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Summary record of the 3140th meeting

Topic:
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3140th MEETING

Wednesday, 4 July 2012, at 10.05 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Al-Marri, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wako, Mr. Wisnumurti, Sir Michael Wood.

Cooperation with other bodies

[Agenda item 12]

STATEMENTS BY REPRESENTATIVES OF THE COUNCIL OF EUROPE

1. The CHAIRPERSON welcomed the representatives of the Council of Europe, Ms. Belliard, Chairperson of the Committee of Legal Advisers on Public International Law (CAHDI), and Mr. Lezertua, Director of Legal Advice and Public International Law (Jurisconsult), and invited them to address the Commission.

2. Ms. BELLIARD (Chairperson of the Committee of Legal Advisers on Public International Law), outlining the history of CAHDI for the benefit of new members of the Commission, explained that the Committee had originally been established as a subcommittee of the European Committee on Legal Cooperation. It had become a full committee, reporting directly to the Committee of Ministers, in 1991. Twice a year, CAHDI convened meetings of the legal advisers to the ministries of foreign affairs of 55 States and representatives of several international organizations. It was responsible for examining questions related to public international law, conducting exchanges of views and coordinating member States' approaches to various issues in the area of international law and also for issuing legal opinions. Its terms of reference for the period 2012–2013 were largely similar to those for the preceding two years, except that it could henceforth supply opinions at the request of the Committee of Ministers or of the other steering or *ad hoc* committees, provided that such requests were transmitted through the Committee of Ministers. The renewal of its terms of reference had provided CAHDI with an opportunity for reviewing its priorities and reaffirming the importance that it attached to the requests for opinions or exchanges of views addressed to it. Emphasis had also been placed on the role of CAHDI as European Observatory of Reservations to International Treaties and as the administrator of several databases on State immunities, the organization and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs and the implementation of United Nations sanctions. Liaising with the International Law Commission and the Sixth Committee and maintaining contact with the lawyers and legal services of other international bodies or organizations were also regarded as crucial activities.

3. CAHDI had been very busy over the previous 12 months. It had held its 42nd meeting in September 2011 and its 43rd meeting in March 2012. At those meetings it had responded to several requests for opinions or exchanges of views and had twice been consulted on the preliminary draft report of the Secretary General of the Council of Europe on the outline of the Council of Europe convention review, since one of the Secretary General's prime concerns had been to review the relevance of those conventions and to present a comprehensive report for the Committee of Ministers by the end of September 2011. At the 42nd meeting, delegations, while agreeing on the importance of that work, had found that they needed more time to prepare a detailed legal analysis of the report. At its 43rd meeting, CAHDI had held a substantive exchange of views on the report and had adopted observations in which it had stressed that, since the Council of Europe was a regional organization, it should first try to encourage its own member States to ratify its conventions before considering the accession of non-members. CAHDI had noted a lack of consistency in the way conventions were classified in the preliminary draft report and had therefore suggested that more States might be prompted to become parties to the conventions if they were arranged in four groups: conventions with numerous ratifications and considered as key; conventions with few ratifications but considered as key; other active conventions; and inactive conventions. CAHDI was in favour of using objective classification criteria for each group. It had likewise suggested a non-exhaustive classification of Council of Europe conventions to take account of the divergence of views among member States on the matter. Furthermore, it had recommended that each group should contain examples of conventions on which all delegations agreed and that the steering committees should be regularly consulted on the classification of conventions in order to determine whether the system should be altered in the light of developments. Lastly, it had drawn attention to the competence of States parties to conventions, especially with regard to provisions on reservations, the implementation of monitoring mechanisms or the denunciation of a convention. Those observations had been largely taken into account in the report that the Secretary General had submitted to the Committee of Ministers.[201]

4. At the request of the Steering Committee for Human Rights (CDDH), CAHDI had given an opinion on the introduction of a simplified procedure for the amendment of certain provisions of the European Convention on Human Rights. In particular, CDDH had asked CAHDI to look into the question of whether the adoption of a statute of the European Court of Human Rights incorporating certain provisions of the Convention and possibly including other elements not present in the Convention would be compatible with public international law and member States' internal law. The underlying aim was to allow some provisions relating to the Court to be amended without requiring the cumbersome ratification of such modifications by national parliaments.

5. A draft opinion highlighting the main issues raised by such a simplified procedure had been adopted by CAHDI at

[201] "Report by the Secretary General on the review of Council of Europe conventions" (information document, SG/Inf(2012)12). Available from https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805ca7b0.

its meeting in September 2011. The first question concerned the legal process for introducing the procedure. One solution would be to supplement the Convention with a clause specifying the provisions that could be amended in that manner, while the other would be to adopt a statute of the Court. In both cases, a protocol amending the Convention would have to be adopted and ratified by all member States in a procedure that complied with their internal law.

