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Summary record of the 2860th meeting

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another. In practice, treaties often acted as *lex specialis* in relation to customary law and general principles. The Study Group had analysed “self-contained regimes” and had concluded that no treaty was isolated from others, from customary law or from general principles, and that therefore no regime was entirely “self-contained”. The term had been seen as a misnomer, since no set of rules was completely isolated from general international law. In that connection, the Study Group had also discussed cases in which general law filled in gaps or lacunae in special regimes.

62. With regard to article 30 of the 1969 Vienna Convention, the Study Group had found that the principle that subsequent treaties overrode previous ones was generally unproblematic, apart from the case where the parties to the later treaty were not identical to the parties to the former treaty. The mere conclusion of a treaty incompatible with an earlier treaty was not a breach of international law. Article 30 did not address the issue of validity but only that of priority.

63. With regard to article 31, paragraph 3 (c), of the Vienna Convention, the Study Group had stressed the need to operationalize that provision, which had been generating considerable interest but had not often been applied in the past. The “other obligations” to be taken into account in the interpretation of a treaty included not only other treaties, but also customary law and general legal principles. The Study Group had also discussed whether the parties to the treaty to be interpreted needed also to be parties to the “other obligations”. It had also reviewed the question of intertemporality, in other words whether the obligations used in the interpretation of a treaty needed to have already been in force at the time the treaty had been concluded. The Study Group had endorsed certain conclusions on that subject.

64. In its consideration of article 41 of the 1969 Vienna Convention, the Study Group had highlighted the fact that that provision was aimed at reconciling the need to preserve the integrity of the treaty as originally concluded, with the need to take into account or to agree to the taking into account of modifications subsequently introduced under an *inter se* agreement. The Study Group had emphasized that *inter se* agreements raised questions similar to those raised by *lex specialis* and that the impermissibility of a modification might follow from the *pacta tertiis* rule or the fact that the modifying agreement might otherwise undermine the original treaty.

65. With regard to the question of hierarchy in international law, the Study Group had agreed that there was no general hierarchy of sources. The three notions (*jus cogens*, obligations *erga omnes* and Article 103 of the Charter) also operated largely independently of each other. Only *jus cogens* and Article 103 of the Charter had to do properly with normative hierarchy. Obligations *erga omnes* had to do with the scope of application of the relevant norms. The Study Group had decided that the understanding of *jus cogens* and *erga omnes* norms adopted under the draft on State responsibility must be followed. It had also decided that it was not its task to identify specific rules under either of the two categories but to highlight how they might be used as “conflict rules”

in order to deal with fragmentation. The issue of normative hierarchy governed the permissibility of particular agreements as *leges specialis*, as subsequent agreements or as *inter se* modifications of multilateral treaties.

66. In conclusion, he said that the Study Group had tried to avoid taking fixed positions. Its study of practice showed that conflicts and overlap between various rules of international law had always existed and had been resolved by applying a variety of techniques. The objective must thus be to show practitioners of the law that the difficult problems they faced were not new ones and that courts had already overcome them successfully in the past.

67. The CHAIRPERSON thanked Mr. Koskenniemi and announced that volume XXIV of the Reports of International Arbitral Awards had just been issued.¹²

The meeting rose at 12.55 p.m.

2860th MEETING

Friday, 29 July 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MONTAZ

Present: Mr. Addo, Mr. Candioti, Mr. Chee, Mr. Comisário Afonso, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Koskenniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Opetti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

Cooperation with other bodies (concluded)*

[Agenda item 11]

VISIT BY REPRESENTATIVES OF THE COUNCIL OF EUROPE

1. The CHAIRPERSON welcomed Mr. de Vel, Director-General of Legal Affairs of the Council of Europe and Mr. Benítez, Deputy Head of the Public Law Department of the Directorate General of Legal Affairs of the Council of Europe and invited Mr. de Vel to address the Commission.

2. Mr. de VEL (Council of Europe) said it was an honour to attend a meeting of the Commission in order to inform it of developments at the Council of Europe since the Commission's previous session. Such meetings had become a welcome tradition.

3. The Council's political life over the past year had been marked by the Third Summit of Heads of State

* Resumed from the discussion at the 2853rd meeting.

¹² United Nations publication (Sales No.: E. F. 04.V.18), July 2005, 380 pages.

and Government of the Member States of the Council of Europe, which had been held in Warsaw, on 16 and 17 May 2005, at the invitation of the Polish Government. The two previous summits, held in Vienna in 1993 and in Strasbourg in 1997, had lent decisive impetus to the integration of the European continent. The Third Summit had taken place against a background of a Europe undergoing substantial changes and had endeavoured to define the Council's place in the European and international institutional landscape, with a view to giving it a precise political mandate for the years to come. The Summit had culminated in the adoption of the Warsaw Declaration,¹ in which the Heads of State and Government of the member States had emphasized that further progress in building a Europe without dividing lines must continue to be based on the common values embodied in the Statute of the Council of Europe: democracy, human rights and the rule of law. They had noted that Europe was guided by a political philosophy of inclusion and complementarity and by a common commitment to multilateralism based on international law. They had defined the Council's core objective as that of preserving and promoting human rights, democracy and the rule of law.

4. The Heads of State and Government had committed themselves to enhancing the role of the Council of Europe as an effective mechanism of pan-European cooperation, while at the same time strengthening and streamlining the Council's activities, structures and working methods in order to ensure that it played its due role in a changing Europe. They had also expressed their determination to ensure the complementarity of the Council of Europe and the other organizations involved in building a democratic and secure Europe by creating a new framework for enhanced cooperation with them. To that end, they had instructed the Prime Minister of Luxembourg, Mr. Jean-Claude Juncker, to prepare, in his personal capacity, a report on relations between the Council of Europe and the European Union, on the basis of the decisions adopted at the Summit and taking into account the importance of the human dimension in building Europe. In that connection, a memorandum of understanding was due to be signed in the near future between the Council of Europe and the European Union in order to define relations between the two institutions. In the Warsaw Declaration, the Heads of State and Government had also undertaken to foster cooperation between the Council of Europe and the United Nations and to achieve the Millennium Development Goals² in Europe. They had likewise adopted an Action Plan.

