

Statements by Professor Georg Nolte in the International Law Commission

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71th Session (2019)

3455th Meeting, 1 May 2019

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Provisional summary record of the 3455th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 1 May 2019, at 10 a.m.

Crimes against humanity (continued)

(p. 10) Mr. Nolte said that the Special Rapporteur's fourth report was impressive, not only because of its – justified – length but also because of the Special Rapporteur's meticulous description and fair and consistent assessment of the many comments and observations made by States, international organizations, non-governmental organizations and individuals. The report demonstrated that the draft articles and the recommended changes thereto were a solid basis for a possible multilateral convention establishing common standards and inter-State cooperation with respect to the prevention and prosecution of crimes against humanity.

The draft articles adopted by the Commission on first reading in 2017 had generated much interest among States, international organizations and others. The overwhelming majority of the comments received by the Commission had been positive and, very importantly, most proposals for change had been constructive and concerned specific points.

The fact that there was a separate initiative to draft a mutual legal assistance convention on crimes against humanity, genocide and war crimes was noteworthy and important, but it would be for States to determine the relationship between that initiative and the outcome of the Commission's work. In any case, he agreed with Ms. Lehto that the Commission's draft articles were standard-setting.

Before making specific comments, he wished to respond to the methodological criticism expressed by Mr. Rajput, who had said that it was not clear why the draft articles borrowed language from certain treaties, in particular the United Nations Convention against Corruption, but not others, and whose preference was for the Commission to use more language from the Rome Statute of the International Criminal Court. His own explanation for the Commission's

choices on first reading was that the aim of the project was not to set up a fully fledged institution like the International Criminal Court but to facilitate international cooperation by providing for a degree of harmonization and for procedures for cooperation. Consequently, treaties on transnational criminal cooperation often provided a fitting model, and it was not necessary to spell out many of the rules and guarantees contained in the Rome Statute.

Turning to the title of the project, he said that he agreed with Sir Michael Wood's proposal to place a title above the draft preamble referring to the prevention and punishment of crimes against humanity, which would, in his view, address the concern voiced by Mr. Tladi in that respect.

Regarding the draft preamble, he understood that some States and previous speakers were concerned about the possible implications of the reference to *jus cogens* in the third preambular paragraph, and the assertion, in the fourth preambular paragraph, that crimes against humanity "must be prevented in conformity with international law". He was open-minded in respect of both concerns. If the reference to *jus cogens* was retained, it should be explained in the commentary that the *jus cogens* character of the prohibition of crimes against humanity had certain undisputed effects, whereas other possible effects were less certain. He would not be opposed to adding a paragraph on the prohibition of the use of force and the principle of non-intervention, as proposed by the United States of America, Mr. Park and Mr. Rajput. Alternatively, it should be emphasized more strongly in the commentary that the reference to "conformity with international law" concerned primarily the prohibition of the use of force and the principle of non-intervention.

He agreed with the Special Rapporteur that draft article 2 had an important expository function, like article I of the Convention on the Prevention and Punishment of the Crime of Genocide, and that, therefore, "the meaning and explanation of the general obligation set forth in draft article 2 is to be found not in draft article 2 itself ... but in the other more specific obligations set forth in the draft articles". That point could be further emphasized in the commentary. The term "crimes under international law" was clearly explained in the commentary and should be retained.

With regard to draft article 3, he agreed with the Special Rapporteur that "the very strong support in favour of closely adhering to the definition of crimes against humanity that appears in article 7 of the Rome Statute of the International Criminal Court warrants few, if any, changes to that text". Nevertheless, he also agreed with the Special Rapporteur's carefully reasoned proposal to delete the final part of paragraph 1 (*h*), which read "or in connection with the crime of genocide or war crimes". The equivalent provision in article 7 (1) (*h*) of the Rome Statute established a form of jurisdiction that was specific to the International Criminal Court, and there was no such clause in the definitions of crimes against humanity laid down in the national laws of States or in the statutes of contemporary international criminal tribunals.

However, the deletion of the entire second half of subparagraph (*h*) would, in his view, go too far in broadening the definition of crimes against humanity. It was of fundamental importance that the definition remained grounded in universal consensus, particularly if the reference to *jus cogens* in the preamble was retained. He therefore continued to agree with the Special Rapporteur that the clause "in connection with any act referred to in this paragraph" should remain. Even though no such connection was established in the constituent instruments of some international criminal tribunals, such tribunals did not typically require persecution to be of "equal gravity" to other acts that could constitute crimes against humanity. Claus Kreß and Sévane Garibian had argued persuasively that the deeper reason for the importance of certain limits in the definition and interpretation of crimes against humanity was expressed in the opening words of the elements of crimes against humanity as defined in article 7 of the Rome Statute:

Since article 7 pertains to international criminal law, its provisions, consistent with article 22, must be strictly construed, taking into account that crimes against humanity as defined in article 7 are among the most serious crimes of concern to the international community as a whole ... and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.

It should thus be highlighted, in the commentary to draft article 3 (1) (*h*), that persecution must be of “equal gravity”. In that connection, the United States of America appeared to be justified in warning against “an overly broad definition of [crimes against humanity] in which ordinary criminal activity by gangs and other organized criminals would qualify as crimes against humanity”.

He agreed that paragraph 3, which defined “gender”, and the words “as defined in paragraph 3” in paragraph 1 (*h*), should be deleted, given the developments that had occurred, and the manner in which viewpoints had evolved, since the adoption of the Rome Statute. It should be clarified, in the commentary, that the interpretation of the term “gender” must be in accordance with international law, particularly international human rights law. The commentary should also provide an overview of current understandings. Lastly, he agreed that the first sentence of paragraph 4 should include a reference to customary international law.

Concerning draft article 4, he was not entirely convinced by the Special Rapporteur’s proposal – made in response to a request from certain States – to introduce a new paragraph 1 that would begin: “Each State undertakes not to engage in acts that constitute crimes against humanity”. He wondered whether such an explicit undertaking of what was already an undisputed *jus cogens* obligation might weaken, or call into question, the firmly established nature of that obligation. The term “undertake” would, after all, seem to suggest the establishment of a new obligation. However, should the Commission wish to include such an undertaking, it would be better to do so in draft article 2, entitled “general obligation”.

He was also not convinced that the inclusion of a reference to “education and training programmes” in paragraph 2 (*a*) would remedy the perceived lack of specificity of the draft article. Given the diversity of situations that existed, the measures that might be necessary or desirable to prevent crimes against humanity could be equally diverse, and thus an obligation to take preventive measures could and should not be too specific. In any event, mentioning a measure by way of example did not make the provision more specific. Rather, it pointed the reader in a particular direction, in the current case towards softer measures. In his view, the examples of “other preventive measures” in the commentary provided sufficient clarification. He did, however, agree with the Special Rapporteur that the reference to “territory under a State’s jurisdiction” and the obligation to cooperate with “others” “as appropriate” struck the right balance.

In draft article 5, the phrase “territory under the jurisdiction of” should be deleted, as proposed by the Special Rapporteur. Regarding draft article 6, he agreed with the Special Rapporteur’s recommendation to replace paragraph 3 on command/superior responsibility with a text inspired by Protocol I additional to the Geneva Conventions of 1949, while bearing in mind more recent formulations by the International Committee of the Red Cross.

It was clear, from paragraphs 145 to 147 and paragraph 151 of the report, that the relationship between “irrelevance of official capacity”, on the one hand, and possible immunities, on the other, was a sensitive issue for States. In his view, it was important for the Commission to maintain the delicate balance that it had achieved with regard to possible immunities in the commentary to draft article 6 (5). Should that balance be upset, the readiness of many States to ratify a possible convention would be put at risk. Therefore, although it would be better, for the purposes of clarity and transparency, to address the issue of immunities explicitly in one way or another, he would leave draft article 6 and the commentary thereto as they stood.

He supported the proposal made by the Special Rapporteur in paragraph 161 of the report to replace paragraph 3 with a text that built upon Protocol I additional to the Geneva Conventions of 1949.

He agreed with the concern expressed by some States that the duty to notify in draft article 9 (3) should not be formulated too strictly, as other legitimate interests in the pursuit of justice might thereby be prejudiced. The Special Rapporteur's proposal to add the words "as appropriate" after "shall" took care of that concern.

The Special Rapporteur's proposal to replace the text of draft article 10 with a formula that was more closely aligned with the standard "Hague formula" was satisfactory. It should be clarified, in the commentary, that the duty to prosecute could also be fulfilled through an investigation that concluded that allegations had already been investigated elsewhere and had been found to be without basis.

With regard to draft article 11, while it might technically be correct to say that human rights law was part and parcel of international law, and that it was therefore unnecessary to mention human rights law explicitly, in a provision that concerned the "fair treatment" of persons, it was, in his view, appropriate to include such a reference. Like Mr. Hassouna, Mr. Rajput and Mr. Tladi, he proposed that, instead of deleting the reference to "human rights law", the Commission should include an additional reference to "international humanitarian law", and thereby mention both areas of law, as it did in draft article 5 (2).

Concerning draft article 12, he agreed with the reasons given by the Special Rapporteur in paragraph 223 of his report for not attempting to define, in the draft articles, the concept of "victim". The Special Rapporteur touched upon an important point in paragraph 230 of his report, in his reaction to the wish of Australia "to clarify that a State would not be under an obligation to provide compensation for victims of crimes against humanity perpetrated by a foreign government outside of the said State's territory or jurisdiction". He supported the Special Rapporteur's proposal to clarify that the right to obtain reparation was linked to crimes against humanity "committed through acts attributable to the State under international law or committed in any territory under its jurisdiction".

He agreed, in principle, with the Special Rapporteur's proposal, in paragraph 256 of his report, to reformulate draft article 13 (1) to include the sentence "a requested State shall give due consideration to the request of the State in whose territory the alleged offence has occurred". He would, however, replace the term "in whose territory" with "the territory under whose jurisdiction", which would keep the terminology consistent with the first sentence of draft article 13 (1) and a number of other provisions of the draft articles.

As to draft article 14, he agreed with the Special Rapporteur's proposal, which had been supported by Mr. Park, to delete the phrase "except that the provisions of this draft article shall apply to the extent that they provide for greater mutual legal assistance". The deletion would reduce the complexity of paragraph 7 and adapt it to more widely used models in other treaties. Although he supported the aim of improving standards of mutual legal assistance, the paragraph as it stood would lead to legal uncertainty, since, as stated by Germany, "it is practically significant that specific bilateral or (regional) multilateral agreements, where they exist, take priority in co-operation on crimes against humanity".

Concerning possible additional articles, he supported the proposal, in paragraph 299 of the report, to include a new draft article 13 *bis* entitled "Transfer of sentenced persons". Such transfers could contribute to the fair treatment and effective rehabilitation of sentenced persons. To address the concerns of Mr. Tladi and Sir Michael Wood, it should be confirmed, in the commentary, that draft article 13 *bis* was fully discretionary.

Although he was attracted to the proposal by France to include a provision on the relationship between the draft articles and the obligations of States in respect of international criminal tribunals, he ultimately agreed with the reasons given by the Special Rapporteur for not doing so. There was no real need for such a provision, and its inclusion could create difficulties and undesired side effects.

Regarding a possible provision on amnesties, the Commission had, on first reading, succeeded in finding a delicate balance in the commentary to draft article 10. In the interests of wide acceptance, by States, of a possible convention, it was not advisable to introduce a draft article providing for a blanket prohibition on amnesties. A more nuanced solution would currently be very difficult to achieve.

As stated by the Special Rapporteur, there were good reasons for not having additional articles on an institutionalized mechanism, the application of the draft articles to all parts of the territory of a State or the possibility of reservations. He looked forward to discussing, with other members of the Commission, the final form that the draft articles should take.

In conclusion, he wished to thank the Special Rapporteur again for his outstanding work in persuasively assessing an extraordinary number of comments from States, international organizations and others, and for sensitively indicating a reasonable path forward. The foundations for the successful completion of what was an important project had been laid. He recommended sending all the draft articles to the Drafting Committee.

3461st Meeting, 10 May 2019

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Peremptory norms of general international law (*jus cogens*)
(continued)

(p. 3) Mr. Nolte said that he wished to thank the Special Rapporteur for his rich and readable report. He much appreciated the fact that the Special Rapporteur had set out his sources and reasoning transparently, and had fairly indicated possible alternatives.

The report first addressed the question of regional *jus cogens*. The Special Rapporteur proposed that no draft conclusion on that matter should be adopted, and that it should be explained in the commentary that “international law does not recognize the notion of regional *jus cogens*”. He agreed with the Special Rapporteur that the Commission should not adopt a draft conclusion on regional *jus cogens*, but he did not believe that a definite negative statement in the commentary about its possible existence would be justified. In his view, the Commission should leave the question open and not address it at all, as had been suggested by, among others, Sir Michael Wood, Mr. Park and Mr. Hmoud. He would now set out the reasons on which that view was based.

He agreed with the Special Rapporteur that peremptory norms of general international law (*jus cogens*) often originated from certain regions, in particular from regional treaty law, and that regional bodies had sometimes played a crucial role in identifying existing universal *jus cogens*. But that observation did not, in his view, carry any negative implication regarding the possible existence of regional *jus cogens*; quite the contrary, in fact. It thus could not justify the Commission’s dismissing the existence of regional *jus cogens* definitively, even if only in a commentary.