6. The second question concerned the simplified procedure for amendment itself, namely the nature of the provisions that could be amended by it and the conditions governing their adoption. It appeared that provisions susceptible to amendment in that manner should be limited to those relating to organizational questions having no impact on the rights and obligations of States or of applicants. That would be the only way to avoid cumbersome approval procedures in some States. As for the method of adoption, information supplied by various delegations on internal law requirements had shown that most would prefer unanimous adoption. CAHDI had, however, indicated that other solutions might be contemplated if they obtained general approval. Delegations had insisted that those replies in no way prejudged the need, or not, for certain member States to transcribe the provisions thus adopted into national law. The Committee had considered that it was unable at that stage to conduct a more in-depth analysis of the question put to it by CDDH. It was, however, prepared to reconsider an actual draft proposal once it had been drawn up and to give its opinion on it; it had not yet been asked to do so.

7. Turning to relations between CAHDI and other organizations, she said that contacts with the lawyers and legal services of other international bodies or organizations had related to topics frequently discussed in CAHDI.

8. Mr. Stephen Mathias, Assistant Secretary-General for Legal Affairs of the United Nations, had discussed the question of the responsibility to protect with CAHDI. He had reported on developments in the international criminal courts and the International Residual Mechanism for Criminal Tribunals and had also emphasized the importance of fairness and transparency in United Nations sanctions regimes. In that connection, he had commended the work done by Ms. Kimberly Prost,[202] Ombudsperson of the Security Council Committee established pursuant to Security Council resolution 1267 (1999) of 15 October 1999. Mr. Luis Romero Requena, Director-General of the Legal Service of the European Commission, had given a talk on the legal order of the European Union and international public law during which he had drawn attention to the fact that European Union law must be interpreted in the light of customary international law, which limited its scope. He had also outlined the adjustments that would be necessary to allow the Union, as a supranational organization, to accede to the European Convention on Human Rights. Mr. Maurizio Moreno, President of the International Institute of Humanitarian Law, San Remo, had talked about his institute and described the challenges faced by international humanitarian law as a result of the changing nature of traditional warfare. Lastly, Mr. David Scharia, of the Counter-Terrorism Committee Executive Directorate of the United Nations, had informed CAHDI about the longstanding cooperation between the Committee and the Council of Europe.

9. CAHDI followed the Commission's work closely. Topics that were regularly included on the CAHDI agenda included the immunity of States and of international organizations and the law and practice of reservations to treaties and interpretative declarations. Although its database focused more on State immunity, CAHDI frequently held exchanges of views on the immunity of State representatives. States regularly informed it of developments in their case law on the subject. The Committee therefore welcomed the appointment of a new Special Rapporteur on that topic. In its capacity as European Observatory of Reservations to International Treaties, CAHDI regularly scrutinized a list of reservations that might be subject to objections and thus participated actively in the "reservations dialogue". It often referred to the Guide to Practice on Reservations to Treaties,[203] which was a mine of information on a very complex subject.

10. In 2011, CAHDI had been pleased to hear Ms. Escobar Hernández's presentation of the work of the Commission at its sixty-third session, and it looked forward to Sir Michael Wood's presentation of the work of the sixty-fourth session. The 44th meeting of CAHDI, to be held in Paris in September 2012, would be followed by a seminar on the topic of judges and customary international law, which had been prompted by the inclusion of Sir Michael's topic, "Formation and evidence of customary international law", in the Commission's programme of work. CAHDI greatly valued its exchanges of views with the Commission.

11. Mr. LEZERTUA (Director of Legal Advice and Public International Law (Jurisconsult)), describing major developments at the Council of Europe in the field of public international law, said that from November 2011 to May 2012 the Committee of Ministers had been chaired by the United Kingdom of Great Britain and Northern Ireland, one of the founding members of the Council and the first State to have ratified the European Convention on Human Rights. During the United Kingdom chairpersonship, the Committee had focused its attention on reform of the European Court of Human Rights and strengthening the implementation of the European Convention on Human Rights; reform of the Council of Europe, which comprised, in addition to the legal aspects mentioned by the previous speaker, budgetary, organizational, institutional and political facets; and strengthening of the rule of law.

12. In May, the chairpersonship had passed to Albania for the first time since that country had joined the Council of Europe in 1995. Like its predecessors, Albania would strive to maintain continuity in the Committee's priorities. For that reason, the reform of the organization, which had been launched by the Secretary General in 2009 and enjoyed the support of all member States, would remain a central concern of the Committee.

[202] The Office of the Ombudsperson was established pursuant to Security Council resolution 1904 (2009) of 17 December 2009 and Ms. Prost was appointed by the Secretary-General on 3 June 2010 (S/2010/282).