5. Both the Action Plan and the Warsaw Declaration had alluded to the most appropriate means of guaranteeing the long-term effectiveness of the Convention for the Protection of Human Rights and Fundamental Freedoms. That was why a "group of wise persons" would be established to consider the issue of the long-term effectiveness of the Convention's control mechanism, including the initial effects of Protocol No. 14 to the Convention. That group had been asked to submit proposals going beyond the

measures already taken, while preserving the basic philosophy underlying the Convention.

6. As members would recall, the previous year, he had informed the Commission of the adoption of Protocol No. 14, amending the control system of the Convention, with a view to reducing the Court's backlog of cases. That Protocol had now been signed by 31 States and ratified by 13. In addition, Protocol No. 12 to the Convention, which was aimed at combating discrimination, had entered into force in April 2005. The Warsaw Declaration and Action Plan plainly attached particular importance to the activities of the Directorate General of Legal Affairs.

7. During the past year, the Directorate General of Legal Affairs had devoted much effort to measures to counter terrorism. The recent bomb attacks in London and Egypt unfortunately proved that it must pursue its action tirelessly. Since November 2001 his Directorate General had striven to make a practical contribution in that field by turning to good account the added value the Council could provide. Its activities were aimed at strengthening legal action against terrorism and its sources of financing, and at safeguarding fundamental values. The Council's rich legal heritage made it possible to preserve essential values which, more than ever before, had to be reconciled and not treated as incompatible, namely, respect for human rights and effective measures to combat terrorism. The Council of Europe was particularly well placed to meet that challenge: it had more than 50 years' experience in promoting and defending human rights and fighting crime, as was evidenced by its pioneering international legal achievements such as the European Convention on Extradition (1957), the European Convention on Mutual Assistance in Criminal Matters (1959), the European Convention on the suppression of terrorism (1977), the Convention on laundering, search, seizure and confiscation of the proceeds from crime (1990) and the Convention on cybercrime (2001). The 1977 European Convention on the suppression of terrorism was the one and only European convention to deal specifically with terrorism. In the 1970s it had marked a breakthrough, for it had made it possible to depoliticize certain terrorist crimes and offences with a view to extraditing those suspected of perpetrating them.

8. The first fruits of the implementation of the action plan against terrorism adopted by the Committee of Ministers in the wake of the events of 11 September 2001, the Protocol amending the European Convention on the Suppression of Terrorism, which had been opened for signature in May 2003, had gathered 26 signatures and 18 ratifications. All the current 44 States parties to the 1977 Convention had to become parties to the Protocol before the latter could enter into force. The Council was therefore making a considerable effort to ensure that outcome as soon as possible.

9. A number of priority fields of action identified in 2001 had led to the drafting of several international standard-setting instruments, which had been adopted in the first half of 2005. They included, first and foremost, the Council of Europe Convention on the Prevention of Terrorism which was designed to bridge gaps in legislation and secure international action to combat terrorism

¹ Council of Europe, document CM(2005)79 final, 17 May 2005. For the Action Plan adopted at the Summit, see document CM(2005)80 final, 17 May 2005.

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

by a variety of means. Various types of conduct likely to lead to the commission of acts of terrorism, such as public provocation to commit a terrorist offence, recruitment for terrorism and training for terrorism, had been classified as criminal offences. The tragic events in London and Sharm el-Sheikh had revealed the extent of those challenges. Cooperation to prevent terrorism had also been strengthened at both the national and international levels.

10. Another new Council of Europe Convention, on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, took account of recent developments, in particular the recommendations of the Financial Action Task Force on Money Laundering concerning measures to combat the financing of terrorism in accordance with Security Council resolution 1373 (2001) of 28 September 2001. In that sphere, the Council had a leading-edge instrument, the Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL Committee), which assessed, at the regional level, member States' action to prevent and suppress money laundering and the financing of terrorism in keeping with the methods advocated by the Financial Action Task Force on Money Laundering. The Committee comprised Council of Europe member States which were not members of the Task Force.

11. Both the Council of Europe Convention on the Prevention of Terrorism and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism had been opened for signature at the Third Summit of Heads of State and Government and, despite the fact that they had been adopted by the Committee of Ministers just two weeks before the Summit, they had already gathered 19 and 13 signatures respectively. They had to be ratified by six States parties in order to enter into force. Moreover, they were open, subject to certain conditions, to States not members of the Council of Europe.

12. In the field of soft law, the Committee of Ministers had recently adopted three recommendations to member States' Governments concerning special investigation techniques in relation to serious crimes including acts of terrorism, the protection of witnesses and collaborators of justice, and identity and travel documents and the fight against terrorism, which would doubtless prove their worth in the coming months.

13. Other international standards, specifically designed to protect human rights, had been formulated in addition to those new instruments. In July 2002, the Committee of Ministers had adopted a first series of Guidelines on human rights and the fight against terrorism, which had been the first international legal text on the matter.³ The guidelines laid down 17 principles which set limits that States must observe in combating terrorism and which had been drawn from international texts and the case law of the European Court of Human Rights. That legal text had recently been supplemented by a further series of

Guidelines on the Protection of Victims of Terrorist Acts, adopted by the Committee of Ministers in March 2005.⁴ They complemented an earlier achievement by the Council in that sphere in the shape of the European Convention on the compensation of victims of violent crimes of 24 November 1983. Furthermore, existing Committee of Ministers recommendations on assistance to victims and the prevention of victimization were being revised. Action had likewise been taken to tackle the root causes of terrorism through the promotion of intercultural and interreligious dialogue.