The Special Rapporteur put forward a number of arguments in his fourth report, which, according to that report, militated against the possibility of regional *jus cogens*. The Special Rapporteur relied, *inter alia*, on the text of article 53 of the 1969 Vienna Convention on the Law of Treaties, the previous work of the Commission, a lack of State practice and a lack of support in the Sixth Committee, as well as on considerations of legal certainty and practicality, in particular with regard to non-regional parties. He would address each of those argu-

ments in turn and then elaborate on why he considered it unwise for the Commission to make a statement in the commentary definitively excluding the existence of regional *jus cogens*.

Article 53 of the 1969 Vienna Convention provided that “a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole”. That definition referred only to norms of general international law and its wording thus did not exclude the possibility of regional *jus cogens*. In echoing concerns formulated by some States and scholars, the Special Rapporteur seemed to be convinced that the words “accepted and recognized by the international community of States as a whole” argued against the possibility of regional *jus cogens*. Yet, the *travaux préparatoires* showed that the words “as a whole” had not been inserted to exclude regional *jus cogens*. According to the report of the Chairman of the Drafting Committee, those words had been inserted only to ensure that recognition and acceptance by all States was not necessary. Indeed, the term “general international law” simply indicated that, at the time of the adoption of the Vienna Convention, regional *jus cogens* was considered to be outside the scope of article 53. Its possible existence was not rejected; it was simply not further examined, and thus excluded from the scope of article 53.

He did not share the Special Rapporteur’s observations, in paragraphs 26 and 37 of the report, that there was no State practice indicating the possible existence of regional *jus cogens*. The practice of Latin American States with regard to the prohibition of enforced disappearance and to the prohibition of arbitrary discrimination, mentioned by the Special Rapporteur in paragraphs 126 and 127, deserved closer attention in that regard. The Inter-American Commission on Human Rights, in *James Terry Roach and Jay Pinkerton v. the United States*, had explicitly referred to the acceptance and recognition of the prohibition of the execution of children by the member States of the Organization of American States. That conclusion was not altered by the fact that the Inter-American Commission had later found that that prohibition had a universal *jus cogens* character.

Practice in Europe suggested that the core of the right of access to a court might be an example of regional *jus cogens*. European courts had described such access as a “foundation” of the “European public order”. They had occasionally attributed effects to that guarantee which were comparable to the legal effect attributed to peremptory norms of general international law, such as the invalidity of reservations to the jurisdiction of the European Court of Human Rights. While he would not go so far as to say that the courts’ reasoning in the cases in question was correct, their judgments could not simply be dismissed.

While it was true that a number of States had expressed reservations about regional *jus cogens* in the Sixth Committee, there had been others, notably Spain, Belarus and the Netherlands, that had adopted a positive attitude in that regard. The question had not, however, been fully debated owing in part to the paucity of Commission work on the subject which could have provided a basis for discussion.

It was thus not simply a few authors who supported the position that the definition of peremptory norms of international law in article 53 was not exhaustive, or the possibility of regional *jus cogens*; there was also support in regional practice and in statements by States.

Considerations of legal certainty and predictability should not prevent the possible recognition of regional *jus cogens*. The latter could apply only among the members of a regional legal system (*inter partes*) and could not be invoked against non-members. He agreed with Ms. Lehto that the term “regional” could simply be defined according to the basis of the regional *jus cogens* norm concerned: if that basis was a regional treaty, the States who were parties to it were bound by that norm. If the basis was regional custom, the region encompassed all States which were bound by the customary rule or particular custom concerned. In accordance

with the Commission's conclusions on identification of customary international law, no member of the region could be bound without its consent by a norm of regional *jus cogens*.

Lastly, and perhaps most importantly, regional *jus cogens* must not contradict or undermine universal *jus cogens*. If the Commission were to say anything regarding the subject, it should be that universal *jus cogens* took precedence over any possible regional *jus cogens* and that the peremptory rules of general international law would deprive any regional international law, including regional *jus cogens*, of its validity and legal effects.

For all those reasons, he was of the view that the report did not provide a sufficient basis for the Commission categorically to reject, in the commentaries, the possibility of regional *jus cogens* norms. The question should be left open. The Commission should simply explain, in the commentaries, that the draft conclusions did not deal with that matter, since it was outside the scope of the topic.

The second question submitted to the Commission by the Special Rapporteur was whether the draft conclusions should include an illustrative list of norms of *jus cogens*. In a change from the preference he had expressed in his first report, the Special Rapporteur was now in favour of the inclusion of such a list and proposed a draft conclusion to that effect. He himself had previously expressed a preference for not having an illustrative list, even in the commentaries; after reading the fourth report and listening to the debate, his view remained unchanged in that regard.

Before explaining why he was of the view that the Commission should not adopt an illustrative list of norms of *jus cogens*, he wished to make clear that it was not because he disagreed with the Special Rapporteur about the fact that the norms referred to in draft conclusion 24 were, in substance, *jus cogens* norms. He thought, however, that the difficulties involved in formulating and explaining those norms, in the context of the current project and at the current stage, were such that they should deter the Commission from seeking to adopt such a list, either as part of a conclusion or in the commentaries.

Of the many reasons why the Commission should not adopt a conclusion such as proposed draft conclusion 24, he wished to focus on two of particular importance.

The first reason concerned the character of the topic. As the Special Rapporteur had himself repeatedly emphasized, the topic was fundamentally concerned with methodology. That was why the outcome of the Commission's work would consist mainly of conclusions that described how *jus cogens* norms were to be identified and what their effects were. In other words, the topic was about secondary rules. The Commission had never claimed or suggested that the purpose of the topic was to identify the content of specific primary rules of *jus cogens*, a matter which deserved to be dealt with in a separate project.

Indeed, the Special Rapporteur did not state that draft conclusion 24 would satisfy such an ambitious claim. He merely proposed an "illustrative" list. Two questions that arose in that regard were, first, what was meant by "illustrative" and, second, what exactly should be "illustrated". In his view, illustrations should illustrate the object concerned, namely the other draft conclusions, not *jus cogens* as such. Accordingly, the word "illustrative" should mean showing how the methodology set out in the draft conclusions should be, or had been, used. However, neither the report nor the draft conclusion did that. The report did not shed any light on how the existence of certain *jus cogens* norms could be explained by applying the methodology of the draft conclusions provisionally adopted by the Drafting Committee. It merely acknowledged that the Commission had recognized those norms. Three examples would serve to illustrate the point.

First, the Special Rapporteur explained the *jus cogens* character of "the basic rules of international humanitarian law" by referring to decisions of the International Court of Justice, dis-

senting opinions of individual judges, decisions of international criminal tribunals and three domestic courts' decisions. Although those rules were indeed *jus cogens* norms, mere references to court judgments did not illustrate the methodology proposed in the draft conclusions, in that they did not demonstrate that the norm had been accepted and recognized by the international community as a whole as a norm from which no derogation was permitted, as was required by draft conclusion 4. Court decisions certainly constituted an element of acceptance and recognition, but they could not form the sole basis thereof.

Second, the Special Rapporteur's justification for including the prohibition of apartheid and racial discrimination, and the right to self-determination, in draft conclusion 24 relied heavily on United Nations General Assembly resolutions. However, the Commission, in its draft conclusion 12 on identification of customary international law, and States in the Sixth Committee had taken a cautious approach to the weight of such resolutions. In the context of *jus cogens* it would therefore have been helpful to know why and under what circumstances General Assembly resolutions could serve as a form of evidence of the acceptance and recognition requirement in the sense of draft conclusion 8 (2) and hence be indicative for the identification of the prohibition of apartheid as a *jus cogens* norm. He wondered if there was any difference between, for example, the prohibition of apartheid and the right to water, on which the General Assembly had adopted resolution 70/169 of 17 December 2015, which affirmed that "human rights to safe drinking water ... are essential for the full enjoyment of the right to life and all human rights".

Third, the report based the *jus cogens* character of the prohibition of aggression on indirect references in two decisions of the International Court of Justice, on General Assembly resolution 3314 (XXIX), statements by some 20 States and four decisions of domestic courts. He wondered whether those sources could be taken to reflect recognition and acceptance by the international community as a whole of a specific, delineated norm and whether, in fact, the answer to that question basically depended on the scope and content of the prohibition. Ms. Lehto had pointed to the difficulties that arose in any attempt to answer those questions.

In the light of those and other possible examples, he was convinced that an illustrative list, based on arguments such as those set out in the report, would generate more questions than answers. In fact, he would even go one step further: such a list, and the explanation thereof, would undermine the other conclusions and thus the methodological standards which the Commission was primarily trying to identify and establish. Indeed, the Special Rapporteur explained the *jus cogens* articulated in draft conclusion 24 on the basis of diverging argumentative patterns. He was therefore not convinced that the justification given in the report for those norms adhered to the methodology as articulated in the provisionally adopted draft conclusions.

The second reason why he was not in favour of the Commission's adopting draft conclusion 24 was more substantive. At the Commission's 3459th meeting, Mr. Petrič had asked why the Commission should not state the obvious, namely that the prohibition of genocide was a *jus cogens* norm. His own answer to that question was that, if the Commission wished to state the obvious, it had to decide and explain what the obvious was, something which, unfortunately, was far from obvious, as was plain from the significantly different reasons given for the *jus cogens* nature of the right to self-determination by Mr. Petrič and the Special Rapporteur. Given the importance of *jus cogens* for international law, the Commission should not simply "provide 'something'", as the Special Rapporteur put it in paragraph 54 of his report, by just adding a few examples of those norms of *jus cogens* that the Commission itself had previously recognized.

Putting the substance of draft conclusion 24 in the commentaries, as had been proposed by some members, would resemble a classic form of compromise to which the Commission often

reverted. Such a middle-ground solution would be neither fit for purpose nor elegant. It would constitute an anticlimax and be counterproductive. The mountain would have given birth to a mouse.

In his view, it would not be a sign of weakness if the Commission restricted itself to the secondary rules regarding the identification of peremptory norms of general international law and their consequences. It would, however, be a sign of weakness if it merely repeated the examples which it had previously recognized, whether in a draft conclusion, an annex or in the commentaries. Perhaps the aim of such an approach was to show that the Commission was not retreating. The Commission would not be retreating, however, if it simply did not address the issue of the primary norms of *jus cogens*. It could, in the general introduction to the commentary, make clear that it had not addressed that matter, and it would thereby avoid all the possible negative implications connected with the adoption of a list.

Peremptory norms of general international law were the most important norms of international law. Their significance, force and status should not be called into question, least of all by the Commission. It was precisely that concern for the importance of those norms which prevented him from supporting draft conclusion 24 or its referral to the Drafting Committee. He was also unpersuaded by proposals to put similar wording in the commentary.

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Provisional

For participants only

1 July 2019

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International Law Commission
Seventy-first session (first part)**Provisional summary record of the 3467th meeting**

Held at the Palais des Nations, Geneva, on Tuesday, 21 May 2019, at 10 a.m.

Protection of the environment in relation to armed conflicts
(continued)

(p. 11) Mr. Nolte said that the Special Rapporteur had produced a broad-minded and thoroughly researched report on protection of the environment in relation to armed conflicts and that she had succeeded in describing the many complex challenges, both factual and legal, which the topic entailed. He particularly appreciated the transparency with which the Special Rapporteur made it clear that most of the draft principles proposed were aimed at progressively developing the law, not at codifying existing law. To his mind, that was a strength, not a weakness. He therefore did not agree with Mr. Murphy that there was a lack of clarity as to whether the principles in question were “legal principles, moral principles, non-binding guidelines or some combination thereof”. On the contrary, the Special Rapporteur made it clear throughout the report, and not only through the choice of the word “should” or “shall”, whether a particular principle was meant to progressively develop the law or to restate existing international law.

In any case, the question of whether the work under a given topic generally pursued the goal of progressive development or codification was the wrong question for most topics. The work itself was not an exercise in one or the other; that distinction was relevant only to the individual provisions adopted by the Commission for each topic. It was not the designation of the Commission’s output as draft articles, conclusions, principles or guidelines that determined whether a particular provision was a restatement of the law, and thus a form of codification, or whether it was more policy-oriented, and thus a form of progressive development.

The Special Rapporteur’s approach was not, *pace* Mr. Murphy, a “jumble of both law and policy” that left States “to guess which was which”. Rather, it was an approach that enabled the Commission to more freely discuss the policy choices she proposed. The Special Rapporteur had provided the Commission with much material from which such policy choices could be drawn. It thus did not matter that a significant number of the materials and sources quoted in the report were not authoritative statements of the law, but duly considered positions ar-

rived at by respected bodies that had reflected on the spirit of the law, even though that spirit had not yet been translated into firm legal rules.

He agreed with the Special Rapporteur that the proposed principles' focus on private corporations rather than armed groups was appropriate, or at least not inappropriate, as the aim was to concentrate on what States could reasonably do when devising regulations to protect the environment in the event of an armed conflict. He also agreed that the international responsibility of organized armed groups, while not a legally uncharted area, was a fragmented topic on which few solid conclusions could be drawn. He would add that the rules regarding the responsibility of such groups should be identified and developed in a different framework, not in the context of the draft principles under discussion. From that perspective, the formulation of recommendations regarding private corporations did not appear to be an effort, as Mr. Murphy had suggested, to stigmatize them as the "lone villains" while overlooking "insurgencies, militias, criminal organizations and individual criminals". Perhaps, as had been suggested, some principles could be added to restate the rules on the conduct of, and responsibility for, armed conflict.