[203] *Yearbook … 2011*, vol. II (Part Two), paras. 75–76, and *ibid.*, vol. II (Part Three).

13. The Secretary General's preliminary report on the subject, to which he had referred at the Commission's sixty-third session,[204] had sought to distinguish between key conventions and inactive conventions; suggest conventions that it would be useful to update; promote the accession of the European Union and, possibly, of non-member States to Council of Europe conventions; and propose measures aimed at giving a higher profile to Council of Europe conventions, increasing the number of accessions and strengthening their impact. The Secretary General's final report[205] on the subject was currently being considered by the Rapporteur Group on Legal Co-operation.

14. Turning to the activities of the Treaty Office, he said that the Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health (Medicrime Convention), adopted by the Committee of Ministers on 8 December 2010 and opened for signature in Moscow on 28 October 2011, had already been signed by 15 States. The Convention was the first binding legal instrument to criminalize the counterfeiting, manufacturing and distribution of medical products that were marketed without authorization or failed to meet safety standards. It was open to all countries and offered a framework for international cooperation and enhanced coordination at the national level. In May 2012, the Council of Europe and the Danish Medicines Agency had organized a conference during the Danish Presidency of the Council of the European Union to call attention to the importance of signing and ratifying the Convention.

15. On 13 June 2012, the Committee of Ministers had adopted the Fourth Additional Protocol to the European Convention on Extradition, which, in addition to updating some of the Convention's provisions, was designed to strengthen international cooperation on the matter of extradition. It would be opened for signature on 20 September 2012. The Third Additional Protocol to the Convention, aimed at simplifying and accelerating the extradition procedure when the person concerned consented to extradition, had entered into force on 1 May 2012.

16. A joint study[206] conducted in 2009 by the Council of Europe and the United Nations had shown that trafficking in organs, tissues and cells and human trafficking for the purpose of organ extraction were problems of global proportions that violated basic human rights and posed a direct threat to individual and public health. The Committee of Experts on Trafficking in Human Organs, Tissues and Cells had therefore been mandated to prepare a draft criminal convention against trafficking in human organs and, if necessary, a draft additional protocol to the draft convention concerning trafficking in human tissues and cells.

17. The process of modernizing the Convention for the protection of individuals with regard to automatic processing of personal data had begun in January 2011 with a public consultation to identify the concerns of Governments, civil society and the private sector in that area. One of the main goals of the process was to address the challenges that the use of new information and communication technologies posed to private life. The Consultative Committee of the Convention was considering proposals aimed at updating the Convention and would transmit those approved to the Committee of Ministers.

18. Accession of the European Union to the European Convention on Human Rights had been a key issue for the Council during the past year. An informal working group of 14 experts, half of whom were from European Union member States, had in June 2011 transmitted a draft accession agreement[207] and related documents to the CDDH, which had in turn transmitted those documents to the Committee of Ministers for consideration. On 13 June 2012, the Committee of Ministers had decided to task CDDH with pursuing negotiations with the European Union with a view to finalizing the legal instruments detailing the accession procedure. The *ad hoc* group established for that purpose had met on 21 June 2012 and planned to hold two more meetings in 2012.

19. Among the high-level meetings and conferences organized by the Council of Europe during the past year had been the seventeenth session of the Council's Conference of Ministers responsible for Local and Regional Government, held in Kyiv in November 2011 and focusing on local communities' response to the recession in Europe, transboundary cooperation and the partnership between the Committee of Ministers and the Conference of Ministers. During the United Kingdom chairpersonship, the Committee had organized a high-level conference on the future of the European Court of Human Rights, held in Brighton in April 2012, which had assessed the progress made since the two previous conferences on the same subject and had made specific recommendations pertaining to aspects of the Court's work, including the possibility of amending the European Convention on Human Rights to give the Court the power to issue, on request, advisory opinions on the interpretation of the Convention in specific cases.

20. Lastly, he wished to inform the Commission that the Council would hold its 31st Conference of Ministers of Justice in Vienna in September. The theme of the Conference would be "Responses of justice to urban violence".

21. The Council of Europe attached great importance to cooperation with the Commission and remained convinced that such cooperation could contribute significantly to the development of international law.

22. The CHAIRPERSON thanked Mr. Lezertua for his presentation and invited members of the Commission to pose any questions they might have for Ms. Belliard or Mr. Lezertua.

23. Sir Michael WOOD asked Ms. Belliard how she perceived the relationship between the Council of Europe and the European Union in the field of public international law and whether she thought that the Council of Europe

[204] *Yearbook … 2011*, vol. I, 3101st meeting, para. 16.

[205] See footnote 201 above.

[206] Council of Europe/United Nations, *Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs* (Strasbourg, 2009). Available from https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805ad1bb.

