invited Ms. Lijnzaad to present the activities undertaken by CAHDI since the Commission’s last session.

2. Ms. LIJNZAAD (Council of Europe) expressed her appreciation for the fact that every year, the International Law Commission invited CAHDI to provide an update on its work. CAHDI was an intergovernmental committee that brought together, twice a year, the legal advisers on public international law of the Ministries of Foreign Affairs of member States of the Council of Europe as well as of a significant number of observer States and international organizations. CAHDI examined questions related to public international law, conducted exchanges, coordinated the views of member States and provided opinions at the request of the Committee of Ministers or other steering committees.

3. At its forty-fourth meeting, CAHDI had adopted comments on Recommendation 1995 (2012) of the Parliamentary Assembly entitled “The International Convention for the Protection of All Persons from Enforced Disappearance”.⁸⁴ In that Recommendation, the Parliamentary Assembly had invited the Committee of Ministers to consider launching preparations for negotiations in the framework of the Council of Europe on a European convention on enforced disappearance, pointing out four shortcomings in the International Convention for the Protection of All Persons from Enforced Disappearance. In its comments,⁸⁵ CAHDI had stressed that this Convention was a recent text and that the shortcomings had already been pointed out during discussions with the United Nations. Many speakers had also stressed that such an initiative might be seen to undermine efforts to promote universal acceptance of the Convention, which, on the contrary, should be supported. In its reply⁸⁶ to the Recommendation of the Parliamentary Assembly, the Committee of Ministers had taken into account the comments made by CAHDI.

⁸⁴ Adopted on 9 March 2012 (available from <http://assembly.coe.int>, “Documents”).

⁸⁵ CAHDI, meeting report, 44th meeting, Paris 19–20 September 2012 (CAHDI (2012) 20), appendix V (available from www.coe.int).

⁸⁶ CAHDI, document CM/Del/Dec(2013)1159, appendix 9 (available from www.coe.int).

4. In September 2012, Sir Michael Wood, in his personal capacity, had briefed CAHDI on the most recent work of the International Law Commission and of the Sixth Committee.
5. At the close of the French Chairpersonship of CAHDI, the French Ministry of Foreign Affairs and the Public International Law Division of the Council of Europe had organized a conference on “The judge and international custom” (Paris, 21 September 2012) in which a number of international judges had participated. The proceedings of the conference had been issued in two different publications.⁸⁷
6. In its capacity as European Observatory of Reservations to International Treaties, CAHDI regularly considered declarations and reservations to conventions concluded within and outside the Council of Europe and reviewed the reservations made to United Nations conventions. CAHDI compiled information on reservations and declarations to enable member States to react to them and, to a certain extent, to coordinate their reactions. By sharing their views on potential difficulties, they might be encouraged to regularly review their own reservations or declarations.
7. CAHDI also maintained three databases on the immunities of States and international organizations; the organization and functions of the Office of the Legal Adviser in the Ministry of Foreign Affairs; and national measures for the implementation of United Nations Security Council sanctions and respect for human rights. The members of CAHDI had shown increased interest in the databases as the year progressed.
8. In March 2013, at its forty-fifth meeting, CAHDI had begun the consideration of a new topic entitled “Service of process”, which was part of the broader discussion on immunities of States and, more specifically, on whether the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) was part of customary law. The early discussions had concerned the translation of court documents and the role of embassies in the service of process. A questionnaire on State practice in that area would allow relevant information to be collected to further enrich the CAHDI database.
9. As a forum for discussion on questions of international law, CAHDI also maintained contacts with the legal services of other international organizations and entities. On that basis, CAHDI had had exchanges in the past few months with the International Institute of Humanitarian Law, the Organization for Security and Co-operation in Europe and the Permanent Representation of Liechtenstein to the Council of Europe.
10. In conclusion, she underscored the contribution made by CAHDI to improving relations between States and developing international law.
11. The CHAIRPERSON thanked Ms. Lijnzaad for her remarks and invited Ms. Olsen to make a statement.
12. Ms. OLSEN (Council of Europe) said that she would outline the recent activities undertaken by the Council of Europe in the area of public international law.
13. She began by recalling the priorities of the latest Chairpersonships of the Committee of Ministers, which had included strengthening the implementation of the conventions of the Council of Europe. The complete list of those conventions drawn up by the Secretary General of the Council had resulted in a report that CAHDI had participated in preparing. In follow-up to that report, the Committee of Ministers had adopted a series of decisions on the promotion and management of the Council of Europe’s conventions, something that would be followed closely by the steering and *ad hoc* committees; the participation of non-member States in conventions; and the dialogue on reservations with a view to possible withdrawal.
14. With regard to the activities of the Treaty Office, she drew attention to the adoption, in June 2012, of the Fourth Additional Protocol to the European Convention on Extradition, aimed at strengthening international cooperation in that area. In addition, the draft Council of Europe convention against trafficking in human organs, prepared by the Committee of Experts on Trafficking in Human Organs, Tissues and Cells, was currently under consideration. The process of updating the Convention for the protection of individuals with regard to automatic processing of personal data, launched in 2011, was entering its final phase, and the Committee of Ministers had to take a position on the mandate of the *ad hoc* committee on data protection tasked with undertaking formal negotiations on a protocol to amend the Convention. Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms had been adopted by the Committee of Ministers on 16 May 2013 and was open for signature. The amendments it contained affected both the provisions on the interpretation of the Convention and the procedural or organizational rules. Draft protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which provided for the possibility that the highest national courts might obtain opinions from the European Court of Human Rights on pending cases, should also soon be open for signature.
15. Draft legal instruments to establish the modalities of the accession of the European Union to the European Convention on Human Rights had been developed in the framework of negotiations between the Steering Committee for Human Rights of the Council of Europe and the European Union in the “47+1” Group. The instruments in question were a draft agreement on accession, accompanied by a draft explanatory report, and a draft amendment to the Rules of the Committee of Ministers for the supervision of the execution of judgments. The Court of Justice of the European Union had yet to state its position on the drafts.
16. Lastly, she said that the CAHDI website had been redesigned in order to make it more accessible to both specialists and the general public.