The problem with regard to extraterritorial jurisdiction seemed to be that certain host States were unable to protect their people and their environment from the effects of armed conflict. In such cases, it made sense for other States to assist such temporarily disabled States by exercising a degree of control over the legal persons under their own jurisdiction. But such benevolent protection could turn into paternalistic interference when a host State made certain legitimate policy choices, including the exercise of its right to freely dispose of its natural resources. The Special Rapporteur had recognized that problem in her introductory statement, in which she had noted that a host State might not be in a position to effectively enforce its legislation and that, in such situations, the home State of a multinational enterprise had a particularly important role to play in providing an effective remedy for alleged wrongdoing. She had also pointed to a very interesting recent judgment of the Supreme Court of the United Kingdom, in *Vedanta Resources PLC and another (Appellants) v. Lungowe and others (Respondents)*, in which the Court had decided that the case should proceed through the English courts even though there was no question about the competence, independence and integrity of the Zambian courts or the ability of the Zambian State to enforce their judgments. The Court's judgment might well serve as an illustration of the ambiguous role that third States and their courts could play in certain situations. Such States also had a responsibility to ensure that their courts took the legislative choices and judicial systems of other States seriously.

He therefore suggested that if the Commission adopted draft principles recommending the exercise of extraterritorial jurisdiction, it should reaffirm the policy space available for the regulation of a multitude of situations, while also recommending that the exercise of extraterritorial jurisdiction should be limited so as not to interfere with the legitimate policy choices of other States. Perhaps one way to achieve that aim would be to state that such jurisdiction could be exercised only if it served to ensure respect for generally recognized human rights and the rights of other States.

As for the draft principles themselves, he supported proposed draft principle 13 *ter*, on pillage. He also supported the general direction of proposed draft principle 6 *bis*, on corporate due diligence, although he wondered whether it should be formulated in less absolute terms, perhaps with the inclusion of a reminder of both the legislative choices open to States and the responsibility that States bore when pursuing the stated goal. A qualification such as "as appropriate" might be advisable, since it could also serve as a reminder that States should exercise their legislative powers with due regard for the legislative power of other States. The second sentence of proposed draft principle 6 *bis* seemed to go well beyond an obligation of due diligence. Like Mr. Nguyen and others, he found that the requirement of "ensuring that natural resources are purchased and obtained in an equitable and environmentally sustainable

manner” would be very difficult to satisfy. The idea should either be rephrased or be moved to the commentary.

He supported proposed draft principle 14 *bis*, on human displacement. However, like Mr. Murphy, he would like to see the word order changed so as to clarify that the protection of the environment did not generally take precedence over the provision of relief for displaced persons.

He also supported the general direction of proposed draft principle 13 *quinquies* on corporate responsibility and, unlike Mr. Murphy, did not think that its aim was to establish corporations’ responsibility under international law. He did not fault the Special Rapporteur for citing the Alien Tort Statute and the ensuing litigation as a possible source of the notion of extraterritorial responsibility for human rights violations. The fact that the United States Supreme Court had interpreted the Statute narrowly should not prevent the Commission from finding the underlying idea commendable. The case of *Kiobel v. Royal Dutch Petroleum Co.* had, however, shown that such legislation must be formulated very carefully in order to avoid friction between States. That was one reason why, in the first sentence of paragraph 1, the word “ensure” might be seen as asking too much of States unless that demand was qualified by the phrase “as appropriate”. The second sentence of paragraph 2 was couched in mandatory language, unlike the rest of the draft principle, and should therefore be reworded to indicate that that sentence was a general policy recommendation.

Proposed draft principle 13 *quater* dealt appropriately with responsibility and liability of States. The “without prejudice” clause in paragraph 1 showed that the purpose of the draft principle was not to establish new grounds for responsibility and liability, or to take a position on contentious issues in that regard. The Special Rapporteur should not attempt to go beyond the Commission’s earlier work on those matters; there was thus no need to define those two terms in the context of the current topic, since a reference to that earlier work was sufficient. The recommendation in paragraph 2 that States should take appropriate measures to ensure that damage did not go unrepaired was a good one. His reply to the point raised by Mr. Murphy in that context was that it would not be asking too much to invite every State to contribute, as it saw fit, to a fund for repairing the common good that was the environment, when the latter had been damaged by unidentified sources.

Paragraph 3 should not be couched in mandatory language and should be placed in the commentary.

Although he generally supported proposed draft principle 13 *bis*, the current wording might well create the impression that it set forth an unquestionable obligation under customary international law. For that reason, he would welcome the inclusion of the phrase “in accordance with its international obligations”, as proposed by the Special Rapporteur in her introductory statement.

Although the adoption of proposed draft principle 8 *bis* containing a variation of the Martens clause would be a move in the right direction, it would be going a step too far in one respect. He agreed with the Special Rapporteur that the draft principles should contain a general principle confirming the existence of rules on the protection of the environment in times of armed conflict that transcended express treaty rules. The fact that military manuals did not yet reflect the ICRC proposal on that subject should not deter the Commission from formulating such a general residual principle. The Martens clause, as a well-established expression of that principle, was an excellent starting point for a legal approach that was not necessarily confined to the law of armed conflict; there was nothing unreasonable about referring to “established custom” and “the dictates of public conscience” as legally relevant sources for the protection of common concerns of humanity, such as the environment. He was therefore in favour of the proposal to include such a clause, but disagreed with the idea that the environment, as such,

remained under the protection of “the principles of humanity”, given that the environment could not be equated with human beings. The principles of humanity specifically served human beings, not animals, plants or the environment. The fact that the environment was of fundamental importance to human beings did not constitute grounds for treating the environment as if it were human.

The potential implications of the idea that the environment was protected by the principles of humanity were highly problematic. What would it mean for the concept of human dignity? How could a balance be achieved between the dignity of human beings and the “dignity” of the environment? If that route was taken, the quintessence of the principles of humanity, in other words the central position of the human person within the environment, might be forfeited, even if the concept of the environment was regarded as including the interests of future generations and even if the environment was recognized as possessing intrinsic value. He therefore shared the opinion of those who thought that the Commission should not employ wording that might detract from the centrality of the protection of persons in times of armed conflict.

When the Commission had adopted a version of the Martens clause for the protection of the environment in the commentaries to its draft articles on the law of the non-navigational uses of international watercourses and to its draft articles on the law of transboundary aquifers, it had not included a reference to the principles of humanity. It had, however, explained that special attention was to be paid to the requirement that regard should be given to vital human needs. The Commission should retain that approach, since none of the major developments in international environmental law since the adoption of those two sets of commentaries warranted a fundamental departure that consisted of stating that the environment itself should be protected by the principles of humanity.

He was unpersuaded by the fact that the ICRC guidelines for military manuals and instructions on the protection of the environment in times of armed conflict provided otherwise. He suspected that ICRC, as the guardian of the treaties on international humanitarian law, did not wish to tinker with time-honoured formulations and had thus decided to leave the reference to the principles of humanity in the new text. However, that did not mean that the Commission should simply incorporate wording that ICRC might have used without fully considering its possible implications.

Whether the Commission should define the word “environment” and whether it should employ only that term were two different questions. One possibility would be to refer to both the “environment” and the “natural environment” in the same document without defining either term, especially as “natural environment” was an established term in some legal contexts and the Commission should not give the impression that it was trying to change an accepted meaning. The use of both terms would not make the draft principles inconsistent, since concepts were defined in order to give them a particular meaning for certain purposes, and that meaning could vary depending on the legal rules in question. In the broader philosophical sense, the term “environment” might well be open-ended and virtually all-encompassing, and thus might leave too much room for interpretation. However, he still took the view that the Commission should not define the term “environment” but should indicate in the commentary that its meaning might vary depending on the context, and in particular on the object and purpose of the principles in which it was used.

He was in favour of referring all the proposed draft principles to the Drafting Committee.

3477th Meeting, 10 July 2019

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Seventy-first session (second part)**Provisional summary record of the 3477th meeting**

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Succession of States in respect of State responsibility
(continued)

(p. 5) Mr. Nolte, thanking the Special Rapporteur for his rich and thoughtful third report, said that he welcomed the Special Rapporteur's intention to revert to the Commission's usual method of preparing and adopting commentaries as soon as possible after the adoption of draft provisions, to ensure that States could follow and influence the Commission's work.

With regard to the general approach taken in the report, he welcomed the Special Rapporteur's responsiveness to the methodological concerns raised in previous debates, particularly the Special Rapporteur's reaffirmation, in paragraph 19, that relevant State practice was diverse, context-specific and sensitive. However, like other members of the Commission, he believed that a substantial part of the State practice cited in the report did not support the Special Rapporteur's interpretations. For the most part, he agreed with other members' assessments of the cases cited by the Special Rapporteur. Most of those cases did not evidence an *opinio juris* in favour of a general rule relating to State succession, but instead constituted context-specific arrangements.

In paragraph 56 of the report, for example, the Special Rapporteur discussed the return by the Soviet Union to the German Democratic Republic of works of art and cultural property that had been "transferred by the Red Army in 1945 from Germany to the Soviet Union". The case was described in the report as an example of "reparation (in the form of restitution) in connection with the end of the Second World War" during the existence of "the German Democratic Republic, a new State, created by secession from Germany". Like other members of the Commission, he did not consider that to be an accurate description of the case. First, the Soviet Union had not regarded the return of the objects in question as an act of reparation in response to an internationally wrongful act because it had not regarded their transfer in 1945 as having been illegal. The German Democratic Republic had also not regarded the return of the objects as a form of reparation for an internationally wrongful act. Second, in the 1950s and 1960s, a large majority of States had not recognized the German Democratic Republic as a new State that had come into existence by an act of secession from Germany. For the purpos-

es of the topic, it was not necessary to determine whether the transfer of works of art and cultural property by the Red Army in 1945 had indeed been an internationally wrongful act, as Mr. Nguyen had said, or whether the German Democratic Republic had indeed been a new State in the 1950s and 1960s. The point that he wished to stress was that the States concerned had not regarded the matter as one that involved succession of States in respect of State responsibility. He therefore doubted that the case could be said to constitute a meaningful precedent in the context of the topic.

The Special Rapporteur also referred, in paragraph 131 of the report, to the 1952 Agreement between the State of Israel and the Federal Republic of Germany, whereby the Federal Republic of Germany had agreed, in the terms of the preamble, to “make good the material damage” which had resulted from the “unspeakable criminal acts” perpetrated against the Jewish people. According to the Special Rapporteur, some authors took the view that the Agreement confirmed the argument that the right to claim reparation for indirect damage suffered by a State could be subject to succession. However, he wondered whether the Special Rapporteur’s description of the Agreement was satisfactory for the purposes of the topic. After all, it was not a case of “succession of States” in the sense of draft article 2 (a), as provisionally adopted by the Drafting Committee, which defined that term as the replacement of one State by another in the responsibility for the international relations of territory. In addition, the nationality of the victims had played no role in the Agreement. The preamble to the Agreement explained that the State of Israel had “assumed the heavy burden of resettling so great a number of uprooted and destitute Jewish refugees from Germany and from territories formerly under German rule” and had on that basis “advanced a claim against the Federal Republic of Germany for global recompense” for the costs of the integration of those refugees. The Agreement thus represented a very important, but also very specific form of global compensation in a special case that could not easily, in his view, be seen as supporting a general principle relating to succession of States.

In paragraph 132 of the report, the Special Rapporteur noted that “the Federal Republic of Germany adopted in 2000 the Law on the Creation of a Foundation ‘Remembrance, Responsibility and Future’ and signed a joint statement with Belarus, the Czech Republic, Israel, Poland, the Russian Federation, Ukraine, the United States of America, the Foundation Initiative of German Enterprises and the Claims Conference, which is a Jewish organization”. That law and the joint statement were the basis for the payment by the Federal Republic of Germany and by German companies of approximately €5 billion, through a difficult mechanism of distribution, to victims of forced and slave labour imposed upon them by the Nazi regime. The Special Rapporteur noted that, “in this statement, Germany ‘accepted that these States could negotiate a reparation agreement on behalf of individuals which did not have their nationality at the time the damage occurred’”.

That assessment of the Special Rapporteur gave rise to two comments. First, the sentence in the report according to which Germany “accepted that these States could negotiate a reparation agreement” was placed within quotation marks, which might give the impression that it was a quotation from the joint statement. However, it was in fact a quotation from a book by Patrick Dumberry and thus reflected that author’s interpretation of the joint statement. Second, and more importantly, in the joint statement the participants acknowledged “the intention of both the Government of the Federal Republic of Germany and German companies to accept moral and historical responsibility arising from the use of slave and forced labourers, from property damage suffered as a consequence of racial persecution and from other injustices of the National Socialist era and World War II”, and recognized “that the establishment of the Foundation does not create a basis for claims against the Federal Republic of Germany or its nationals”. The joint statement also provided that payments were to be made irrespective of the nationality of the applicants.