[207] "Draft revised explanatory report to the agreement on the accession of the European Union to the European Convention on Human Rights" (CDDH-UE(2011)08).

was the more active body in that field. Regarding the classification of conventions into four categories, he wished to know whether that classification had been made public.

24. Addressing Mr. Lezertua, he observed that he had been barred from accessing certain parts of the CAHDI website because he was not a member; he therefore wished to have more information about the site and its development. He noted also that representatives of 55 States had attended the CAHDI session, yet the Council of Europe had only 47 members. He would therefore welcome more information about the status of the eight participating States that were not Council members.

25. Mr. MURASE said that the Commission was perceived by many as increasingly outdated and marginalized within the United Nations treaty-making process. Whereas he himself had joined the Commission three years ago with great hopes and ambitions, he had since become disillusioned by such phenomena as a lack of transparency, the slow pace of progress and the dearth of appropriate topics. While those were matters internal to the Commission, he wished to draw attention to certain issues relating to the work of the Sixth Committee, as it was his understanding that CAHDI played a coordinating role in some matters relating to that Committee.

26. When he had served on the Sixth Committee secretariat in the 1980s, he had been impressed by the degree to which delegations were well versed in the items under consideration, including the work of the Commission. In contrast, at the most recent session of the Committee, which he had attended as a representative of his country, he had noted that many Committee members were less experienced delegates who frequently commented on the Commission's work without having read the relevant background documentation. There were moves afoot to use the United Nations Educational, Scientific and Cultural Organization (UNESCO) as an alternative to the Sixth Committee as a treaty-making forum.

27. The Sixth Committee was also, under article 15 of the Commission's statute, responsible for proposing appropriate topics to the Commission, yet the Commission had not received any such proposals from the General Assembly. The election of Commission members also fell within the General Assembly's purview, and in his view the membership needed to be reformed, with more attention to gender balance and the possible introduction of generation quotas; the issue of absenteeism also needed to be tackled. He therefore hoped that at its meetings, CAHDI would consider the points he had just raised.

28. Mr. HASSOUNA asked Ms. Belliard whether CAHDI sometimes issued advisory opinions on important points of international law without being requested to do so by the Committee of Ministers. He also wished to know whether CAHDI had considered establishing relations with organizations other than those mentioned in her presentation, in particular with regional organizations. In his view, an exchange of views between CAHDI and such organizations would be of mutual interest.

29. Ms. BELLIARD (Chairperson of the Committee of Legal Advisers on Public International Law) said that CAHDI played an essential role in the relations between the Council of Europe and the European Union in the field of public international law. The European Union's legal services were increasingly confronting issues relating to public international law; disputes brought before the Court of Justice of the European Union and the European Court of Human Rights attested to that.

30. Regarding the classification of conventions into four categories, she said that the goal of that exercise had been to identify key conventions that member States—and perhaps non-member States—should be encouraged to join and also to identify instruments that had become obsolete. While the classification was proving difficult to implement, the concept was sound and should be pursued. The list in the Secretary General's draft report on the review of conventions was deliberately non-exhaustive in order to circumvent debates regarding its contents.

31. Referring to Mr. Murase's comments, she said that CAHDI was a discussion forum, not a decision-making body. While it might sometimes be in agreement with the United Nations Secretariat, there was no attempt to establish joint positions. Replying to Mr. Hassouna, she said that CAHDI set its own agenda and could comment in its reports on any issue that in its view merited it. She acknowledged that CAHDI should perhaps develop closer ties with more international bodies, especially regional organizations; it should be noted, however, that since CAHDI held only two sessions a year, with full agendas that could accommodate only a limited number of guests, it was difficult in practice to add organizations to the programme.

32. Mr. LEZERTUA (Director of Legal Advice and Public International Law (Jurisconsult)) said that consideration of the question on why the European Union had acceded to a relatively small number of Council of Europe conventions had been suspended pending agreement of the terms of its accession to the European Convention on Human Rights. Once that issue had been settled, it would be possible to resume talks aimed at identifying obstacles to its accession to other Council of Europe conventions.

33. The draft report by the Secretary General on the review of Council of Europe conventions provided for a number of measures, including the promotion of specific conventions, the introduction of a convention-oriented dimension into the Council's programme of work and the regular review of Council of Europe conventions by steering committees with a view to assessing their relevance.

34. A decision had recently been taken to restructure the CAHDI website in order to make needed improvements. He hoped that the next time representatives of CAHDI visited the International Law Commission, its members could report that they had found the improvements helpful.

35. In addition to representatives of Council of Europe member States, participants in the regular meetings of CAHDI included representatives of States having observer status with the Council of Europe, namely Canada, the Holy See, Japan, Mexico and the United States of America. Observer States were frequent participants at regular

meetings of CAHDI, which showed that interest in the work of CAHDI extended beyond European borders. The Committee of Ministers resolution of 9 November 2011 on intergovernmental committees and subordinate bodies, their terms of reference and working methods, contained in document CM/Res(2011)24, governed the details of participation in regular meetings of Council of Europe committees such as CAHDI, including attendance by non-member States that did not have observer status with the Council.