14. A third convention opened for signature at the Third Summit of Heads of State and Government was the Council of Europe Convention on Action against Trafficking in Human Beings, which had already been signed by 15 States. Its purpose was to prevent and combat trafficking in human beings, whether national or transnational and whether or not connected with organized crime. Its principal added value lay in its focus on the rights of individuals, the attention it paid to the protection of victims and its independent monitoring mechanism guaranteeing parties' respect for the provisions of the Convention.

15. In the Group of States against Corruption (GRECO), the Council of Europe possessed an integrated and fully operational monitoring system which might serve as a model for worldwide action to stamp out corruption. A number of bodies were examining the idea of a follow-up to the United Nations Convention against Corruption. If that idea were accepted, it would be necessary to examine how to coordinate that follow-up with other monitoring processes and systems in order to avoid duplication and the overlapping of activities and guarantee that the various monitoring procedures reinforced one another. That was all the more important since follow-up was often a heavy burden on the countries concerned and, at least in Europe, there were signs of monitoring fatigue which should not be treated lightly.

16. GRECO was continuing the evaluation of its 39 members, including one non-member State, the United States, using methods which had proved their worth. It was about to complete its second round of evaluations (2003–2006) on the proceeds of corruption, corruption in public administration and the use of legal persons to shield corruption offences. The first round (2000–2002) had been concerned with the independence and specialization of anti-corruption bodies and immunities from investigation and prosecution in corruption cases. At its plenary meeting in June 2005, GRECO had decided to devote its third evaluation round to transparency in the funding of political parties, and to the incrimination of offences provided for in the Criminal Law Convention on Corruption.

17. Fighting cybercrime was another key area of the Council of Europe's action. His Directorate General was pushing for the widest possible ratification of the Convention on cybercrime, which had entered into force on 1 July 2004, and its Additional Protocol concerning the criminalization of acts of a racist or xenophobic nature

³ Committee of Ministers, 804th meeting, document CM/Del/Dec(2002)804, appendix 3; annexed to the "Letter dated 1 August 2002 from the Permanent Representative of Luxembourg to the United Nations addressed to the Secretary-General" (A/57/313).

⁴ Committee of Ministers, 917th meeting, document CM/Del/Dec(2005)917, appendix 2.

committed through computer systems required only one more ratification in order to enter into force. That event should occur in the very near future, once France, which had just ratified both the Convention and the Protocol, deposited its instrument of ratification. Both Council of Europe instruments were open to non-member States of the Council of Europe, since their ambit was intended to extend far beyond the continent of Europe, as had been noted at the Eleventh United Nations Congress on Crime Prevention and Criminal Justice held in Bangkok on 18–25 April 2005.⁵ The Council of Europe would be convening a conference in Madrid later in the year to encourage the accession of Latin American countries to the Convention on cybercrime.

18. The Action Plan adopted by the Third Summit of Heads of State and Government reflected their agreement on another very important objective, that of ending the sexual exploitation of children and drafting legal instruments for that purpose. At a conference jointly organized by the Council of Europe and UNICEF in Ljubljana on 8 and 9 July 2005 to review, for Europe and Central Asia, the Yokohama (2001) commitments on the sexual exploitation of children, the relevant working party had recommended the drafting of a new convention. It was essential to coordinate work in that sphere with the United Nations, especially with regard to the follow-up to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

19. In response to a request from the European ministers of justice and in keeping with the Action Plan agreed at Warsaw, the Directorate General of Legal Affairs was in the process of finalizing updated European Prison Rules paying due heed to technological, legal and social advances since 1987, when the last version had been issued.⁶ They were expected to be adopted by the Committee of Ministers before the end of the year.

20. It was also important to mention the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Biomedical Research, which had been opened for signature in January 2005, because it supplemented the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Convention on Human Rights and Biomedicine), which was still the only international treaty on the subject. Further standard-setting work would be done in that sphere with the drafting of an additional protocol to the Convention on genetic testing and the preparation of a draft instrument on stored human biological materials (biobanks).

21. The law of nationality was an important area of concern of both the Council of Europe and the Commission. The Council had just drawn up a draft protocol on the avoidance of statelessness in relation to State succession. In June 2005 it had been referred to the Parliamentary Assembly for opinion, and it should be adopted before

the end of the year. That protocol supplemented the 1997 European Convention on Nationality, in particular its chapter on State succession and nationality. It had been drafted in response to a Committee of Ministers recommendation to member States in 1999 on the avoidance and reduction of statelessness⁷ and it was based on a number of countries' recent practical experience in respect of State succession and statelessness. It also took account of the Convention on the reduction of statelessness, the Declaration on the consequences of State succession for the nationality of natural persons⁸ prepared by the European Commission for Democracy through Law (Venice Commission), and, last but not least, the International Law Commission's own draft articles on nationality of natural persons in relation to the succession of States.⁹ In that connection, he wished to thank Mr. Galicki and Mr. Mikulka, Secretary to the Commission, for their invaluable contribution to the Council's text.

22. He welcomed the excellent cooperation which had grown up between the Committee of Legal Advisers on Public International Law (CAHDI) and the Commission and the constant participation of Commission members in the CAHDI meetings. CAHDI was rounding off the Pilot Project of the Council of Europe on State Practice Regarding State Immunities with the preparation of an analytical report of State practice. The General Assembly's adoption of the United Nations Convention on Jurisdictional Immunities of States and their Property, a landmark event, far from reducing the relevance of the Council's activity, had highlighted the fact that it would facilitate the implementation of the Convention at national level.