It was thus not clear that the signatories to the statement had conceived of the payment of compensation for forced and slave labour during the National Socialist era as a matter of State succession in respect of State responsibility. Rather, they seemed to have made a context-specific special arrangement that transcended the confines of State succession and nationality. It was true that the case had involved the participation by territorial successor States in a claim for a form of compensation for their nationals. However, he doubted that it evidenced an *opinio juris* that affected traditional general rules relating to the nationality of claims.

His intention in focusing on those three cases was not to downplay or revisit important issues relating to the horrific and shameful National Socialist past of Germany, which had been addressed in various and mostly very complicated agreements. In his view, those three cases confirmed the Special Rapporteur's statement that relevant State practice was diverse, context-specific and sensitive. The Commission should use such cases as examples only if their significance for the solutions being proposed was clear.

With regard to the general propositions contained in the report, he wished to express his agreement with the points made variously by Mr. Aurescu, Mr. Murphy and Mr. Reinisch and to make a few additional comments.

First, the Special Rapporteur noted in paragraph 19 of the report that the inconclusiveness of State practice did not allow the existence of the "clean slate" principle to be asserted as a legal basis governing the relations between States in terms of the topic at hand. However, that very inconclusiveness was a reason for the Commission to be particularly careful when proposing draft articles. One way in which it could do so was to state clearly that it was engaged in an exercise of progressive development. Indeed, in that same paragraph of the report, the Special Rapporteur stated that the Commission's approach clearly met the criteria for such an exercise.

Second, the Special Rapporteur explained in paragraph 34 of the report that he was not asserting any "automatic succession to rights and obligations arising from internationally wrongful acts", as would result from "an automatic operation of rules of international law". Instead, the Special Rapporteur was proposing that a successor State should have the possibility of raising, with the wrongdoing State, the issue of reparation of injury caused to the predecessor State. That distinction between a substantive legal claim of succession to rights or obligations and the procedural possibility to "seek reparation" was indeed important.

Like Mr. Murphy, Ms. Oral and Mr. Reinisch, however, he wondered whether that distinction was useful in the context of the topic, and he doubted that the Special Rapporteur had actually upheld it. Although the Special Rapporteur wished to nuance the sharp line traditionally drawn between an automatic rule of non-succession and an automatic rule of succession, asking whether a successor State had the possibility "to raise the issue of reparation of injury caused to the predecessor State" did not do away with the original question of which State actually had a right to reparation in a particular case. The fact that a successor State might have the possibility to "raise the issue of reparation" did not mean that the predecessor State no longer had that possibility. The question of which State took precedence with regard to a substantive claim could be resolved only if the States concerned arrived at an agreement. But was there a rule that determined, in the event that a court was competent to adjudicate the matter, whether the successor State or the predecessor State was entitled to reparation from the responsible State? There was a risk that that question would be overlooked as a result of the shift of focus from a substantive rule of succession to the procedural possibility of seeking reparation. In addition, the recognition that a successor State might have the possibility to claim reparation did not establish that it was entitled to reparation in cases where the predecessor State no longer existed.

It was unclear what purpose was served by recognizing a procedural position of successor States instead of identifying a general rule or specific rules of succession in respect of the substance of the claims in question. If there was no connection between the procedural position and the substance of the claim, different claimants would be able to seek reparation and the difficulty of determining entitlement would remain. However, if there was a connection between them, it should be clearly set out, particularly for the purpose of determining which State among several was entitled to reparation. The Special Rapporteur referred at times to the “possibility” of raising a claim and, at other times, as in paragraph 60, to States’ being “entitled to reparation”. Mr. Murphy had rightly noted that the report’s use of the phrase “may request reparation” was ambiguous and inconsistent. Instead of evading the question of who was entitled to reparation in a case of State succession by recognizing only procedural “possibilities to claim”, the Commission should, in his view, more openly make proposals aimed at progressively developing the law on succession of States in respect of State responsibility, as had been suggested by Mr. Aurescu.

Lastly, he sympathized with the general policy position that, in cases of State succession, the rules of international law should, as far as possible, not be applied in such a way that “no State would be entitled to seek redress against the State responsible” and that the internationally wrongful act would remain unrepaired. However, in some situations, there were good reasons why a successor State could not claim reparation from a State that was responsible for an internationally wrongful act. As in other legal systems, formal conditions such as legal personality and continuity might be relevant. The Commission should not ignore the purpose of such conditions by framing them as “positivist” and claiming that they represented a “traditional” rather than a “modern” approach. In his view, relevant State practice was diverse, context-specific and sensitive. That practice was thus more apt as a basis for formulating recommendations that took best practices into account than for proving the existence of a new general approach or generally applicable rules. The Commission should seek to make recommendations of that kind with a view to progressively developing the law.

He supported the referral of all the proposed draft articles to the Drafting Committee, on the understanding that it would have the freedom to modify them substantially, as had been the case in the previous two years. He would then make more detailed comments on the various draft articles proposed.

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Held at the Palais des Nations, Geneva, on Wednesday, 17 July 2019, at 10 a.m.

Immunity of State officials from foreign criminal jurisdiction
(continued)

(p. 3) Mr. Nolte said that, although the Special Rapporteur's well-structured seventh report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/729), read together with the sixth report (A/CN.4/722), contained much valuable material and made some useful proposals on a number of important points, it unfortunately failed to address one major issue, namely procedural safeguards in relation to the subject matter of draft article 7, entitled "Crimes under international law in respect of which immunity *ratione materiae* shall not apply". For that reason, his statement would consist of two parts: the first part would address the relationship of the sixth and seventh reports to draft article 7, and the second would comment on those reports themselves.

The Sixth Committee's debates during the seventy-second and seventy-third sessions of the General Assembly had shown that it was important to address the relationship of the sixth and seventh reports to draft article 7. The Special Rapporteur's statement in paragraph 12 of the seventh report that "the inclusion of the draft article and its content received broad support from States, regardless of whether they considered said precept a proposal of *lex lata* or of *lex ferenda*" was not the right point of departure for the Commission's discussion of the proposals contained in the seventh report.

In the debates in the Sixth Committee, about half of the States had expressed a positive view of the draft article and half had expressed a negative view. A clear majority of States had opposed the suggestion that the draft article reflected *lex lata*. Many States had emphasized that it was essential to distinguish between *lex lata* and *lex ferenda*, had asked the Commission to clarify whether the draft article reflected *lex lata* or *lex ferenda* and had urged the Commission to achieve a consensual outcome. At the seventy-third session, express support for the draft article had been voiced by only 9 of the 14 States listed in footnote 45 of the seventh report, and Azerbaijan, which was listed among those States, had in fact strongly criticized it. Seven other States had explicitly rejected it, while a further seven delegations had expressed reservations or had asked the Commission to reconsider it. Thus, in 2018, as in 2017, States in

the Sixth Committee had been almost evenly divided in terms of their support or rejection of draft article 7. The statement that the draft article had received “broad support” was therefore difficult to accept.

The Special Rapporteur’s view that draft article 7 had been supported by States “regardless of whether they considered said precept a proposal of *lex lata* or of *lex ferenda*” also needed to be nuanced, since none of the States listed in footnote 46 had expressly indicated that they considered that draft article to be *lex lata*, and four more States should be added to those listed in footnote 52 which had rejected that position. The affirmation that “some States” did not regard draft article 7 as *lex lata* was therefore a strong understatement.

As for the assertion that “Some States recalled the trend in practice to exclude international crimes from the application of immunity *ratione materiae*”, he could find only one State that had expressed that opinion; in contrast, at the seventy-third session of the General Assembly, five States had disputed the existence of any such trend. It was also worth noting that seven States in addition to those listed in footnote 57 of the seventh report had urged the Commission to reach a consensual outcome.

In recalling the deliberations in the Sixth Committee, his intention was not to rekindle past debates, but to draw attention to some major issues that needed to be addressed at the current session in order to achieve a satisfactory and consensual outcome. He wished to emphasize, rather, that those debates were still open and were inextricably connected with the current debate, and that the Commission should see that as an opportunity to help resolve the issues surrounding draft article 7.

A systematic shortcoming in the substance of the seventh report was the fact that none of the draft articles proposed therein applied to situations covered by draft article 7. That draft article provided that immunity did not apply in respect of certain crimes, whereas all the draft articles proposed in the seventh report presupposed that immunity might possibly apply. When considering the issuance of an arrest warrant against a foreign State official suspected of having committed a war crime, a domestic judge would not follow the procedural rules proposed in the report. Rather, like most lawyers, he or she would conclude from draft article 7 that there was no need to apply the procedural safeguards proposed in draft articles 8 to 15, because immunity did not apply to alleged war crimes. Why, indeed, should a procedural safeguard apply when there was nothing to safeguard?

The Special Rapporteur’s understanding that draft articles 8 to 15 applied to situations covered by draft article 7 was clearly contradicted by the text of that draft article, under which cases concerning certain international crimes were excluded entirely from the scope of immunity *ratione materiae*. Draft article 7 thus forestalled any justification for the application of procedural provisions or safeguards in situations covered by it. For that reason, as long as draft article 7 retained its current wording, the Commission must explicitly state that any general procedural provisions and safeguards also applied to situations covered by draft article 7 and explain how they could serve as safeguards in that context. Even if the Commission included such a statement, it would also need to devise additional procedural rules or safeguards that were specifically tailored to apply in the situations covered by draft article 7. The Special Rapporteur seemed to assume that general procedural provisions and safeguards were sufficient to ensure the proper operation of draft article 7, although she acknowledged the special importance of procedural safeguards in that context. One of the central concerns expressed in the 2017 and 2018 debates in the Commission and the Sixth Committee had been that exceptions to immunity *ratione materiae* under draft article 7 could be abused for political ends. That concern had been the main reason why, in 2017, 24 States had emphasized the interdependence between procedural safeguards and the content of draft article 7. He wondered why the Special Rapporteur had not drawn clearer conclusions from her acknowledgement of the

fact that preventing the politically motivated or abusive exercise of criminal jurisdiction against foreign officials was a core function of procedural safeguards.

In 2018 he had made a proposal to meet that concern by including a short list of specific procedural preconditions that might make draft article 7 more acceptable to the large group of States that were critical of that draft article (A/CN.4/SR.3439). Unfortunately, the Special Rapporteur seemed to have misunderstood that proposal as an attempt to recast draft article 7. In fact, he had merely suggested that draft article 7 should be accompanied by effective procedural safeguards. His proposal had been noted with interest by five members of the Commission. In addition, Professor Claus Kress had expressed the view that the proposal represented a very promising direction for a procedural compromise that duly considered the conflicting considerations that lay at the heart of the matter. He therefore took the liberty of reminding members of that proposal, which read, in essence:

“An exercise of national criminal jurisdiction based upon an exception to immunity *ratione materiae* as described in draft article 7 is only permissible if:

- the evidence that the official committed the alleged offence is fully conclusive;
- the decision by the forum State to pursue criminal proceedings against a foreign official is taken at the highest level of government or prosecutorial authority; and
- the forum State must cooperate with the State of the official by notifying the State of the official and offering to transfer the proceedings to its courts or to an international criminal court or tribunal under certain conditions.”

The requirements that evidence must be “fully conclusive” and that the decision to pursue criminal proceedings must be taken “at the highest level of government” were specific to situations covered by draft article 7 and did not apply to other situations. That was not only because some of the dangers of political abuse were specific to certain international crimes, but also because specific thresholds were necessary in those cases, given that immunity would otherwise not apply. The Special Rapporteur had developed some elements of that approach in draft article 14 (Transfer of proceedings to the State of the official), with the principle of subsidiarity in mind. The Commission should acknowledge the special significance of that principle in the context of draft article 7. For those reasons, he proposed that the Commission should adopt an additional draft article to make it clear that general procedural provisions and safeguards also applied to situations covered by draft article 7, along with certain specific safeguards. That article might read:

“Draft article X

In order to determine, in accordance with draft articles 8–14, whether an exception to immunity *ratione materiae* pursuant to draft article 7 applies, the competent authority of the forum State shall ascertain whether:

- (1) a decision to open criminal proceedings against a foreign official has been taken at the highest level of government or prosecutorial authority;
- (2) the evidence that the official committed the alleged offence is fully conclusive; and
- (3) the forum State has notified the State of the official of the intention of its competent authorities to open criminal proceedings and offered to transfer the proceedings to courts of the State of the official, on the condition that this State provides assurances demonstrating its ability and willingness to carry out proper proceedings against the official, or to an international criminal court or tribunal.”

The wording of the chapeau drew largely on paragraph 128 of the seventh report.

Turning to some of the matters that were addressed directly in the two reports, he said that the order of the proposed draft articles should highlight the function of the procedural provisions and safeguards by making it plain that the determination of immunity under draft article 9 should occur after the domestic authorities of the forum State had notified the State of the official of their intention to exercise jurisdiction and had thereby given the latter State enough time for consultation and sufficient opportunity to invoke or waive immunity and to exchange information. Notification should be a prerequisite for “determination” under draft article 9. In order to reflect the proper sequence of steps, draft articles 8 to 12 should be rearranged in such a way that draft article 8 (Consideration of immunity by the forum State) came first, followed by draft article 12 (Notification of the State of the official), then draft article 10 (Invocation of immunity), then draft article 11 (Waiver of immunity) and finally draft article 9 (Determination of immunity).