36. CAHDI determined its own meeting agendas and addressed its reports directly to the Committee of Ministers; it could, at its own initiative, request that issues it identified should be considered at the highest level of the organization.

37. Mr. NOLTE said it was his understanding that when the various Council of Europe conventions were placed into categories such categorization did not produce any legal effect. Yet he failed to see how it was possible to escape the conclusion that when a convention was classified as "inactive", for instance, and States parties unanimously expressed their agreement with such a categorization, its provisions were thus obsolete and deprived of any legal force. In such cases, then, the designation "inactive" would seem to have legal effects. He requested clarification of that point.

38. Mr. KITTICHAISAREE pointed out that a Council of Europe secretariat memorandum dated 14 March 2011 and prepared by the Directorate General of Human Rights and Legal Affairs contained an opinion of the European Committee on Crime Problems regarding the principles of universal jurisdiction and *aut dedere aut judicare*.[208] That Committee had held that, since there was no international consensus on the definition and scope of the principle of universal jurisdiction, as the exercise of universal jurisdiction was in practice often subject to legal limitations defined in national legislation, the Council of Europe should maintain its neutral stance in relation to that principle and should reinforce the application of the principle of *aut dedere aut judicare* as a means of prosecuting war crimes effectively in cases where universal jurisdiction could not be exercised. He asked whether, in keeping with that opinion, the Council of Europe had made progress in reinforcing the application of the principle of *aut dedere aut judicare*.

39. Ms. BELLIARD (Chairperson of the Committee of Legal Advisers on Public International Law), replying to Mr. Nolte, said that the classification of Council of Europe conventions did not produce legal effects *per se*. The mere fact of designating a treaty a "key convention", for example, did not mean that if some member States had not ratified it they were nonetheless bound by its provisions. The lists of conventions classified by CAHDI were merely indicative, and the relevant Council of Europe steering committees were responsible for managing the outcome of the reviews of the conventions. Although many different criteria were used in assessing the relevance of Council of Europe conventions, any action taken on the basis of those assessments was taken on a case-by-case basis.

40. Mr. LEZERTUA (Director of Legal Advice and Public International Law (Jurisconsult)), replying to Mr. Kittichaisaree, said that the provisions of many Council of Europe conventions reflected the principle of *aut dedere aut judicare*, and he would furnish the Commission with a list of them.

41. Mr. KAMTO asked how Council of Europe conventions to which the European Union acceded were implemented within the Union's legal system. It would be useful to know which body was responsible for compliance with the provisions of those conventions and which body was responsible for monitoring compliance. He also wished to know whether States that requested observer status with the Council of Europe were required to be member countries of the Organisation for Economic Co-operation and Development (OECD).

42. Ms. ESCOBAR HERNÁNDEZ said that exchanges of experience and information between CAHDI and the Commission were important for both bodies. In view of the decision to improve the CAHDI website, she wondered whether any consideration had been given to providing external users with access to Council of Europe databases containing information supplied by individual member States and organized by subject, some of which was directly relevant to the work of the Commission.

43. She asked what the prospects were for reviving the informal consultations on the subject of the International Criminal Court that had previously been held under the auspices of the Council of Europe. Such an initiative might be timely, given that the first review conference on the Rome Statute of the International Criminal Court had been held in 2010 and the tenth anniversary of the Statute's entry into force had been observed on 1 July 2012.

44. Mr. MURPHY asked whether the CAHDI database on State practice regarding State immunities contained information that would be directly relevant to the work of the Commission on personal immunity. He would welcome any information that the representatives of CAHDI could provide on the exchange of national practices that had taken place at the March 2012 meeting of CAHDI on possibilities for ministries of foreign affairs to raise public international law issues in procedures pending before national tribunals and related to immunities of States or international organizations.

45. Ms. BELLIARD (Chairperson of the Committee of Legal Advisers on Public International Law), replying to Mr. Kamto's question on the status of treaties under European Union law, said that as soon as the European Union acceded to a treaty it formed part of the Union's legal system. Since the European Union had international legal personality, it had responsibility under international law for all the agreements it concluded, under the supervision of the European Court of Justice. When the European Union became party to the European Convention on Human Rights, its application would also be monitored by the European Court of Human Rights.

[208] "Opinion of the European Committee on Crime Problems (CDPC) on Parliamentary Assembly recommendation 1953 (2011) on the obligation of member states and observer states of the Council of Europe to co-operate in the prosecution of war crimes" (CDPC (2011) 5). See in particular paras. 10–11. Available from the Council's website (www.coe.int).