⁸⁷ *The Law and Practice of International Courts and Tribunals*, vol. 12, No. 2 (2013), E. Lijnzaad and Council of Europe (eds.); and *The Judge and International Custom/Le juge et la coutume internationale*, Brill/Nijhoff (upcoming publication). The proceedings of the Conference are available from www.coe.int.

17. The CHAIRPERSON thanked Ms. Olsen for her statement and invited members of the Commission to comment.

18. Mr. VALENCIA-OSPINA emphasized the importance of the cooperation between the Commission and CAHDI. It allowed States to express their individual views on topics on the Commission's agenda, and in so doing strengthened the relationship between the Commission and the Sixth Committee and contributed to the consistent implementation of the Commission's texts by the member States of the Council. He welcomed the information provided on the conference held in September 2012 and thanked the organizers.

19. Sir Michael WOOD asked whether CAHDI maintained close relations with other regional bodies that performed similar functions, such as AALCO, and whether it informed the international community, particularly the United Nations, about its work. He suggested that CAHDI might see what it could do to promote ratification of the United Nations Convention on Jurisdictional Immunities of States and Their Property, particularly in 2014, which marked the tenth anniversary of its adoption.

20. Mr. KITTICHAISAREE, noting that European countries faced a growing influx of asylum seekers, asked whether the Council of Europe had considered changing its position with regard to the expulsion of aliens. In the light of other recent events, he asked whether CAHDI had looked at the international legal regimes that might be applicable to the situation in the Syrian Arab Republic, especially in the context of the responsibility to protect, or that might help to preserve a balance of interests between the protection of security and the protection of privacy.