While he agreed with the general thrust of draft article 8, the relationship between the three paragraphs was unclear, and he hoped that the draft article could be streamlined in the Drafting Committee.

With regard to draft article 10, he endorsed the Special Rapporteur’s view that invocation of immunity was not a precondition for the application of immunity *ratione personae*. Whether that was also true of immunity *ratione materiae* was a more difficult question. Perhaps it might be possible to reconcile members’ differing opinions in that regard by starting from the premise that, if there were sufficiently clear indications that a person might enjoy immunity *ratione materiae*, the authorities of the forum State must consider that type of immunity and notify the State of the official. In the absence of such indications, the forum State could proceed until immunity was formally invoked by the State of the official. The forum State could also proceed if the State of the official did not react within a reasonable time after notification. On the other hand, the forum State must determine whether immunity applied once the State of the official formally invoked it. That invocation might even have a suspensive effect. If the State of the official did not invoke immunity within a reasonable time after it had been notified or made aware of the proceedings, it should be deemed to have renounced the official’s immunity, or to have forgone certain procedural safeguards. There was a terminological question as to whether that form of renunciation should be termed an “implied waiver”, as the Special Rapporteur seemed to suggest, or whether the term “waiver” should be reserved for clear and express forms of renunciation of immunity. He was open to the formulation of a paragraph providing for the exceptional possibility of an “implied” or “presumed” waiver in that situation, or describing the situation with a phrase such as “shall be considered as having renounced”.

On that understanding, the role of the invocation of immunity *ratione materiae* was compatible with the judgment of the International Court of Justice in *Certain Questions of Mutual Assistance in Criminal Matters* (*Djibouti v. France*), as well as with the approach of the former and current Special Rapporteurs and the position of those members who were reluctant to see immunity *ratione materiae* downgraded. He agreed with Mr. Aurescu that the line between the non-invocation of immunity and the waiving of immunity should not be blurred, but the commentary could provide some guidance on how long the State of the official could wait to invoke immunity *ratione materiae* before it could be deemed to have renounced such immunity. He acknowledged that, in footnote 117 of the third report of the previous Special Rapporteur on the topic (A/CN.4/646), the latter indicated that he was “not familiar with any court judgments, practices, State opinions or doctrines which either clearly confirm or are at variance with such an approach to the issue”. That important aspect of invocation in cases of immunity *ratione materiae* might require further examination in the context of draft article 10.

He concurred with the Special Rapporteur that the courts of the forum State were competent to determine immunity and were not obliged to “blindly accept any claim” of immunity put

forward by the State of the official. At the same time, the courts of the forum State did not have complete freedom to determine whether or not immunity was applicable in a particular case. The invocation of immunity should possess presumptive weight and the courts must naturally comply with the pertinent rules of international law. If they failed to do so, they would engage the international responsibility of the forum State. The Commission also needed to address the complex and delicate situation that arose when the State of the official had not yet informed the forum State whether it intended to invoke the immunity *ratione materiae* of its State official.

As far as draft article 11 (2) was concerned, he agreed with the Special Rapporteur that a waiver must, as a general rule, be express and clear. However, that provision should also accommodate the possibility of inferring a State's consent to the exercise of jurisdiction from its clear conduct to that effect, or, in specific cases, its lack of reaction, within a reasonable time, to a notification by the forum State.

With respect to draft article 11 (4), it was neither correct nor appropriate to regard the possible effects of treaties on immunity as a form of waiver. A characteristic feature of a waiver was that it expressed a State's renunciation of immunity in an individual case. A State's consent to renounce its immunity more generally under a treaty was a separate matter that should not be confused with the concept of waivers. That point had been well illustrated by the Pinochet (No. 3) case that had come before the United Kingdom House of Lords, to which reference was made in paragraph 83 of the report. As the Special Rapporteur correctly pointed out, most of the judges in that case had not taken the view that the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contained an implied waiver, but had relied on the consent of Chile to that treaty to argue that immunity *ratione materiae* did not apply to the alleged offences.

The Commission should refrain from making a general statement about the effects of treaties on the immunity of State officials, since that might seem to imply that there was no need for close examination of the specific provisions of each treaty. In order to avoid that danger, he proposed that the issue should be addressed by means of a "without prejudice" clause.

He welcomed the Special Rapporteur's valuable explanations with regard to the notification requirement contained in draft article 12. Notification was indeed a precondition for enabling the State of the official to invoke or waive immunity. Furthermore, the duty to cooperate under general international law might require the forum State to notify the State of the official of its intention to exercise criminal jurisdiction. Concerning the reference to German domestic law in paragraph 123 of the report, he explained that, while the executive branch was not allowed to instruct domestic courts on how to decide actual cases, and also could not formulate binding assessments regarding international law, in 2015 the Foreign Office had published non-binding guidelines for domestic courts on questions of immunity under international law. The Federal Court of Justice, which was the country's highest criminal court, had referred to those guidelines in a recent decision.

Concerning draft article 14, he appreciated the emphasis that the Special Rapporteur had placed on the concept of subsidiary jurisdiction, which was a core element of any meaningful procedural safeguard, particularly with respect to the provisionally adopted draft article 7. The proposals that he had made in 2017 and 2018, which he hoped might help the Commission to find common ground, had been inspired by the concept. Nevertheless, he saw a problem with draft article 14 in its current form.

The problem concerned the role of the State of the official. As explained in the report and in the Special Rapporteur's introductory statement, draft article 14 focused on the forum State as the initiator of a transfer of proceedings. Like several other members of the Commission, he was not sure whether the Special Rapporteur was proposing that the State of the official

should also be able to initiate a transfer of proceedings to its own jurisdiction. In any case, draft article 14, as it stood, did not provide for a right of the State of the official to request a transfer of proceedings to its own jurisdiction or to have proceedings blocked or suspended. Moreover, draft article 14 did not provide that acts of the State of the official demonstrating that it was willing and able to prosecute the official should have any weight in relation to the forum State's decision to transfer the proceedings.

In more general terms, the concept of subsidiary jurisdiction was hardly reflected in draft article 14 itself, despite the explanations given by the Special Rapporteur in the report. For example, in paragraph 141, she stated that "the transfer of criminal proceedings is based on the concept of subsidiary jurisdiction", which "may be fully transposed to the regime of immunity of State officials from foreign criminal jurisdiction". The Special Rapporteur referred to the judgment in the case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) and also based her findings on an analogy from the general rules on transfer of criminal proceedings and an analysis of a 2018 case before the Court of Appeal of Lisbon.

The discrepancy between the emphasis placed on the concept of subsidiary jurisdiction and the content of draft article 14 was perhaps due to the fact that the draft article was modelled on treaties such as the European Convention on the Transfer of Proceedings in Criminal Matters and the Model Treaty on the Transfer of Proceedings in Criminal Matters. Nonetheless, those treaties had a different thrust, as recognized by the Special Rapporteur in paragraph 142 of the report: they referred merely to "the ordinary context of the exercise of competing criminal jurisdictions" and were designed to deal with transnational crime. In such treaties, the primary aim of a transfer was to ensure the efficient allocation of prosecutorial resources, not the sensitive delimitation of jurisdiction for the prosecution of international crimes. In fact, as acknowledged by the Special Rapporteur in paragraph 142, such treaties even recognized immunity as a reason to refuse a transfer request.

For the purposes of the Commission's work, the model taken from the European Convention and the Model Treaty should be strengthened through wording aimed at ensuring a true subsidiary jurisdiction for the prosecution of international crimes. As Ms. Galvão Teles had pointed out in 2018, examples of a true concept of subsidiary jurisdiction could be found in the practice of States relating to the prosecution of foreign nationals for international crimes, including in national legislation in Belgium, Croatia, Spain and Switzerland, domestic prosecutorial practices in Denmark, Germany, Norway and the United Kingdom, and some court practice in Austria, the Netherlands and Spain. Such examples demonstrated that the concept of subsidiary jurisdiction was also an important element in the prevention of impunity for international crimes.

Accordingly, in order to strengthen the concept of subsidiarity, he proposed that a new paragraph 2 should be added to draft article 14 that would apply specifically to the situations covered by draft article 7. The paragraph would read:

"2. In cases in which draft article 7 applies, the authorities of the forum State shall decline to exercise its jurisdiction in favour of the State of the official and transfer to that State criminal proceedings that have been opened against the official, if the State of the official requests a transfer of proceedings to its own jurisdiction and provides assurances demonstrating its ability and willingness to carry out proper proceedings against the official."

Regarding draft article 16, he did not think that a provision on fair treatment was appropriate in the context of the topic, since, as rightly noted by the Special Rapporteur in paragraph 111 of the report, "it is generally accepted that State officials are afforded immunity from foreign criminal jurisdiction for the benefit of the State". So-called "procedural safeguards" of im-

munity could thus consist only of rights pertaining to the State of the official. The individual rights of suspects or accused persons were typically guaranteed in treaties on cooperation with respect to certain crimes, human rights treaties and domestic laws. There was no need to add to those guarantees in situations involving the question of immunity. The Commission should not create the impression that procedural rights afforded special protection to State officials in their individual capacity.

Concerning the questions raised by the Special Rapporteur in paragraph 176 of the report, he, like Mr. Hmoud, was in favour of proposing a mechanism for the settlement of disputes between the forum State and the State of the official, but did not support the inclusion of recommended good practices in the draft articles, as the latter could become a complicated issue.

He wished to conclude with some general remarks. The International Court of Justice had stated, in paragraph 93 of its judgment in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, that “[t]he rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State”. That statement confirmed that all the rules of State immunity were procedural in character, including those on the immunity of State officials. The Commission must bear in mind that all those rules were interconnected. While some rules of immunity might appear to be more procedural than others, they all shared the same basic procedural character. In that sense, draft articles 5 to 7 did not constitute a sort of separate substantive law on immunity of State officials; they were part of a comprehensive procedural law of immunity and needed to be completed by rules that, for want of a better term, might be called “second-order procedural provisions and safeguards”.

The Special Rapporteur made valuable proposals to that effect in her seventh report, but they did not resolve the difficult questions regarding draft article 7. That was particularly true for the question of whether the Commission should, in accordance with the view of a large majority of States, characterize draft article 7 as an exercise in progressive development. The same question arose in respect of the draft articles that the Commission might provisionally adopt on the basis of the sixth and seventh reports. As the dictum of the International Court of Justice suggested, a rule such as draft article 7 and any so-called “procedural provisions and safeguards” were inextricably interrelated, including with regard to the determination of their legal character. He agreed with the Special Rapporteur, Mr. Hmoud, Mr. Murphy and Mr. Tladi that most of the proposed procedural provisions and safeguards would constitute an exercise in progressive development, although certain elements of them might flow from the general duty of States to cooperate. However, as recognized by a large majority of States, draft article 7 was also an exercise in progressive development. That fact, and the interrelationship between the two sets of rules, should be acknowledged. The debates in the Sixth Committee in 2017 and 2018 reinforced that point.

The quality of the overall outcome of the Commission’s work on the topic would depend on the quality and acceptability of the procedural provisions and safeguards, particularly as they applied to possible exceptions to immunity *ratione materiae* under draft article 7. It might be that the legality of the application of an exception under draft article 7 by the forum State would be seen to depend on its compliance with at least some procedural provisions.

He supported the referral of the proposed draft articles to the Drafting Committee, on the understanding that the Committee might also consider additional proposals that would make clear that the general procedural provisions and safeguards applied equally to the exceptions referred to in draft article 7, and would provide for specific safeguards in respect of the situations covered by that draft article.

3492nd Meeting, 29 July 2019

Available at:

https://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr3492.pdf&lang=EF

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International Law Commission
Seventy-first session (second part)**Provisional summary record of the 3492nd meeting**

Held at the Palais des Nations, Geneva, on Monday, 29 July 2019, at 10 a.m.

General principles of law
(continued)

(p. 16) Mr. Nolte said that he wished to thank the Special Rapporteur for his first report on the topic of general principles of law. His excellent report provided a thoroughly researched, readable and transparently balanced introduction to that important topic.

Given the advanced stage of the debate, and the time pressure under which the Commission currently operated, his comments would not be long.

The Special Rapporteur noted in paragraph 15 of the report that “the starting point for the work of the Commission on this topic should be Article 38, paragraph 1 (c) [of the Statute of the International Court of Justice], analysed in the light of the practice of States and the jurisprudence of international courts and tribunals”. That should indeed be the starting point. However, the identification of general principles of law required a broader base than just the practice of States and the jurisprudence of international courts and tribunals, as they were usually understood in the context of the identification of customary international law. In the present context, the “practice of States” encompassed their domestic law to a greater extent. And the relevant practice might be less visible in diplomatic intercourse than in more general forms of conduct. The relevant means for the identification of general principles of law also encompassed, probably to a larger extent than in the context of customary international law, the jurisprudence of national courts, the output of international organizations, and academic writings, as had been noted by Mr. Nguyen, Ms. Galvão Teles, Mr. Park and others. Like Sir Michael Wood and Mr. Murphy, he did not think that the topic was only about courts and adjudication; it should thus not be dealt with in a court-centric way.