23. Reservations to international treaties was another of the main topics of CAHDI, one in which it functioned as a European Observatory. Over the years, its activities in that respect had broadened and extended into the field of reservations to international treaties against terrorism, irrespective whether or not an objection could be entered to such reservations. CAHDI had made a list of "possibly problematic" reservations of that nature and, at its recommendation, the Committee of Ministers, through the good offices of the Secretary-General, had initiated a dialogue among reserving States, including non-members of the Council of Europe, with a view to persuading them to withdraw those reservations. Hence it had supplemented its approach to individual States with a collective *démarche*.

24. Another area on which CAHDI had been focusing since 2004 and which had aroused much public interest was that of United Nations sanctions. CAHDI was studying their implementation at national level and the repercussions they could have on respect for human rights. The topic would be discussed at the thirtieth meeting of CAHDI in September 2005, when the Committee would receive several special guests, including a member of the Court of Justice of the European Communities. It would

⁷ Recommendation No. R (99) 18, 15 September 1999, 679th meeting of the Ministers' Deputies.

⁸ Adopted at the 28th Plenary meeting, Venice, 13–14 September 1996 (document CDL-NAT(1996)007Rev).

⁹ *Yearbook ... 1999*, vol. II (Part Two), chap. IV, sect. E, p. 21, para. 47. Also annexed to General Assembly resolution 55/153 of 12 December 2000.

⁵ See the Report of the Eleventh United Nations Congress on Crime Prevention and Criminal Justice (A/CONF.203/18), chap. I, Bangkok Declaration (para. 16), and chap. VI, para. 338.

⁶ Recommendation No. R (87) 3, 12 February 1987, 404th meeting of the Ministers' Deputies.

also examine the latest report of the International Committee of the Red Cross on customary international humanitarian law¹⁰ and, would, as usual, consider the outcome of the annual session of the Commission. He looked forward to the participation of Mr. Koskenniemi in that meeting.

25. In the field of constitutional and electoral law, the Council's Venice Commission had recently adopted some important opinions on constitutional reform in Armenia, on draft amendments to the electoral codes of Armenia and Azerbaijan, on the compatibility of Italy's Gasparri Law and Frattini Law with the standards of the Council of Europe in the field of freedom of expression and media pluralism, on the Russian Federal Law on the Prosecutor's Office and on the amendments to the Ukrainian Constitution adopted on 8 December 2004. It was also assisting the Constitutional Commission of Kyrgyzstan with constitutional reform, and had signed an agreement with the United Nations Interim Administration Mission in Kosovo (UNMIK) on the application in Kosovo of the Framework Convention for the Protection of National Minorities and the European Convention for the prevention of torture and inhuman or degrading treatment or punishment.

26. It could thus be seen that the action of the Council of Europe was aimed at promoting the building of a Europe without dividing lines, based on the common values embodied in the Statute of the Council of Europe: democracy, human rights and the rule of law.

27. Mr. KOLODKIN said that the work of the Council of Europe in the legal sphere was a valuable source of practice against which the efforts of the Commission in the areas of codification and progressive development of international law could be measured. Mr. de Vel had touched on the relations between the Council and the European Union, noting that a memorandum of understanding was about to be signed. In the Commission's consideration of the fragmentation of international law, the interplay between the Council's conventions and European Union law had come to the fore. Just the day before, introducing his briefing note, Mr. Koskenniemi had mentioned that the Study Group on Fragmentation had discussed "disconnection clauses" (see 2859th meeting, above, paras. 60–61).

28. The three conventions opened for signature at the Third Summit of Heads of State and Government of the Council of Europe contained such clauses: he cited in particular article 52, paragraph 4, of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. There had been heated discussions on those clauses in the final stages of the Council's work, and not all member States were entirely satisfied with the outcome. The interplay between Council of Europe conventions and European Union law thus remained a burning issue.

29. He would like to know Mr. de Vel's views on "disconnection clauses", which he personally considered to be a misnomer: it would be better to refer to "connection

clauses". How should the search for formulas and instruments to promote appropriate relations between the Council's legal texts and European Union law be pursued?

30. Mr. GALICKI endorsed that question. Having participated in the elaboration of the Council of Europe Convention on the Prevention of Terrorism, he was well aware of the difficulties experienced in drafting the final version of the "disconnection clauses". The clauses differed from convention to convention, and he would be interested to know what Mr. de Vel thought about that sort of differentiation. The final versions of the clauses incorporated into the three most recent conventions were much milder than the original texts, their most extreme elements having been eliminated.

31. He would also like to know Mr. de Vel's views regarding the participation of the European Union, separately from that of member States, in the conventions concluded under the auspices of the Council of Europe. Some States that were not members of the European Union feared that such dual representation might be contrary to the principle of equality of parties to conventions. Lastly, did Mr. de Vel think that further legal steps could be undertaken by the Council of Europe against terrorism? Two possibilities came to mind. The first was a comprehensive convention against terrorism, something that might be envisaged as an extension of the step-by-step approach the Council had taken in the long struggle against terrorism. The second was the conclusion of an additional protocol to the European Convention on Human Rights to deal with a new human right: the right to be protected against terrorism. The repeated violent terrorist attacks that were directed against States but primarily affected individuals gave every reason to entertain such a radical possibility.