21. Ms. LIJNZAAD (Council of Europe) emphasized that CAHDI was first and foremost a forum for discussion, and very rarely took decisions. There was always an item on international humanitarian law on the agenda of CAHDI meetings, but as they were held only twice a year, the discussions were somewhat removed from current events. Furthermore, they focused primarily on international law in the context of the activities of the Council of Europe. The issue of asylum seekers and economic migrants came under the competence of the European Union rather than that of the Council of Europe. All matters related to privacy were debated in forums other than CAHDI, such as the Steering Committee on Media and Information Society and the Consultative Committee set up by virtue of the Convention for the protection of individuals with regard to automatic processing of personal data. The relations CAHDI maintained with other regional bodies were subject to the procedures established by the Council of Europe with regard to the participation of non-member States in the work of its bodies and working groups, which somewhat limited the opportunities for exchange. CAHDI did not generally seek to promote its own work, but it would, indeed, be helpful for the Sixth Committee to be informed of what had been done and what publications were available. It was not for CAHDI to promote the United Nations Convention on Jurisdictional Immunities of States and Their Property, especially as there was no consensus on that instrument among the member States of the Council of Europe; however, the issue was debated at all CAHDI meetings.

22. Mr. SABOIA agreed that CAHDI should have more contact with other regional bodies and regretted that this was not possible. He noted with satisfaction that CAHDI was in favour of universal ratification of the International Convention for the Protection of All Persons from Enforced Disappearance rather than of trying to draft a European equivalent, and that it had also supported the work in Kampala of the Review Conference of the Rome Statute of the International Criminal Court on giving the International Criminal Court jurisdiction with respect to the crime of aggression. He also welcomed the work done on the Additional Protocols to the European Convention on Extradition and the draft Council of Europe convention against trafficking in human organs, which were important subjects. Another important issue was the service of court documents in foreign States, which was often such a slow and complex process that it was an obstacle to judicial cooperation and even to the fight against impunity.

23. Mr. NOLTE asked why a different approach had been adopted in the draft agreement on the accession of the European Union to the European Convention on Human Rights as compared to the International Law Commission's approach in its draft articles on the responsibility of international organizations:⁸⁸ specifically, the draft agreement contained a clause that appeared to contradict the approach taken by the Commission in draft article 17 as well as the position adopted by the European Court of Human Rights in the *Bosphorus* judgment. In his own view, the approach adopted in the draft agreement constituted *lex specialis* compared with the Commission's draft articles.

24. Mr. ŠTURMA said that the interaction between the Commission and CAHDI was particularly important given that both bodies dealt with the codification and progressive development of the law, one at the international level and the other at the regional level. He endorsed Mr. Nolte's questions concerning the draft agreement on the accession of the European Union to the European Convention on Human Rights and would welcome further information on draft protocol No. 16 to that Convention.

25. Ms. LIJNZAAD (Council of Europe) agreed that the contacts between CAHDI and other regional institutions were helpful and were always feasible: it was simply necessary to move in the direction of more informal contacts. With regard to the service of court documents in foreign States, CAHDI had asked all of its participating States, both members and observers, to provide information on their practice, including references to relevant legislation and court decisions, preferably with links to databases.

26. The accession of the European Union to the European Convention on Human Rights was a matter dealt with by the Steering Committee for Human Rights of the Council of Europe and its counterpart body in the European Union. The issue of the responsibility of international organizations did not appear to have arisen specifically. It should be borne in mind that it was a very unusual situation—given that the 28 members of the European

⁸⁸ *Yearbook ... 2011*, vol. II (Part Two), paras. 87–88. The articles on the responsibility of international organizations adopted by the Commission at its sixty-third session are reproduced in the annex to General Assembly resolution 66/100 of 9 December 2011.

Union were all already parties to the Convention—and the main concern expressed in the debates, particularly by the member States of the Council that were not members of the Union, was how the presence of a member of the Council that was an international organization rather than a State might disturb the structural balance.

27. Ms. OLSEN (Council of Europe) said that draft protocol No. 16 to the European Convention on Human Rights had been submitted to the Parliamentary Assembly of the Council of Europe, which had issued its opinion in June 2013. The opinion, which was available on the Assembly's website,⁸⁹ contained all of the requested information on the Protocol.