46. Replying to Ms. Escobar Hernández's question concerning the International Criminal Court, she said that CAHDI had not had any contact with the Court recently, but it planned to re-establish such contact in the future.

47. Replying to Mr. Murphy, she said that CAHDI did discuss issues relating to immunities. Such discussions were very open and did not result in detailed reports that the Commission would find particularly useful.

48. Mr. LEZERTUA (Director of Legal Advice and Public International Law (Jurisconsult)) said that observer status in the Council of Europe was governed in the first instance by Statutory Resolution (93) 26 on observer status, adopted by the Committee of Ministers on 14 May 1993, which posed no limitations based on geographical origin or any other status on States applying for observer status. Observer States were entitled to participate in virtually all the activities of the Council. Any State could be granted observer status provided that it was willing to accept the fundamental principles of the organization, namely democracy, the rule of law and the enjoyment of human rights and fundamental freedoms, and wished to cooperate with the Council of Europe in the promotion and defence of those principles.

49. It was also possible to request the Secretary General to grant observer status for a particular committee, such as CAHDI. That was a simpler procedure, which conferred on the requesting State the right to participate in the work of the committee concerned without the right to vote.

50. Another option was to become a special invitee of the Parliamentary Assembly, a status granted by the members of the Assembly to certain States based on their parliamentary relations with the Assembly. However, such status was confined to their participation in the Assembly and did not allow for any intergovernmental activities.

51. Lastly, most Council of Europe conventions now had clauses allowing the Committee of Ministers to invite non-member States that were not observer States to accede to the convention in question and participate in relevant activities, including follow-up mechanisms. Some conventions had elicited significant support and interest, such as the Convention on the transfer of sentenced persons.

52. Turning to the issue of the website raised by Ms. Escobar Hernández, he said that while some databases contained information provided by member States, access to them was, as a rule, for CAHDI members only. The Committee could certainly look into the possibility of opening up some of those databases after a certain period of time had elapsed and the information in question was no longer too recent. The issue was a sensitive one, however, as States provided information on a confidential basis. The consensus of members would thus be required before steps could be taken to open up access to the public, the Commission or international organizations.

53. He agreed with Ms. Belliard that the time had come to re-establish contact with the International Criminal Court. As far as the informal consultations were concerned, he assumed that Ms. Escobar Hernández had been referring to the several rounds of consultations held to facilitate the ratification of the Rome Statute by the Council of Europe member States. Those consultations had come to an end following the entry into force of the instrument.

54. In response to Mr. Murphy, he said that the current database contained information on issues relating to State immunities only, but that during CAHDI in camera proceedings, information on cases relating to the immunity of international organizations or State officials was also discussed. Such information could not be entered in the database without the express consent of CAHDI. However, meeting reports were published, following their approval by the Council of Ministers.

55. The CHAIRPERSON thanked Mr. Lezertua and Ms. Belliard for their statements.

Protection of persons in the event of disasters (*continued*) (A/CN.4/650 and Add.1, sect. C, A/CN.4/652, A/CN.4/L.812)

[Agenda item 4]

Fifth report of the Special Rapporteur (*continued*)

56. Mr. SABOIA congratulated the Special Rapporteur on his fifth report, which, as usual, was clear, well researched and objective. He thanked him also for his comprehensive and well-argued presentation, which had clarified some of the issues that had given rise to differences of opinion during the discussion in the Sixth Committee at the sixty-sixth session of the General Assembly. At the current advanced stage of the debate on the topic, he would focus his comments on issues that appeared to have raised doubts and concerns among members, as well as on the newly proposed draft articles.

57. The report contained a detailed account of the extensive debate held in the Sixth Committee on the draft articles already provisionally adopted (paras. 10–54). The account was indeed useful, as the Commission needed to be mindful of the opinions of States; however, he agreed with Mr. McRae that discussions in the Sixth Committee should not become a straitjacket for the Commission. Members were expected to bring their own best judgment and work on the topic to the Commission.

58. Draft articles 10 and 11 had elicited many comments and some concern, even though the discussion of those texts had been formally concluded. Their provisions had been carefully crafted to articulate a delicate balance of obligations and rights that addressed the paramount issue of protection of persons while stressing the primary role of the affected State and the need to respect its sovereignty and avoid interfering in its internal affairs. He saw no contradiction between the two articles. As paragraph (1) of the commentary[209] made clear, draft article 10 related to draft articles 9 and 5. It was a corollary of the understanding that sovereignty conferred rights upon States and imposed obligations on them, as Judge Álvarez had indicated in a separate opinion in the *Corfu Channel* case. The protection of persons was therefore a duty of States and, according

[209] *Yearbook … 2011*, vol. II (Part Two), p. 158.

to several international instruments and the comments of treaty monitoring bodies cited in the commentary to draft article 10, the affected State had a duty to seek assistance, to the extent that the disaster exceeded its national response capacity. However, that was without prejudice to the affected State's retention of its primary role and right to choose from among other States, the United Nations and other actors the assistance that was most appropriate to its specific needs.