32. Mr. ECONOMIDES said that the Council of Europe, as an eminently juridical body that dealt with international law, had much in common with the Commission. He endorsed the question already raised about disconnection clauses. Most of the conventions that contained such clauses were conventions adopted by the Council of Europe. That was understandable, because members of the European Community occupied a dominant place among members of the Council of Europe. Disconnection clauses necessarily caused fragmentation, since when they were applied, all members of the European Community disconnected themselves from the convention, ceased to apply it and applied Community law, although the hierarchical relationship between that law and the conventions was not clear. The question was whether such fragmentation was good or bad. He considered that it was good when it helped to strengthen, clarify and develop international law, and bad when it weakened international law or created obstacles to or restrictions on its application. He therefore suspected that disconnection clauses were a threat to international law and, even though it was too soon to assess their effects, their very existence was a matter of concern. He would like to know Mr. de Vel's views on the matter.

33. Mr. PAMBOU-TCHIVOUNDA said he had a broad issue and a very specific question to raise on the subject of terrorism. Freedom was under attack in democratic

¹⁰ J.-M. Henckaerts, "Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict", *International Review of the Red Cross*, vol. 87, No. 857 (March 2005), pp. 175–212.

societies. Democracy was a valued commodity on the international political market, and both the established Western democracies and the emerging or transitional democracies elsewhere were faced with a challenge to its underlying precepts, particularly freedom. The challenge was particularly acute for European democracies, which seemed to need to rethink both the content and the goals of freedom while at the same time assessing its limitations in the light both of Europe's involvement in the movement towards globalization and the search for a balance between security and freedom. Hence the broad question he wished to raise was whether the Council of Europe's handling of terrorism was diverting it from the mission assigned to it by the founding fathers in 1949 and 1950. If that was so—and he believed it was—then was it appropriate for European and, by extension, other democracies to move in that direction, or was it a rash venture?

34. His specific question related to the Guidelines adopted in 2002 and 2005 by the Committee of Ministers, a practice that had apparently been found useful. Mr. de Vel had referred to the Guidelines as “legal texts” (para. 13 above), and he wondered what that meant and whether an assessment had yet been made of the success with which the two sets of Guidelines had been applied.

35. Ms. ESCARAMEIA noted that there had been intensive debate in academic and other circles on the relationship between the application of international humanitarian law and the protection of human rights in situations of war. Had the Council of Europe discussed the issue, either within CAHDI or in another forum? Mr. de Vel had mentioned that a list of reservations that were deemed problematic was to be drawn up, and she would like to know whether the list cited specific reservations, or identified types of reservations to the Council of Europe's conventions that should be prohibited.

36. Mr. de VEL (Council of Europe), replying first to the questions about disconnection clauses, said that they were actually called “transparency clauses” by the Council and that the term “disconnection clauses” emanated from the European Commission in Brussels. Such clauses now figured in eight conventions, the first usage having been in 1989 in the European Convention on Transfrontier Television. In response to Mr. Galicki's question about the differing versions of the clauses, he said that whenever such a clause was included in a convention, it was discussed with the European Commission's legal services with a view to adapting it to the content of the convention concerned. Obviously, when a convention enunciated fundamental rights, it was difficult to insert a disconnection clause, and when a convention envisaged a monitoring system, the disconnection clauses had to be drafted accordingly.

37. The discussion had become heated during the run-up to the Third Summit of Heads of State and Government because three major conventions—on the prevention of terrorism, against trafficking in human beings and on money laundering and the financing of terrorism—had been ready for adoption by the Committee of Ministers. The European Commission had referred to the need to insert disconnection clauses in those conventions, but they had not been accepted by the Committee

of Ministers. There had been major differences of opinion among Council member States and even among member States of the European Union. Protracted negotiations had ensued, but in the end, thanks to the good offices of the President-in-Office of the Council, Mr. Juncker of Luxembourg, the clauses had been softened and the three conventions had been accompanied by an explanatory statement by the President of the Council and by the European Commission.

38. One could ask, as had Mr. Economides, whether fragmentation was a good or a bad thing. It was too soon to speak of bad fragmentation, since the members of the European Union continued to apply the Council of Europe conventions. He could confirm that there had been no problems with the implementation of the clauses; however, member States had to remain vigilant. The Council was following very closely the discussion of the matter in certain international bodies such as UNESCO and UNCITRAL, where, in contrast to the situation in the Council of Europe, European countries were not in the political majority. The Council was also considering the issue in the context of the memorandum of understanding that was to be concluded between the European Union and the Council of Europe, the report of the Prime Minister of Luxembourg, Mr. Juncker, and the evolving situation in other institutions.

39. The Council had been active in the struggle against terrorism for nearly 30 years, and it could certainly not be said that that struggle was not part of its mission. Since the 1970s, the time of the Rote Armee Fraktion, the Red Brigades and the troubles in Northern Ireland, the European Court of Human Rights had handed down numerous decisions in cases concerning terrorism because it understood very well that foremost among human rights was the right to life. As to whether a protocol to the European Convention on Human Rights enshrining the right to protection against terrorism could be adopted, serious consideration must be given to the matter, but in his view, that right was already covered by the right to life, enshrined both in the Convention and in the extensive case law of the European Court of Human Rights.

40. As to other activities in the struggle against terrorism, the Council was continuing to compile the profiles that were submitted voluntarily by member States and the European Union. Attempts had been made to conclude a comprehensive convention against terrorism at the regional level, but States had not wished to obstruct the efforts under way in the United Nations to elaborate a convention which would incorporate a definition of terrorism. Especially since the events in London and Egypt, and with the renewed determination of many States to resume the exercise and try to arrive at a definition, now was not the time for action on that front by the Council of Europe. In his personal view, only if efforts in the United Nations failed could the Council revert to the issue.