28. Mr. PETRIČ noted with satisfaction the organization of the conference on “The judge and international custom” and the publication of the proceedings. In the current era of globalization, national courts, including constitutional courts, increasingly referred to international law, but while the use of treaty law was widespread, knowledge of customary international law remained limited in some regions. He asked whether CAHDI might encourage States to pay greater attention to the work of the Commission, given that the response rate to the Commission's requests for information was generally very low. CAHDI might also give some consideration to the fact that, in the light of the strengthening of democratic principles and civil society, human rights were now under threat less from States and more from non-State actors, particularly organized crime. Consideration should also be given to the issue of respect for privacy, as there was still a great deal of legal uncertainty in that area, particularly regarding legal persons.

29. Mr. PARK requested further information on the four shortcomings that the Parliamentary Assembly of the Council of Europe claimed to have discerned in the International Convention for the Protection of All Persons from Enforced Disappearance. He would also be interested to learn more about any consultations that were held between CAHDI and the legal advisers of the European Union, and whether there were ever conflicts of jurisdiction between the European Court of Human Rights and the Court of Justice of the European Union. Lastly, with regard to the implementation of United Nations Security Council sanctions, he asked whether there was any compilation of legal opinions on that matter or information from member States.

30. Ms. ESCOBAR HERNÁNDEZ asked whether, as part of the redesign of the CAHDI website, there were any plans to include a section specifically on the immunity of State officials from foreign criminal jurisdiction in the database on State immunities. If so, she wished to know whether it would be possible to set up a system to which the members of the Commission could have access for the exchange of information with States, as the Commission received few responses from States to its questionnaires.

31. Ms. LIJNZAAD (Council of Europe) said that CAHDI would endeavour to encourage member States to reply to the Commission's questionnaires. Human rights

violations committed by non-State actors fell within the scope of the Commission on Crime Prevention and Criminal Justice based in Vienna and of specific working groups of the Council of Europe rather than of CAHDI. Replying to Mr. Park, she referred him to Recommendation 1995 (2012) of the Parliamentary Assembly of the Council of Europe on the International Convention for the Protection of All Persons from Enforced Disappearance, and said that the legal advisers of the European Union participated in the meetings of CAHDI and vice versa. The jurisdiction of the European Court of Human Rights was based on the European Convention on Human Rights, whereas the jurisdiction of the Court of Justice of the European Union derived from the Treaty on European Union, but the two bodies worked together increasingly often as human rights were being incorporated into the constitutions of the European countries.

32. Ms. OLSEN (Council of Europe) said that access to the CAHDI database on State immunities was public and that CAHDI would include the issue of the immunity of State officials from foreign criminal jurisdiction in its discussions on immunity.

33. The CHAIRPERSON thanked the representatives of the Council of Europe.

**Protection of persons in the event of disasters
(continued) (A/CN.4/657, sect. B, A/CN.4/662,
A/CN.4/L.815)**

[Agenda item 4]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

34. Mr. EL-MURTADI SULEIMAN GOUIDER said that he had listened with interest to the comments made by the members of the Commission and agreed with many of them. All of the views expressed would help to enrich the work of the Special Rapporteur. He was in favour of referring the two draft articles contained in the sixth report of the Special Rapporteur (A/CN.4/662) to the Drafting Committee to be reworked, taking into account the comments and proposals that had been made.

35. Sir Michael WOOD said that he had not been a member of the Commission when the topic under consideration had been placed on the agenda. Since it was fairly atypical, raised many issues and seemed to have raised misgivings among States and others, he welcomed the great efforts made by the Special Rapporteur, which had enabled the Commission to reach the end of its first reading of the set of draft articles. Given that the Special Rapporteur's sixth report dealt with eminently practical matters, the Commission should not let differences over issues of principle stand in the way of finding practical solutions. The sections on the historical development of the concept of disaster risk reduction, international cooperation on prevention, and national policy and legislation were of great interest and amply substantiated the draft articles proposed. Like others, he had doubts about the section on prevention as a principle of international law, although those doubts were not directly related to the text of the draft articles. However, he was sure that the Special Rapporteur would take into account the views

⁸⁹ Opinion 285 (2013) of 28 June 2013 (available from <http://assembly.coe.int>, “Documents”).

expressed during the debate when it came to preparing the commentaries. In doing so, he might find that there was no great need to cover the legal issues addressed in that section, which were not central to the overall project.