59. Draft article 11 (Consent of the affected State to external assistance) articulated a qualified consent regime in the field of disaster relief operations that was based on the concept of the dual nature of sovereignty entailing both rights and duties, as explained in paragraphs (1) and (3) of the commentary. Several speakers had argued that the word "arbitrarily" in paragraph 2 of the draft article was vague and difficult to define in practice. In paragraph (7) of the commentary,[210] the Special Rapporteur had established several possible criteria for determining whether a decision to withhold consent was arbitrary. Moreover, during the discussion in the Sixth Committee, a constructive suggestion had been made by the delegation of Thailand,[211] which he suggested might be borne in mind when the draft articles were revised on second reading.

60. Offering some general comments on the plenary debate during the current session, he endorsed the view that it was not appropriate to speak of a balance between sovereignty and human rights; the real balance must be between respect for the rights of the affected State and the need to provide assistance to persons in need. Human rights rules were standards agreed among States for the protection of individuals or groups; they stood alone as obligations of all States towards persons under their jurisdiction and had no element of reciprocity. They were universal, interdependent and a legitimate matter of concern for the international community.

61. He thanked Mr. Petrič for having recalled the dynamic nature of concepts such as domestic jurisdiction. Article 2, paragraph 7, of the Charter of the United Nations had, until the 1960s, prevented the Organization from tackling the crime of apartheid and any complaints regarding human rights violations. Under political pressure, legal opinion had subsequently shifted, and it had been determined that apartheid was a matter of concern to the international community as a whole.[212] That had paved the way for the current United Nations system of human rights monitoring that had evolved as a result of treaties and the work of the human rights bodies.

62. He had been surprised by the comment that there was no point in referring to the human rights of persons affected by disasters, as no one had ever called such rights into question. Persons affected by disasters were quite likely to be subjected to treatment that affected their rights and their dignity, particularly when a disaster resulted in protracted displacement under difficult conditions. Of course, it did not necessarily follow that the affected State, overwhelmed by the effects of the disaster, was to blame for all the suffering endured by its population; nevertheless, there was certainly justification for bearing human rights in mind, even while conceding that certain derogations were unavoidable.

63. Without going into detail, he wished to endorse the position taken by the Special Rapporteur in the chapter of his report on the question posed by the Commission in chapter III of its report on the work of its sixty-third session[213] (paras. 55–78).

64. As regards the following chapter on elaboration on the duty to cooperate, he concurred with the analysis provided by the Special Rapporteur in paragraphs 79 to 116 of the report and the conclusion that, in the present context, the duty to cooperate was an obligation of conduct rather than an obligation of result. The duty to cooperate was an important cornerstone of the United Nations system, particularly where economic, social and humanitarian issues were concerned. However, it should be emphasized that in some cases, when such a duty was defined by measurable goals or obligations subject to the supervision of the treaty monitoring bodies, the duty to cooperate might also comprise elements of an obligation of result.

65. It had been suggested, with regard to section C of that chapter, which described the categories of cooperation relevant for disaster relief assistance, that reference should be made to cooperation in other areas, in particular preparedness and prevention, as well as in post-disaster phases, such as reconstruction and sustainable development. However, it should not be overlooked that the extent of the personal damage suffered in disasters was often the result of poverty, including a lack of safe and adequate housing and access to drinkable water and sanitation. He would be in favour of a specific reference to such factors. In any event, the Special Rapporteur had stated his intention to deal with pre- and post-disaster phases at a later stage.

66. He expressed support for draft article A, which provided a more specific elaboration of the duty to cooperate in the context of disaster relief. He assumed that the list contained in the draft article was not exhaustive and that the Commission might incorporate in it some of the suggestions made during the plenary debate such as Mr. Forteau's suggestion to include a reference to financial assistance.

67. He agreed that draft article 13 required more substance as well as a possible word of caution to the effect that conditions imposed should not impair the timely and efficient provision of assistance. However, that matter could be addressed in the Drafting Committee.

68. He shared the view that draft article 14 was in need of some improvement, for the sake of accuracy and consistency with the assumption that the affected State retained the power to determine when assistance should be terminated.

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[210] *Ibid*., p. 162.

[211] *Official Records of the General Assembly, Sixty-sixth Session, Sixth Committee*, 24th meeting (A/C.6/66/SR.24), para. 91.

[212] See, among others, General Assembly resolutions 1375 (XIV) of 17 November 1959 and 1761 (XVII) of 6 November 1962, and Security Council resolution S/134 (1960) of 1 April 1960.