41. With regard to the question by Mr. Pambou-Tchiounda, guidelines were a rather recent development in Council of Europe practice. Two types of Council of Europe legal instruments existed: recommendations of the Committee of Ministers to member States (soft law), and binding conventions, agreements or treaties. In

addition, two guidelines existed which the Committee of Ministers had termed “legal documents” and which were also of considerable political importance. The first time that guidelines had been taken into account had been in connection with the Protocol to the 1977 European Convention on the suppression of terrorism, which had been drawn up in parallel with the Guidelines on human rights and the fight against terrorism. Likewise, the Guidelines on the Protection of Victims of Terrorist Acts had been elaborated in parallel with the draft convention on the prevention of terrorism, which contained provisions on victims. Close consideration would be given to those Guidelines when revising the recommendation of the Committee of Ministers on assistance to victims and the prevention of victimization.

42. The Directorate General of Human Rights had already begun an informal appraisal of the application of the Guidelines on human rights and the fight against terrorism; however, the Guidelines on the Protection of Victims of Terrorist Acts were too recent. In sum, although the concept of guidelines was rather new, the guidelines seemed useful in areas in which it was not possible to produce recommendations or treaties.

43. With regard to Ms. Escarameia’s question on human rights in situations of war, he noted in that connection that Protocol No. 6 to the European Convention on Human Rights prohibited the death penalty, even in cases of conflict or in times of war.

44. Mr. BENÍTEZ (Council of Europe) said that human rights in times of war and international humanitarian law were subjects which were regularly on the CAHDI agenda. The next meeting of CAHDI, in September 2005, would focus specifically on the relationship between human rights law and international humanitarian law, and on the recent report on customary international humanitarian law prepared under the auspices of the ICRC.

45. On the question of reservations, he said that in the late 1990s CAHDI had begun a general consideration of objections to inadmissible reservations to international law, drawing up what had later become a Committee of Ministers recommendation on model objection clauses to inadmissible reservations, so that there was a standard clause that member States of the Council of Europe and a number of observer States could use in reacting to inadmissible reservations.¹¹

46. CAHDI functioned as an observatory for reservations to international treaties, in particular for outstanding reservations, i.e. those for which the deadline for introducing an objection had not yet passed. Normally, a list was drawn up jointly by the presidency and the secretariat and submitted to the members of CAHDI, who could then point to problems with some of those reservations, following which they either entered into a dialogue with the reserving State and reported to CAHDI on the outcome, or, if the outcome was not satisfactory, announced their intention to lodge an objection and called upon all Council of Europe member States to do likewise, for greater effect.

47. On the question of reservations to anti-terrorism treaties, for the first time CAHDI was considering non-outstanding reservations, i.e. those for which deadlines for objections had passed. Those were specific reservations by member States or non-member States of the Council of Europe with regard to Council of Europe or other conventions. CAHDI had drawn up the list in September 2004 and forwarded it to the Committee of Ministers, proposing that the Secretary-General, on the instructions of the Committee of Ministers, write to the ministers for foreign affairs of the reserving States asking them to consider withdrawing their reservations. It was the first time that the Council of Europe had adopted such a *démarche*. It had already received a number of replies to the Secretary-General’s letter, which had been brought to the attention of CAHDI, and at its March 2005 meeting CAHDI had begun to revise the list in the light of developments. That action was specific to the area of counter-terrorism and was also closely related to Security Council resolution 1373 (2001).

48. Mr. CHEE said that the Commission had recently met with the ICRC and had learned about the very competent and extensive work being done on the subject of customary international humanitarian law. He therefore wondered whether work being undertaken by the Council of Europe on the same topic was not an unnecessary duplication.

49. Mr. BENÍTEZ (Council of Europe) stressed that CAHDI was not undertaking a new study. One of the authors of the ICRC study on customary international humanitarian law would attend the next CAHDI meeting to discuss the ICRC report and its findings. Thus, the Council of Europe was simply holding an exchange of views with one of the authors of the ICRC study to see to what extent it reflected the relevant positions of States.

50. The CHAIRPERSON thanked Mr. de Vel and Mr. Benítez for their information concerning the activities of the Council of Europe, and for the interest they had shown in the work of the Commission.

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

[Agenda item 1]

51. The CHAIRPERSON announced that the Commission would suspend the meeting in order officially to close the International Law Seminar.

The meeting was suspended at 11.20 a.m. and resumed at 12.15 p.m.

Fragmentation of international law: difficulties arising from the diversification and expansion of international law (*continued*) (A/CN.4/549 and Add.1, sect. E and A/CN.4/L.676 and Corr.1)

[Agenda item 9]

52. The CHAIRPERSON invited members of the Commission to comment on the briefing note on fragmentation

¹¹ Recommendation No. R (99) 13, of 18 May 1999.

* Resumed from the discussion of the 2848th meeting.

of international law: difficulties arising from the diversification and expansion of international law, introduced by the Chairperson of the Study Group, Mr. Koskenniemi, at the previous meeting.

53. Mr. PAMBOU-TCHIVOUNDA said that the well-prepared briefing note and the oral introduction had confirmed his evaluation of the topic, about which information had previously been available only sporadically. The information now provided was of an extraordinary intellectual and methodological quality, whether it concerned the hierarchy of rules in international law, interpretation or the application of successive treaties. He expressed his appreciation to Mr. Koskenniemi and thanked the members of the Commission who had worked on the various aspects of the subject of fragmentation. The information to be made available at the next session would provide more grist to the Commission's mill.

54. Mr. ECONOMIDES said that all the questions that had been or were being taken up by the Study Group were of considerable theoretical and practical interest, dealing with difficult issues on which there was little guidance in textbooks on international law. The contribution of the Study Group was thus considerable. However, the purpose of such a group was not only to produce theoretical studies, but also to formulate specific recommendations for practitioners on all the difficult problems posed for the application of international law.

55. There was good fragmentation and bad. The goal of the Commission should be to encourage good fragmentation, which specified, developed and strengthened rules of law and facilitated their application, whereas bad fragmentation was the very opposite and consisted of practices, rules and institutions which aimed to introduce exceptions to or derogations from the rules and thereby undermined international law.