36. He agreed with much of what had been said by Mr. Murase, Mr. Park and Mr. Tladi, particularly the concerns expressed by Mr. Tladi with regard to the dual-axis approach recommended in paragraph 36 of the report. The title of the section in question—“Prevention as a principle of international law”—encapsulated the problems he had with that part of the report. What was meant by “principle of international law” in that context, given that unlike “rule”, the term “principle” had many meanings, some quite vague? And what was meant by “prevention”? Prevention by whom, and of what? The mention in paragraph 40 of “the overarching principle of prevention, which lies at the heart of international law” did little to clarify matters for the Commission, and nor did the reference in paragraph 41 to “an international legal obligation to prevent harm, both in its horizontal and vertical dimensions”, which “finds support in human rights law and environmental law”.

37. Each of the many examples given by the Special Rapporteur of the use of the word “prevent” in legal and other texts was taken from a very specific context; each had a particular object, and was subject to particular interpretation. They could not easily be grouped together to form an overall “principle of prevention”. Mr. Murase had said much that he himself would have wished to say about the references to environmental law, particularly with regard to the precautionary principle. Mr. Park had drawn attention to the statement, in paragraph 50 of the report, that “[t]he existence of an obligation to mitigate has been recently addressed in relation to climate change”, which seemed out of place in a section dealing with human rights and did not appear to be well supported by the authorities cited by the Special Rapporteur. The two cases cited in paragraph 51—*Öneryıldız v. Turkey* and *Budayeva and Others v. Russia*—could hardly be said to lead to a general obligation for States to take appropriate steps to prevent and mitigate disasters in less predictable situations. Mr. Tladi had also shown that the judgments of the European Court of Human Rights could not be read as establishing a “general principle to prevent” under international law—still less could one rely on separate or dissenting opinions or passages from the writings of doubtless learned authors. Mr. Park, like others, had emphasized the need to distinguish human-made disasters from natural disasters and had drawn attention to the statement in paragraph 53 of the report that the European Court of Human Rights had “articulated the same duty regarding natural and man-made disasters”. That was not how he himself had read the judgment in *Budayeva and Others v. Russia*, particularly since in paragraph 135, the Court stated that operational choices in terms of priorities and resources needed to be taken into consideration and must be “afforded even greater weight in the sphere of emergency relief in relation to a meteorological event, which is as such beyond human control, than in the sphere of dangerous activities of a man-made nature”.

38. In conclusion, he believed that the wording of the two draft articles could be improved significantly, and he looked forward to working with the Special Rapporteur and the members of the Drafting Committee to that end.

He therefore supported referring draft articles 16 and 5 *ter* to the Drafting Committee.

The meeting rose at 12.45 p.m.

3178th MEETING

Thursday, 11 July 2013, at 10.05 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Protection of persons in the event of disasters (continued) (A/CN.4/657, sect. B, A/CN.4/662, A/CN.4/L.815)

[Agenda item 4]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. The CHAIRPERSON invited the Commission to continue its consideration of the sixth report of the Special Rapporteur on the protection of persons in the event of disasters (A/CN.4/662).
2. Mr. SABOIA said that, unlike other members of the Commission, he thought that the Special Rapporteur had drawn well-founded conclusions about the current legal framework for prevention, risk reduction, preparedness and mitigation of disasters, the duties to prevent and cooperate and the principle of due diligence. He had solidly established the pertinent analogies to human rights law and environmental law. The dual-axis approach he had adopted was perfectly valid for the current stage of consideration of the topic. Brazilian domestic legislation took the same approach.
3. Concern had been expressed with regard to the Special Rapporteur’s alleged failure to draw a distinction between natural and human-made disasters: true, it might have been useful to examine the distinction more closely. Insufficient attention had purportedly been paid to differences in the capabilities of States. Yet the Special Rapporteur had clearly stated that the duty to prevent and the principle of due diligence had to be seen in the light of the economic, scientific and technological level of a country, although a State’s economic level could not discharge it from its responsibilities. In the work on the topic, emphasis should be placed on poverty and lack of development as obstacles to adequate prevention, preparedness, mitigation and post-disaster reconstruction. Haiti was a dramatic example of a