[213] *Yearbook … 2011*, vol. II (Part Two), paras. 43–44.

69. In response to the comments made with regard to the need to make greater reference to the operational aspects of assistance, he recalled that IFRC had specifically requested that the Commission should leave operational matters aside,[214] as it would risk duplicating the Federation's rules[215] in areas where its expertise was incontestable. The Commission's task had instead been defined as the provision of a broad general framework of legal rules on the applicable principles of law and the rights and duties of the main actors. Thus, while Mr. Murase's proposal to draft a model status-of-forces agreement for disaster situations was very interesting and might well be useful, the Commission must determine whether such a task would entail a change in the scope of the topic; the Special Rapporteur's views on that proposal would be most welcome.

70. In conclusion, he recommended the referral of the three draft articles to the Drafting Committee and reiterated his thanks to the Special Rapporteur for his outstanding contribution.

The meeting rose at 12.45 p.m.

3141st MEETING

Thursday, 5 July 2012, at 10.10 a.m.

Chairperson: Mr. Lucius CAFLISCH

Present: Mr. Al-Marri, Mr. Candioti, Mr. Comissário Afonso, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Gómez Robledo, Mr. Hassouna, Ms. Jacobsson, Mr. Kamto, Mr. Kittichaisaree, Mr. Laraba, Mr. McRae, Mr. Murase, Mr. Murphy, Mr. Niehaus, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Wisnumurti, Sir Michael Wood.

Tribute to the memory of Mr. Choung Il Chee, former member of the Commission

1. The CHAIRPERSON said that it was his sad duty to inform members of the Commission of the death of Mr. Choung Il Chee on 1 May 2012. A member of the Commission from 2002 to 2006, eminent jurist and member of various university associations, Mr. Chee had participated in several important international conferences, including on fisheries and the environment. A professor of international public law at Hanyang University in Seoul, he had also been the author of many publications and articles and had made a substantial contribution to the literature of international law. His vast experience, in-depth knowledge and friendly and collegial manner would be remembered by everyone who knew him.

At the invitation of the Chairperson, the members of the Commission observed a minute of silence.

2. Mr. PARK expressed thanks, on his own behalf and on behalf of the Permanent Mission of the Republic of Korea to the United Nations Office at Geneva, to members of the Bureau and, more generally, members of the Commission for having taken the initiative to organize the tribute to Mr. Chee. After finishing his studies at the University of Seoul, Mr. Chee had studied international law and international relations at Georgetown University and New York University in the United States of America, where he had taught for 10 years. He had then returned to the Republic of Korea in the mid-1970s, where he had also taught and had carried out important research work. An expert in fisheries, he had participated in a number of conferences on maritime law and had left behind him several authoritative publications in Korean and English.

3. Mr. MURASE said that he had been saddened to hear of the death of Mr. Chee, whom he had encountered several times at meetings of the Japan branch of the International Law Association in Tokyo. He had been a sincere, frank and direct man who hated hypocrisy more than anything. He had made no secret of his feelings about Japan's colonial past in Korea, which he condemned. He sometimes brought up the subject during the Commission's meetings, departing from the topic under discussion, something which he had every right to do, however, since his country had been subjected to such horrendous atrocities. As he himself abhorred hypocrisy, he could understand Mr. Chee's angry reaction and would have reacted the same way. The death, on 15 July 1907, of the Korean diplomat Yi Jun, who had gone to The Hague to plead for Korean independence at the second International Peace Conference, had deeply affected Mr. Chee, who had eloquently argued that such events should not happen again.

4. Mr. CANDIOTI joined all speakers who had expressed their sorrow at the death of Mr. Chee. He had had the honour of sitting next to Mr. Chee from 2002 to 2006 and remembered a friendly, affable man with a solid knowledge of international law who was particularly committed to the work of the Commission. On behalf of the Group of Latin American and Caribbean States, he expressed his condolences to Mr. Chee's family and to the Republic of Korea.

5. Mr. KAMTO said that the successive announcements of the deaths of former members of the Commission served as a reminder of the fragility of the human condition. There was one lesson that current members could learn: they must perform their tasks to the best of their ability, with rigour and courtesy, in order to preserve the best possible memories of the moments they shared. He had had the privilege and honour of being well acquainted with Professor Chee, who had joined the Commission in 2002, after his own arrival, and had sat near him. He remembered a delightful man with a thorough knowledge of the international situation in the aftermath of the Second World War, and he recalled their conversations about the 1960s, when the Republic of Korea had been at the same level of development as a number of African countries.

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[214] See the second report of the Special Rapporteur, *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/615, para. 28.

[215] IFRC, *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance* (Geneva, 2011). Available from www.ifrc.org/PageFiles/41203/1205600-IDRL%20Guidelines-EN-LR%20(2).pdf.