He agreed with the Special Rapporteur’s suggestion in paragraph 24 of the report that the Commission should further explore the interrelationship of general principles of law and other sources of international law. Mr. Reinisch had made comments in that respect, including on the *lex specialis* rule, with which he agreed. He also supported Mr. Aurescu’s proposal that the Special Rapporteur should consider the relationship of general principles of law with “eq-

uity”. Like Sir Michael Wood and Mr. Aurescu, he was not concerned about the use of the term “source”. Even if there were different understandings of the term in the academic literature, as Mr. Murase had pointed out, the Commission should simply indicate that it was following the most common understanding, which was, he believed, the legal process and the form by which a legal rule came into existence.

On that basis, he believed that the question of the delimitation between the different sources of international law was less difficult than was sometimes assumed. For example, like Mr. Reinisch, he thought that the distinction between a rule of customary international law and a general principle of law depended not so much on the generality of their content, but rather on the way in which a particular principle had come about, or, as Sir Michael Wood had said, on the distinct rules of recognition. Rules of customary international law might be quite general, and general principles of law might acquire the character of a rule of customary international law – if such principles could be shown to be followed in the practice of States and were generally accepted by States in the form of *opinio juris*. It was somewhat akin to rules of customary international law that might simultaneously be treaty rules. Thus, general principles of law and rules from other sources of international law were not necessarily distinguishable by their formulation or content. They were, rather, distinguished by the process by which they came into existence and by the conditions which they must otherwise fulfil.

He found very useful and convincing the Special Rapporteur’s analysis, in paragraphs 77 to 109 of the report, of the “practice prior to the adoption of the Statute of the Permanent Court of International Justice” as well as of the drafting history of Article 38 (1) (c) of the Statute of the International Court of Justice and its predecessor. He agreed with the main conclusions derived therefrom in paragraphs 108 and 109, which were: first, general principles should not give the Court the power to legislate, a point which had been emphasized by Mr. Hmoud and others; second, general principles might derive from principles found *in foro domestico*; and, third, the possibility was not excluded that general principles might find their origins elsewhere as well. The overview, in paragraphs 111 to 139, of references to general principles of law in international instruments and in international judicial practice was also very helpful.

Regarding the “elements” of general principles of law in Article 38 (1) (c) of the Statute of the International Court of Justice, as discussed in paragraphs 141 to 187 of the report, it was important to ask whether the generality of “general principles” implied that they also had “a more fundamental character”, as the Court had seemed to suggest in the *Gulf of Maine* case. The answer to that question depended on what was meant by “fundamental”. In his view, in the context of general principles of law, the term “fundamental” did not necessarily indicate a higher rank or a particular substantive quality of any principle, as was the case for peremptory norms of general international law. In the context of “general principles of law”, the term “fundamental” indicated, rather, an underlying, or structural, character of any principle. He thus agreed with the conclusion of the Special Rapporteur in paragraph 153 that general principles might be “‘fundamental’ in the sense that they underlie specific rules”. As other colleagues had pointed out, many general principles of law did not embody a particular higher value, but were simply widely recognized as rules of a general nature. Thus, like Mr. Hmoud and Sir Michael Wood, he thought that general principles of law might, or might not, embody important values, a point put more plausibly by Mr. Valencia-Ospina, who had stressed the procedural nature of a good number of general principles of law.

Concerning the element “recognized”, as discussed in paragraphs 163 to 175, he agreed, as had Mr. Aurescu and others, with the Special Rapporteur’s view in paragraph 167 that the requirement of recognition “may depend on the category of general principles of law”, a point to which he would return.

With respect to general principles of law derived from national legal systems, he agreed with the Special Rapporteur that the element of recognition had a double function, which was, first, “to avoid granting judges overly broad discretion in determining the law”, as noted in paragraph 166, and, second, to ensure that “a principle common to national legal systems ... is applicable in the international legal system”, as stated in paragraph 169. In respect of the latter function, he thought that the conditions should not be formulated too strictly. If there was a principle common to domestic systems of law, there might be a weak presumption that it was “transposable” to the international legal system. Such transposability could not, however, be assumed if, for example, a certain general principle presupposed an institutional arrangement which did not exist at the international level.

He agreed with the Special Rapporteur, in paragraphs 176 to 187 of the report, as well as with Mr. Jalloh and all the other colleagues who spoken before him, that the term “civilized nations” was outdated and should not be used. He believed, however, that the Commission should identify an alternative term which was fully compatible with the fundamental principle of sovereign equality of States and which maintained an important function of the outdated term. Indeed, the original purpose of using the term “civilized nations” had been not only to reaffirm the illegitimate primacy of certain States, but also to ensure that general principles were not identified too easily and without a qualitative collective judgment. The term had also served to ensure that “general principles of law” did not become an instrument for judges and other actors to justify their preferred outcomes.

That issue arose particularly in connection with the second category of general principles of law proposed by the Special Rapporteur, namely those “formed within the international legal system”. If general principles of law could be “formed within the international legal system” simply by being “generally recognized by States”, then that could justify the concerns of Mr. Tladi, Mr. Murase, Sir Michael Wood, Mr. Rajput and other colleagues that the source “general principles of law” might be used to undermine, or circumvent, the more rigorous conditions for the formation of rules of customary international law. It would indeed be hard to understand why a more general principle of law could be formed more easily than ordinary rules of customary international law.

He therefore proposed that the expression “must be generally recognized by States”, in draft conclusion 2, should be replaced with a stricter rule of recognition. One possibility would be to use the term “international community of States as a whole”, an expression taken from article 53 of the Vienna Convention on the Law of Treaties. The use of that expression would not mean that general principles of law would thereby be equated to peremptory norms of general international law. That was because the recognition of a general principle of law by “the international community of States as a whole” would not extend to a – non-existent – peremptory character of the general principle in question. The advantage of that expression was that it required not only the addition of the individual positions of States, but also a determination that the collective body of States as a whole considered a principle to be a general principle of law. That form of recognition would require the acceptance by a “very large majority” or an “overwhelming majority” of States, expressions that had been used by, respectively, the Commission in draft conclusion 7 (2) on peremptory norms of general international law (*jus cogens*) and the International Court of Justice in its judgment in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*. Mr. Hmoud had made a similar proposal when he had suggested using the term “international community of States”. Another possibility would be to simply say that recognition must stem from the “international community”, as Ms. Galvão Teles and Mr. Hassouna had suggested. That proposal would give more room for the inclusion of international organizations and other actors in the group of actors which needed to recognize a general principle of law. He was not sure whether even broader ap-

proaches, based on terms like “transcivilizational”, as proposed by Mr. Murase, or “national”, including subnational and transnational, as proposed by Mr. Tladi, could be operational.

However, the expression “general principles of law recognized by the community of nations” could perhaps capture the gist of most of the proposals. That expression was contained in article 15 (2) of the International Covenant on Civil and Political Rights, which dated from 1966, a time shortly after decolonization, when States had made successful efforts to translate the old international law to the new era of a decolonized world. In his view, the expression “general principles of law recognized by the community of nations” was a felicitous effort to translate the discredited term “civilized nations” to the current time, while preserving the legitimate part of its object and purpose.

Regardless of how the more stringent standard of recognition was formulated, it was clear, as Sir Michael Wood had said, that its actual operation was not a matter of mathematical calculation. That was particularly important in light of the fact that explicit expressions of recognition might sometimes be limited and that they might come from diverse actors, not only States, but also international organizations and, indirectly, possibly from other actors.

He largely agreed with the convincing description and analysis given in paragraphs 190 to 230 of the report, showing that “general principles of law may be derived from national legal systems”. In many cases, it could be assumed that a general principle that was derived from national legal systems was “transposable” to the international legal system. He therefore thought it preferable to speak only of “transposability”, not of a stricter requirement of “transposition”.

Finally, in paragraphs 231 to 253 of the report, the Special Rapporteur dealt with the category of “general principles formed within the international legal system”. As Mr. Hmoud, Mr. Park, Sir Michael Wood, Mr. Murphy and others had said, that category was less well established than the category of “general principles derived from national legal systems”. He did not think, however, that the Commission should therefore summarily reject, or overly restrict, that second category. As he had said, the main concern was that the preconditions for such “general principles formed within the international legal system” to arise needed to be sufficiently stringent. In that sense, draft conclusion 3 depended on the precondition which was formulated in draft conclusion 2. In his view, the Special Rapporteur had made a *prima facie* case that general principles of law might also derive from within the international legal system. Depending on the preconditions for their formation, the category of “general principles formed within the international legal system” could be conceived as a form of general principles under Article 38 (1) (c) of the Statute of the International Court of Justice. In that case, it would be important to establish a reasonable distinction between “general principles of law formed within international law” and “general principles of international law”, perhaps allowing for some possibility of overlap and avoiding being drawn too much into terminological questions – which had been the subject of a mini-debate between Mr. Grossman Guiloff and Mr. Reinisch.

In sum, draft conclusion 3 could be acceptable if the requirement of recognition in draft conclusion 2 was sufficiently strengthened for the category of general principles “formed within the international legal system”.

Regarding the future programme of work, it appeared that the Special Rapporteur intended to follow a deductive approach in respect of the order and content of the two envisaged reports, starting with general matters, like function, and only then moving to more specific questions, like recognition. It might be better to start with what was generally accepted, for example, general principles derived from national legal systems, and then move on to what was less accepted, for example, general principles formed within the international legal system, and treat both function and recognition together with the respective categories.

Finally, he wished to encourage the Special Rapporteur to continue with his broad-based approach to the topic, and not limit himself to merely providing a bibliography instead of integrating all kinds of relevant material in the commentaries.

He agreed that the proposed draft conclusions should be referred to the Drafting Committee, although it might be preferable to wait to deal with draft conclusions 2 and 3 until the Commission was able to assess them in the light of the next report.

70th Session (2018)**3439th Meeting, 31 July 2018**

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http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr3439.pdf&lang=E

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Immunity of State officials from foreign criminal jurisdiction
(continued)

(p. 3) Mr. Nolte said that, as the translated versions of the report had been made available so late, he had not had time to fully analyse it and prepare a comprehensive statement. He would thus limit his comments to one part of the report and address the others at the next session. The sixth report was an interim report in several respects: it covered only one part of the procedural aspects of the topic, it did not propose any new draft articles, and it did not address the relationship between the procedural and substantive aspects of the topic. However, he understood that the Special Rapporteur would deal with those aspects in her seventh report.

The proposed order of work provided the Commission with an opportunity, at the current session, to collectively reflect on future work on the topic without being under pressure to take decisions. He would have preferred to undertake the reflection more informally, for example in a working group, and explore possible avenues for overcoming the division among members that had resulted from the debate and recorded vote on draft article 7 at the previous session. However, he accepted that the Special Rapporteur would rather have at least a partial debate on the sixth report in plenary meetings to help her prepare the seventh report, with the aim of arriving at a consensual outcome on the topic.

With that common goal in mind, he would make a number of remarks inspired by the motto for the Commission's seventieth anniversary: "Drawing a balance for the future". In his view, a good future could only be achieved by properly taking the past into account. He did not wish to suggest that the Commission should reopen the debate on draft article 7 at the current stage, but the question of whether it reflected existing customary international law or was a proposal for progressive development of international law would have to be reviewed at the

following session if the Commission wished to achieve a consensual outcome. Most States were asking for an answer to that very question, as had been evident during the debate on the matter in the Sixth Committee in 2017, a summary of which was provided in paragraphs 13 to 20 of the report.

As the summary showed, very few States were even close to believing that draft article 7 reflected customary international law. Only one — Italy — had expressly stated that it did, and 21 States had explicitly rejected the claim. He agreed with the Special Rapporteur that the division within the Commission was reflected in the comments of States in the Sixth Committee, which had been fairly evenly divided between those favourable towards and those critical of draft article 7. The significance of that division among States went far beyond mere statistics.

Most States that had expressed a positive opinion about draft article 7 had suggested that they considered it to be a proposal for the progressive development of international law (*lex ferenda*) and not codification of existing law (*lex lata*). As the Special Rapporteur noted in paragraph 18, many States on both sides had called on the Commission to clarify whether the proposal represented codification or progressive development. In addition to the 12 States cited by the Special Rapporteur in footnote 68, Belarus, Japan, the Russian Federation, Sri Lanka and Thailand had also made a request for clarification.

As noted in paragraph 20, many States had expressed concern that the Commission was split and had resorted to a vote, and had urged it to move forward cautiously with a view to achieving consensus. He therefore agreed with the Special Rapporteur that the Commission should carefully consider its future approach to the topic.

Another reason for clarifying the legal character of draft article 7 was that the question would have to be addressed once the outcome of the Commission's deliberations on procedural aspects were linked to substantive rules, such as draft article 7. If, for example, procedural rules regarding cooperation between the State of the official and the forum State were proposed, States would need to know whether the Commission considered that they must be followed as a matter of existing law or should be accepted and further developed by States, and whether any exceptions to the immunity of State officials *ratione materiae* could be applied only after the procedural rules had been followed. The procedural and substantive aspects of the topic were therefore interconnected. Nonetheless, he agreed that it made sense for the Commission to focus on procedural aspects at the current session.