56. In that connection, he referred again to the question of the disconnection clauses which the European Union and its member States attempted to insert in international conventions which they concluded and which he regarded as an example of bad fragmentation. One such disconnection clause, which was found in a number of Council of Europe treaties, read: "In their mutual relations, parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except insofar as there is no Community rule governing the particular subject concerned." That clause was applied automatically and was even mandatory. If the European Community had any rules relating to the treaty, it no longer applied the treaty, but Community law. However, in its relations with other parties to the treaty, the Community would continue to apply the treaty. Thus, the disconnection clause was a flagrant case of fragmentation, because when the Community had rules which were parallel to the rules of another convention, the member States of the Community opted out of the international treaty regime in the context of their relations with each other and ceased to apply it. Such clauses clearly conflicted with the basic rules of international law and in particular with the law of treaties. They challenged the principle that a treaty took precedence over the internal law of States and international

organizations. Nor were they in keeping with the fundamental principle of *pacta sunt servanda*, and they were hardly compatible with the principle of reciprocity which constituted the basis of the law of treaties. By creating a regime customized for certain States, the disconnection clause undermined the principle of equality between States, and in particular the right of the contracting parties to juridical equality. Although it was somewhat premature to decide whether the disconnection clause was legal, its effects on international treaty law were already alarming, and he agreed with Mr. de Vel that, although there had not yet been any problems with the clause in practice, extreme vigilance was called for.

57. Mr. PELLET said he would be less intrepid than Mr. Economides in pronouncing on what was good and what was bad. Fragmentation was a fact, and the function of the Commission's study was to help States find their way through situations in which a problem of fragmentation arose. Jurists should not hand out praise and blame. International law must meet the needs of its users.

58. Fortunately, that also seemed to be the intention of the Study Group, although he was somewhat puzzled about the relative weight to be attributed to the general study and the specific conclusions which the Study Group proposed to provide for States. He hoped that the 150-page analytical study announced by the Chairperson of the Study Group in his briefing note would not be too general. Personally he would have preferred the presentation to be linked to the condensed set of 40 conclusions, because that was more in keeping with the mission of the Commission than a study which, even if interesting from the point of view of doctrine and the result of a collective effort, might not be closely coordinated with the condensed proposals or guidelines, which, in his view, would be the most useful outcome of the study.

59. On the whole, the Study Group had produced a substantial and interesting piece of work. He welcomed the indicative list of cases in which fragmentation posed problems. One of the most intriguing areas of fragmentation was that of reservations to treaties. It would be interesting to see how the Study Group thought that the subject matter tied in with the topic of reservations to treaties, as, numerically speaking, reservations probably constituted the largest group of examples of fragmentation of international law.

60. Turning to more specific comments, he said that both the draft report of the Study Group and the briefing note contained fairly vague references to "general principles of international law", which had been translated in the French versions as "*les principes généraux du droit international*". He recalled that there was a clear distinction for French speakers between "*les principes généraux du droit international*" and "*les principes généraux de droit reconnus par les nations civilisées*", the latter being those covered by article 38 of the Statute of the ICJ. He suggested that both the briefing note and the draft report should be carefully revised to make it quite clear which of the two the Study Group had in mind.

61. Secondly, he disagreed with the Study Group's unduly restrictive and conservative view of the evolutive

interpretation of treaties. He believed that the law should evolve in line with the needs of international society; when the context changed, a treaty could no longer be interpreted as having frozen the law at a given point in time, irrespective of the intentions of its framers.

62. Thirdly, he welcomed the distinction drawn in the briefing note between *jus cogens* and obligations *erga omnes*—the former relating to the normative hierarchy, the latter to the scope of application of norms—particularly since not even the ICJ had always been consistent in that regard. If the Commission, with all its authority, were to do no more than stress that point, that alone would have made work of the Study Group worthwhile.

63. Fourthly, he questioned the appropriateness of the title of Mr. Galicki's study, namely, "Hierarchy in international law". What was at issue was a hierarchy in the sources or norms of international law. There was a hierarchy of norms, albeit in embryonic form, based on the notion of *jus cogens*. Otherwise, there were a number of devices such as *lex specialis* and *lex posterior* which helped to choose between norms that were apparently incompatible. That, however, was not a question of hierarchy, but one of deciding which norms should be applied.

64. In conclusion, he said that, while he had not participated in the work of the Study Group, he hoped that the study of the topic would result in specific information or recommendation for States, such as were expected of the Commission.

65. Mr. GALICKI, responding to Mr. Pellet's concerns regarding the title of his study, drew attention to the paragraph of the study which explained that although "Hierarchy in international law" was the title agreed upon by the Commission, the Study Group was dealing with norms with a special status under international law, with the different relationships between them, or even with obligations deriving from them.

66. Mr. Sreenivasa RAO said that, despite his initial reservations regarding the usefulness of the topic, he had benefited greatly from his participation in the Study Group. The Group's detailed analysis would indeed help practitioners and scholars to take a broader view of the somewhat unorganized development of international law and its application in disparate contexts. While he shared the concerns expressed by Mr. Economides and Mr. Pellet regarding the potentially very broad scope of the topic and the possible difficulties of such a study, the preliminary conclusions drawn and the summary of the discussions thus far had persuaded him that the Study Group was following the right methodological approach and in so doing would produce results that would be of real use to practitioners. It was clear that the Study Group had much work to do in the coming year and that some of the issues it had raised, including self-contained regimes and hierarchy, required further clarification. Another issue taken up by the Study Group that was not reflected in the summary of the discussions was regionalism, a topical issue on which very useful work had been done.

67. Mr. OPERTTI BADAN said he was satisfied with the methodical analysis being conducted by the Study Group.

The valuable input it would provide for legal experts in foreign ministries and international organizations was in itself justification for the study of the topic. The *ratione materiae* approach adopted consisting of the study of five broad themes was a good basis for the subsequent analysis. The risks of the proliferation of norms were felt not only by the international community as a whole, but also at the regional level, where efforts were under way on the codification of regional and subregional laws. The Commission could make a valuable contribution in that area. The differing dispute settlement mechanisms available under the auspices of the WTO and the regional integration organizations offered an obvious example of the fragmentation of the law and constituted a potential source of conflict. He hoped that the Study Group's work would result in a set of guidelines or recommendations which, although not binding in nature, would be of practical use.

68. Lastly, he endorsed the Study Group's view of international law as a system of interrelated norms. Mr. Pellet had referred to reservations as a prime example of fragmentation of law. The links between that topic and the present topic should be explored so as to provide practical guidance to legal experts and practitioners on how to deal with the threat posed by the proliferation of norms.

69. Mr. KOSKENNIEMI (Chairperson of the Study Group) said that although the debate on the fragmentation of international law would be continued at a subsequent meeting, he would respond immediately to a few of the points raised. On the point raised by Mr. Economides, it was generally recognized that the fragmentation of law was a many-sided phenomenon, and there was broad agreement among the members of the Study Group that it was not befitting for them to identify developments as good or bad. On the other hand, it was clear that the Commission must be able to produce information for experts in the Sixth Committee and in relevant institutions so that they could draw their own conclusions on the matter. It was his intention to provide a very clear description of practice relating to disconnection clauses.

70. He endorsed Mr. Pellet's comment concerning the looseness of the terminology used with regard to general principles of law; he understood that distinctions needed to be made and would revise the text accordingly.

71. There were several references in the documents before the Commission to evolutive interpretation, and in its final submission the Study Group would have to address the extent to which interpretation should take into account developments subsequent to the conclusion of treaties. It was necessary to strike a balance between the conflicting considerations of stability and change—a task traditionally dealt with by the courts. The Study Group had no magic formula to identify where the line should be drawn, but it could assist by providing examples of practice.

72. He noted Mr. Operti Badan's satisfaction with the Study Group's fundamental approach to its work whereby international law was viewed as a system of rules that operated in relation to other rules. In concluding, he said that any further input from members, even on very specific points relating to the five studies conducted, would

be of great assistance to participants in the forthcoming meeting of the Study Group.

The meeting rose at 1.05 p.m.

2861st MEETING

Tuesday, 2 August 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Al-Baharna, Mr. Al-Marri, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Yamada.

Draft report of the International Law Commission on the work of its fifty-seventh session

1. The CHAIRPERSON invited the Rapporteur of the Commission to introduce the draft report of the Commission on the work of its fifty-seventh session.

2. Mr. NIEHAUS (Rapporteur) said that the draft report was divided into 12 chapters: chapter I contained the introduction, chapter II provided a brief summary of the work of the Commission at its fifty-seventh session and chapter III dealt with specific issues on which comments from Governments would be of particular interest to the Commission. Chapters IV to XI dealt with the substantive topics considered by the Commission at the current session, while chapter XII concerned other decisions.

CHAPTER IV. *Shared natural resources* (A/CN.4/L.667)

3. The CHAIRPERSON invited the members of the Commission to consider chapter IV of the draft report of the Commission (A/CN.4/L.667).

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

Section A was adopted.

B. Consideration of the topic at the present session

Paragraph 3

4. Ms. ESCARAMEIA asked why the presentation on the joint management of the Geneva aquifer system was not mentioned in the paragraph. Had it not been an informal technical presentation?

5. The CHAIRPERSON said that that question had been raised in the Working Group.

6. Mr. CANDIOTI said that the final sentence of the paragraph should be completed by inserting figure 11 in the blank space.

7. Mr. GAJA asked whether the report of the Working Group on Shared Natural Resources would be included in the Commission's report or whether it was only mentioned by way of reference.

8. Mr. YAMADA (Special Rapporteur) said that the Chairperson of the Working Group, Mr. Candioti, would give a presentation the following day in plenary meeting that ought to be mentioned; perhaps the paragraph should be set aside, as it would have to be redrafted.

9. The CHAIRPERSON said that a sentence would be added to that effect.

10. Mr. MANSFIELD said that the chapter should reflect the fact that the Working Group had worked tirelessly, had reached agreement on several draft articles and was continuing its work. It was not enough to say that the Working Group had held 11 meetings.

11. The CHAIRPERSON replied that it would be preferable to have the Working Group's report in hand before adding a sentence or paragraph that would reflect those concerns.

Paragraph 3, as amended, was adopted.

Paragraphs 4 to 11

Paragraphs 4 to 11 were adopted.

Paragraph 12

12. Mr. PELLET said that it had been his understanding that the principle of reasonable utilization applied to non-recharging aquifers and asked whether the first sentence did not contain a mistake.

13. Mr. YAMADA (Special Rapporteur) said that the sentence summarized the introduction to his report in which the application of the principle of reasonable utilization had been considered in respect of two categories, namely recharging and non-recharging aquifers. He recalled that under the 1997 Watercourses Convention the principle of sustainable utilization applied to surface waters but not to groundwaters.

14. Mr. MANSFIELD said that he, too, thought that the wording of the first sentence did not reflect the content of the two draft articles and proposed that it should be amended to read: "Paragraph 2, on reasonable utilization (i.e. sustainable utilization), was divided into subparagraphs (a) and (b) to reflect the practical application of this principle in different circumstances of a recharging and a non-recharging aquifer."

Paragraph 12, as amended, was adopted.

Paragraphs 13 to 17

Paragraphs 13 to 17 were adopted.