To maximize the chances for a constructive and consensual outcome, it was necessary to distinguish between general procedural requirements that applied to all situations in which the immunity of a State official was at issue and specific procedural safeguards that applied to situations in which an exception to such immunity, as in draft article 7, was at issue. The report dealt only with the first category. As he had been unable to properly digest the text in the short time available, he could not address the detailed considerations provided by the Special Rapporteur in that respect. However, he wished to offer a few suggestions regarding the second category. Indeed, a very large majority of States agreed that, if there was to be a provision along the lines of draft article 7, there must also be effective procedural safeguards. In his view, a possible provision might read:

The exercise of national criminal jurisdiction based upon an exception to immunity *ratione materiae* as described in draft article 7 is only permissible if:

- (1) The foreign official is present in the forum State;
- (2) The evidence that the official committed the alleged offence is fully conclusive;

- (3) The decision by the forum State to pursue criminal proceedings against a foreign official is taken at the highest level of Government or prosecutorial authority; and
- (4) The forum State cooperates with the State of the official. This duty to cooperate means that the forum State must:
 - (a) Notify the State of the official if it intends to pursue criminal proceedings and inquire whether the State of the official wishes to waive the immunity of its official; and
 - (b) If the State of the official is able and willing to submit the matter to prosecution before its own courts, the forum State must transfer the proceedings and extradite the alleged offender to the State of the official or, if agreed between the States concerned, transfer him or her to a competent international court or tribunal; or, alternatively, if the State of the official is not able or willing to submit the matter to prosecution before its own courts or before an international court or tribunal, the forum State must, before permitting the continuation of the prosecution by its national instances, offer to be ready to transfer the alleged offender to a competent international court or tribunal if such a court or tribunal has jurisdiction.

The jurisdiction of an international criminal court or tribunal in such cases might result from its statutory basis or from a specific agreement between the forum State and the State of the official, if such an agreement was compatible with the statute of the international court or tribunal and if such international court or tribunal was willing and able to take the case.

He hoped that those specific procedural safeguards for the application of an exception to immunity *ratione materiae* in cases of alleged international crimes would be generally acceptable to the Commission members and, if so, that they could also contribute to reaching an agreement on other aspects of the topic. However, if the Commission wished to achieve a consensual outcome, it must also make it clear that the rule envisaged in draft article 7 did not reflect existing customary international law but was a proposal for the progressive development of international law. The members could then set aside their differences regarding whether or not there was a “trend” in either direction. In his view, the Commission had two options. It could either state that the draft articles on immunity of State officials from foreign criminal jurisdiction were intended to become a treaty or reformulate draft article 7 and couch it as a recommendation, for example by replacing the word “shall” with “should”. It would not be sufficient to indicate in the commentaries that draft article 7 contained elements of progressive development and of codification and that it was not always easy to distinguish between the two. In the case of draft article 7, it was possible to make that distinction.

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Succession of States in respect of State responsibility (*continued*)

(p. 3) Mr. Nolte said that he wished to congratulate the Special Rapporteur on his report, which was excellently researched and well argued, and would provide valuable guidance for the future work of the Commission on the topic.

The debate on the topic within the Commission at its seventieth session had already been very rich, so much so that the Commission was under considerable time pressure. He would therefore not address the report and the proposed draft articles comprehensively. Instead, he would focus on one specific case and one draft article, before indicating his position on the other draft articles by associating himself with previous speakers.

In his statement the previous day, Mr. Petrič had said that the Special Rapporteur, in proposing draft article 10, entitled “Uniting of States”, had relied too heavily on a single case study, namely the reunification of Germany. Indeed, in the report, the case of Germany was invoked as the primary precedent for proposing draft article 10, which reversed the traditional rule of non-succession and postulated a rule of succession for cases of unification in which a predecessor State ceased to exist.

It was worthwhile assessing the case, as a closer look at the sources quoted in the report demonstrated that the reunification of Germany did not support draft article 10. Rather, the sources pointed in the opposite direction. In paragraph 160 of the report, the Special Rapporteur quoted a judgment of the German Federal Administrative Court. He asserted that the judgment “provides an exception to the traditional approach of non-succession”. However, first of all, the judgment confirmed the traditional rule of non-succession in strong terms by mentioning a constant jurisprudence of the Federal Constitutional Court of Germany and “unanimity among authors” to the effect that a successor State was not responsible for the internationally wrongful acts of a predecessor State that no longer existed. Only after recognizing the traditional general rule of non-succession, which went squarely against proposed draft article 10, did the Court acknowledge a very limited exception by stating that pending claims for compensation for expropriations did pass to the successor State. The sources cited

by the German Federal Administrative Court in support of that limited exception confirmed the point made by Mr. Reinisch, namely that the obligation to pay compensation for expropriation did not arise from succession to State responsibility for wrongful acts, but from the primary obligation not to expropriate without adequate compensation. In short, the Special Rapporteur invoked the recognition of a very limited exception to the traditional approach of non-succession in order to support a much broader rule, so that the exception would come to engulf the rule. In his view, that was not how the traditional approach of non-succession could be overcome.

As a result, proposed draft article 10 could not be based on that particular element of State practice. In fact, it ran counter to that practice. Moreover, the Federal Republic of Germany had not otherwise recognized its responsibility for internationally wrongful acts committed by the German Democratic Republic, other than on the basis of a specific agreement. Other cases of unification mentioned in the report did not support draft article 10, either. The case of the United Arab Republic, which was cited in paragraph 153 of the report, concerned only agreements on expropriations, which did not fall into the category of internationally wrongful acts. The cases of Yemen and the United Republic of Tanzania supported only the proposition that no automatic succession of obligations took place, since the statements of the respective States had been limited to treaties.

The analysis of State practice on unification led to a more general point: it was one thing to say that there was very little and diverse practice, and that doctrinal and policy considerations should therefore play a greater role; it was another to go against the available State practice and say that an exception to such practice was the rule.

Were there not at least good policy reasons for the Special Rapporteur's proposal, in draft article 10, to depart from the traditional rule of non-succession? He had his doubts. To arrive at such a conclusion would first require a consideration of the reasons why successor States, in cases of unification, had, in the past, not accepted responsibility for the internationally wrongful acts of predecessor States that had ceased to exist. Looking at the cases of Germany, Viet Nam and Yemen, but also at the possibility of Korean reunification, it became plausible that the reasons for such refusals did not lie simply in a desire not to be held responsible. Rather, successor States did not — with good reason — find it acceptable to be burdened with claims related to the internationally wrongful acts of another State, to which they had not contributed, from which they had not benefited and which they might rightly consider “odious”. To be burdened with such claims might be a serious impediment to a process of unification that could be in the interests of international peace and security. The unification of States typically took place when a predecessor State was in great difficulty, possibly after having committed serious violations of international law. In those circumstances, the unification of two States might be the only politically practicable way of resolving a critical situation to which other States also wished to see a peaceful resolution. A unification was often not simply a source of enrichment for the successor State. In fact, it could create a huge economic burden that the envisaged successor State might hesitate to assume, and that might become unacceptable if it brought with it responsibility for internationally wrongful acts considered “odious”. The prospect of being the successor to violations of international law would not be considered just by a successor State or its population, particularly if such violations had been committed under the protective influence of a third State. It was one thing to assume responsibility for the acts of a previous regime of one's own State, as the Federal Republic of Germany had done; it was another to have to assume responsibility for the acts of a different State that might have been an antagonist in the past.

For the reasons he had outlined, neither State practice nor certain policy considerations supported the rule of succession proposed in draft article 10. It was true that there was a policy consideration that spoke in favour of passing the obligations of an extinct predecessor State to

a unified State, namely that an injured State should not lose a debtor through what was, for it, an unrelated event, and that, in relative terms, a unified State typically had the closest connection to a predecessor State. Even so, that policy consideration alone could not serve as the basis for a straightforward rule, as proposed in draft article 10, if State practice and other policy considerations spoke against it. In his view, the available State practice and its underlying policy considerations permitted only the formulation of a rule or, rather, a policy recommendation, that gave a decisive role to agreements between an injured State and a newly unified successor State. He therefore proposed that draft article 10 should be reformulated so that it became subject to the agreement of a successor State, as appropriate. Paragraph 3, as it stood, did not fit the bill; far from it. Draft article 10 should thus be redrafted to read:

“Draft article 10 Unification of States

1. When two or more States unite and form a new successor State, the obligations arising from an internationally wrongful act of any predecessor State pass to the successor State if and to the extent that the States concerned have so agreed.
2. When a State is incorporated into another existing State and ceased to exist, the obligations arising from an internationally wrongful act of the predecessor State pass to the successor State if and to the extent that the States concerned have so agreed.
3. Paragraphs 1 and 2 are without prejudice to claims of compensation for the expropriation of property.”

By focusing on draft article 10 and the example of Germany, he did not wish simply to reinforce the point made by the Special Rapporteur that cases of State practice were “diverse, context-specific and sensitive”. While that statement was true, it was also a bit misleading because it suggested that instances of practice were often not very helpful in the context at hand. By using the specific example of German reunification, he wished to demonstrate the importance of looking closely at instances of practice, even if they were few in number and diverse. Such instances often revealed their significance and underlying considerations only after a careful analysis.

It would be useful to explore available practice relating to the succession of States in respect of State responsibility in greater depth, as he had tried to do with the case of German reunification. That task need not necessarily be undertaken by the Special Rapporteur himself. It could perhaps be carried out by the Secretariat, which, in a study, could verify: (a) whether claims of succession in respect of State responsibility had been put forward; (b) whether such claims had been opposed by successor States; and (c) whether or not agreements had been concluded with regard to such claims in general or to a certain category of claims.

In conclusion, he agreed with previous speakers who had adopted an approach comparable to the one he had tried to illustrate by focusing on the example of Germany, including Mr. Hassouna, Mr. Hmoud, Mr. Jalloh, Mr. Nguyen, Mr. Park, Mr. Petrič, Mr. Rajput, Mr. Reinisch and Sir Michael Wood. By associating himself with previous speakers, he simply wanted to give an indication to the Special Rapporteur and others of the general perspective from which he might raise certain points in the Drafting Committee.

He recommended that all the proposed draft articles should be referred to the Drafting Committee, on the understanding — as highlighted by Mr. Hmoud — that the Drafting Committee might change the general direction of certain draft articles.

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International Law Commission
Seventieth session (second part)**Provisional summary record of the 3429th meeting**

Held at the Palais des Nations, Geneva, on Friday, 13 July 2018, at 10 a.m.

Protection of the environment in relation to armed conflicts
(continued)

(p. 3) Mr. Nolte said he agreed with the Special Rapporteur that the protection of the environment in situations of occupation resulted from an interplay of the law of occupation, international human rights law and international environmental law, where the law of occupation functioned as *lex specialis*. He was also in favour of the Special Rapporteur's proposal to draft principles formulated in general terms applicable to all forms of occupation. It could be made clear in the commentary that the exact scope of a particular obligation would depend on the nature and duration of the occupation. He concurred that the meaning of some terms of the law of occupation could evolve over time.

He supported the contents of draft principle 19 (1), as reformulated by the Special Rapporteur in her oral presentation. The terms "environmental considerations" could be further elaborated in the commentary, along with "administration", which might include the exercise of delegated authority by private actors. While he basically agreed with paragraph 2, he wondered whether it should not also require the occupying Power to respect the occupied State's international legal obligations with regard to environmental protection. As it stood, that paragraph tracked article 43 of the Regulations respecting the Laws and Customs of War on Land (the Hague Regulations) of 1907 and article 64 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (the Fourth Geneva Convention), both of which reflected the conservationist principle which, at that juncture, had sought primarily to preserve domestic law, whereas environmental protection was currently shaped by international agreements as well. Even though the word "legislation" might be construed as including international legal obligations, it might be advisable to insert the phrase "and its international obligations" after "legislation".

Like Mr. Hassouna, he thought that draft principle 19 could be strengthened by inserting a third paragraph along the lines of the second paragraph of guideline (5) of the Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed

Conflict, so that it would read: “Obligations of the occupying State under international agreements and customary law pertaining to the protection of the environment may continue to be applicable in situations of occupation to the extent that they are not inconsistent with the applicable law of armed conflict.” That wording would be in line with the Commission’s draft articles on the effects of armed conflicts on treaties, draft articles 6 and 7 and annex (g) to (i) of which carried an implication that treaties on environmental protection continued in operation, in whole or in part, during armed conflict.

While he generally endorsed draft principle 20, it might be advisable to recast it slightly since, as the Special Rapporteur had acknowledged in paragraphs 93, 94 and 97, the legal value and exact content of the term “sustainable use” was controversial. In many of the cases quoted in paragraph 95, where international courts or tribunals had referred to that term, they either did not attach a specific legal value to it, or it was used in the context of a treaty containing it. The relationship between draft principles 20 and 19 (1) was also questionable, especially with regard to usufruct. As the Special Rapporteur had indicated, some of the possible interpretations of “sustainable use” regarded it as a broader concept than the concretization of usufruct.

Nevertheless, he was in favour of retaining the term “sustainable use” because it had been employed, in terms of “sustainable development”, by the International Court of Justice in *Gabčíkovo-Nagymaros (Hungary v. Slovakia)* and in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*. The Court had considered it to be an apt expression of the need to reconcile economic development and the protection of the environment. The notion itself and its underlying rationale were also applicable in a situation of occupation. Furthermore, the need to balance economic development against other objectives in a situation of occupation had been reflected in the rules on usufruct in article 55 of the Hague Regulations. The Special Rapporteur was correct in contending that the term “sustainable use” was the modern equivalent of usufruct. The principle of usufruct predated most norms of international environmental law, but in the shape of “sustainable development” it was sufficiently broad to accommodate legal developments since 1907, including the right to retain permanent sovereignty over natural resources. Paragraphs 97 and 98 of the report provided excellent guidance on how the term “sustainable use” should be used in the context of the topic under consideration. However, in order to meet the concerns of some members, the Special Rapporteur should further clarify its meaning in the commentary. It should be interpreted in light of the right to permanent sovereignty over natural resources as permitting the exploitation of natural resources solely “for the benefit of the population”. That position was corroborated by paragraph 249 of the 2005 judgment in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*.

While he generally agreed with the formulation of draft principle 21, which was apparently drawn partly from the judgment in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, the wording “damage to ... areas beyond national jurisdiction” seemed somewhat unusual, as he was unsure whether an “area” as such could be damaged. It was also unclear why the Special Rapporteur proposed the term “significant damage” rather than the more widely used term “significant harm”. “Significant damage” was normally used in the contexts of attribution and compensation, whereas “significant harm” was contained in many texts, including the Commission’s articles on prevention of transboundary harm from hazardous activities and the judgment of the International Court of Justice in *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*. The proposal made by Ms. Galvão Teles to consider wording taken from the last sentence of paragraph 29 of the advisory opinion on *Legality of the Threat or Use of Nuclear Weapons* merited further examination.

Lastly, he recommended referring all three draft principles proposed in the report to the Drafting Committee.

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Commemoration of the seventieth anniversary of the Commission
(continued)**Seventy Years of the International Law Commission:**
A Solemn Meeting***Panel 1: The Commission and its impact***

(p. 7) Mr. Nolte (International Law Commission), moderator, said that the panel discussions were a fundamental feature of the events to mark the seventieth anniversary of the Commission, as they were central to the aim of “drawing a balance for the future”, which entailed not only commemorating the anniversary, but also reflecting on how to prepare the Commission for future challenges, some of which might be rooted in the present.

The sixtieth anniversary celebrations had been more low-key and had not given rise to an official anniversary publication. They had been held against a backdrop of a sense of stagnation and a crisis of self-confidence in the Commission, encapsulated in an academic article by Christian Tomuschat entitled “*The International Law Commission: An Outdated Institution?*”, in which the author had expressed scepticism about the Commission’s future role and wondered what work was left to be done, since the Commission had, in his view, progressively developed and successfully codified the major general rules of international law.

The current situation was completely different. The Commission was dealing with a large number of important topics at a more rapid pace than ever before. The number of new topics which had been proposed actually exceeded its capacity. There was a higher rate of participation in the Drafting Committee and an unprecedented number of young people were interested in working as assistants to the members.

One of the purposes of the colloquium was to have the Commission’s state of health checked by recognized experts, in other words renowned academics whose findings would then be discussed by the legal advisers of States and international organizations.

The panel discussions should produce lasting impetus which would enhance and safeguard the Commission's unique function of progressively developing and codifying international law. A report of the panel discussions would be produced and presented during the International Law Week in New York in 2018 and speakers' written contributions and the proceedings would be published in book form as a reference point for a wider debate about the Commission's performance in fulfilling its mandate.

There were, of course, limits to the Commission's capacity. The current turbulence on the international political scene might bode ill for the progressive development and codification of international law and might affect the Commission directly or indirectly. States, courts, international organizations or other actors might not be receptive to the increased activity of the Commission. The only way that the Commission could respond to those challenges to the international rule of law was to base its work on authoritative sources, to present its work in a transparent and well-argued fashion and to maintain its cohesion in order to remind States and other actors that there was a common basis on which peaceful and fruitful international relations needed to be conducted in everyone's common interest.

The five panels would focus on questions of immediate interest to the Commission, but each of the topics was affected by broader political and other developments. The subject of the first panel — "The Commission and its impact" — called for consideration of the Commission's role in relation to its addressees and international law as a whole. The second panel — "The working methods of the Commission" — concentrated more on technical matters, but working methods might well be mirrors or symptoms of more general policy or developments. The third panel — "The function of the Commission: How much identifying existing law, how much proposing new law" — addressed a classic question which had acquired greater significance, given that the products of the Commission's work were more frequently used by national and regional courts than they had been in the past. The fourth panel — "The changing landscape of international law" — was also concerned with matters which were high on the Commission's current agenda, namely how to determine the priority of the multitude of areas where the Commission could possibly contribute. The title of the fifth panel — "The authority and the membership of the Commission" — might suggest that there was a connection between the Commission's authority and its membership, but panellists were obviously free to question whether and to what extent that was the case.

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Peremptory norms of general international law (*jus cogens*)
(continued)

(p. 10) Mr. Nolte said that he wished to thank the Special Rapporteur for his rich third report on *jus cogens*, which covered many important questions in a crucial area of international law. The Commission needed to deal with such questions in a particularly careful way. Any premature conclusions could have serious effects on the state and the working of the international legal system.

The procedural rules set out in articles 42 and 65 of the 1969 Vienna Convention on the Law of Treaties were of great importance for ensuring the stability of treaty relations and for preventing incorrect or abusive invocations of *jus cogens*. It was therefore crucial that those articles should be taken as the point of departure when considering the relationship between the rules regarding the consequences of *jus cogens* and the procedure by which the existence of a *jus cogens* norm was determined. Such rules needed to be reaffirmed.

That being said, national and regional courts had occasionally raised the issue of whether a particular treaty, or treaty-based decision, violated a norm of *jus cogens*, without making the consequences of such a violation dependent on following the procedure under the Vienna Convention. It would indeed be difficult for national or regional courts to suspend the effects of their judgments, if they concluded that a treaty violated a norm of *jus cogens*, until the States concerned had followed the procedure under the Vienna Convention. That did not mean, however, that the obligation of States under the Vienna Convention to follow the procedure did not also apply in such cases; it did indeed apply. Therefore, a State whose court had declared a treaty to be invalid because it would conflict with a *jus cogens* norm must notify other States; and a State that considered that the court of another State had wrongly declared a treaty to be invalid for the same reason could choose to follow the procedures under articles 65 and 66 of the Vienna Convention.

An even more important question was whether States that were not bound by articles 65 and 66 of the Vienna Convention — either because they had not ratified the Convention or be-

cause they had entered reservations with respect to article 66 — could simply invoke the invalidity of a treaty as a result of a violation of a norm of *jus cogens*, or whether such States must or should follow at least certain basic elements of the procedure laid down in the Vienna Convention before being able to draw any consequences from their view that a treaty violated a norm of *jus cogens*. There was no easy answer to that question. So far, relevant practice seemed sparse. It was clear, however, that the recognition of *jus cogens* and its effects, by the Vienna Convention, was premised on the requirement that a State could not unilaterally draw consequences when it considered that a treaty was void because the treaty violated a norm of *jus cogens*. Draft conclusion 14, by recommending States to submit the matter to the jurisdiction of the International Court of Justice, seemed incorrectly to imply that they were free to do so. While it was true that States that were not bound by the Vienna Convention were obviously not bound by article 66, which established the jurisdiction of the International Court of Justice, the rules contained in article 65 were more than mere treaty obligations. Rather, article 65 expressed certain generally recognized rules that should be recognized in the draft conclusions. After all, in paragraph 109 of its judgment in the case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, the International Court of Justice had noted the following regarding articles 65 to 67: “... if not codifying customary international law, [they] at least generally reflect customary international law and contain certain procedural principles which are based on the obligation to act in good faith.” He therefore proposed inserting a new paragraph above the current paragraph 1 of draft conclusion 14, to read:

“A State party which invokes the invalidity of a treaty as resulting from a conflict with a peremptory rule of general international law (*jus cogens*) shall notify the other parties of its claim. If another party raises an objection, the States parties concerned shall negotiate in good faith with a view to agreeing on a solution or an appropriate procedure to resolve the dispute. The invoking party may give effect to its claim in relation to any objecting party after the invalidity of the treaty has been determined as agreed by them.”

The proposed additional paragraph reflected the basic elements of article 65 of the Vienna Convention, using language from that provision. While article 65 was generally supported during the elaboration of the Vienna Convention, it was well known that article 66 had attracted several reservations and objections to those reservations. However, the basic elements of article 65, as they were reflected in the proposed additional paragraph, expressed certain core rules that flowed from the generally recognized obligations to act in good faith and to settle disputes peacefully. The rules acquired their specific character in the present context from the importance of the question under which circumstances the fundamental principle of *pacta sunt servanda* might be called into question by States parties when invoking *jus cogens*.

The question of the procedure by which a conflict with a *jus cogens* norm was determined arose with respect not only to treaties but also to other sources of law and of obligations, as covered in draft conclusions 15 to 17. It was his view that the same procedural rules should apply for all sources of law and obligations. He therefore proposed that the additional paragraph that he had put forward in respect of draft conclusion 14 should either be added, *mutatis mutandis*, to draft conclusions 15 to 17, or, preferably, that the Commission should formulate a general draft conclusion on procedure. Such a draft conclusion would read:

“A State which invokes the invalidity of an obligation as resulting from a conflict with a peremptory rule of general international law (*jus cogens*) shall notify other States concerned of its claim. If another State raises an objection, the States concerned shall negotiate in good faith with a view to agreeing on a solution or an appropriate procedure to resolve the dispute. The invoking State may give effect to its claim in relation to any objecting State after the invalidity of the obligation has been determined as agreed by them.”

The proposed new paragraph did not address all the questions that might arise in the context, including the issue of whether a treaty was presumptively valid if States parties were unable to agree on a way to determine if a treaty was invalid because it would violate a norm of *jus cogens*. It would clearly be preferable for the Commission to formulate a conclusion in that respect. If it did so, it should take care not to be overly influenced by the distrustful attitudes that many States had displayed towards the International Court of Justice in the 1960s and 1970s, following its 1966 judgment in the *South West Africa* cases.

Turning to the individual draft conclusions, he said that draft conclusion 10 was a good point of departure with regard to the consequences of *jus cogens*, although he had doubts regarding the second sentences of paragraphs 1 and 2. While supporting the thrust of paragraph 3, he did not see why the rule of interpretation contained therein should not also apply to rules of customary international law and other sources of obligations that were addressed in other proposed draft conclusions, especially draft conclusions 15 to 17. Moreover, if there were a general rule of interpretation, it would not be necessary to repeat the rule in draft conclusion 17 (2), specifically for resolutions of international organizations.

He supported paragraph 2 of draft conclusion 11; however, subparagraphs 2 (b) and (c) were superfluous and might even be misleading, principally because they covered matters that were already addressed in subparagraph (a). As for paragraph 1 of draft conclusion 11, it was true that the paragraph reflected the Commission's views in the lead-up to the adoption of the 1966 draft articles on the law of treaties. There was, moreover, a strong argument in favour of draft conclusion 11 (1), according to which the non-severability rule emphasized the importance of *jus cogens* and provided a sanction and a deterrence against violations of *jus cogens*. Those facts notwithstanding, he had pragmatic doubts about the content of paragraph 1. By way of example, he noted that the General Assembly had declared in 1979 in its resolution 34/65 "that the Camp David accords and other agreements have no validity in so far as they purport to determine the future of the Palestinian people and of the Palestinian territories occupied by Israel since 1967." The Assembly thereby seemed to have expressed the view that certain provisions of the Camp David accords would remain valid even if others violated a norm of *jus cogens* which existed prior to the conclusion of the treaty. Given the increase, since the 1960s, of the number of norms that were arguably *jus cogens* and given the complexity of many treaties that had been concluded thereafter, it was likely that specific rules from treaties that were otherwise unobjectionable might be called into question as violating *jus cogens*. He wondered whether it would be necessary or appropriate to request the parties to such a treaty to revise it as a whole in cases in which an interpretation of the treaty concerned in conformity with *jus cogens* norms was not possible. Perhaps, then, the Commission should consider basing the entire draft conclusion on the severability approach contained in paragraph 2 of draft conclusion 11, with a presumption that the whole treaty was void in a case like that set out in article 53 of the Vienna Convention. Draft conclusion 11 could also be extended to cover secondary treaty law, namely acts of international organizations that created obligations for States.

He agreed that draft conclusion 12, which dealt with the duty to eliminate consequences of a treaty that conflicted with *jus cogens*, should be based on article 71 of the Vienna Convention. However, the phrase "as far as possible", which appeared in paragraph 1 (a) of that article, should not be omitted, as it was important in assuring that the legal effect of rules of *jus cogens* remained practicable. He supported in principle draft conclusion 13, although its placement should be discussed.

With regard to draft conclusions 15 to 17, he agreed with the Special Rapporteur that it was not necessary to address the consequences of peremptory norms on general principles of law. He could not conceive of a situation in which a general principle of international law could conflict with a norm of *jus cogens*. If such a situation were to be asserted by a State, the gen-

eral principle of law would surely be interpreted in a way that would render it consistent with *jus cogens*. While he generally supported draft conclusion 15, he wondered why the words “not of a *jus cogens* character” appeared only in paragraph 2 and not in paragraph 1. As it was currently formulated, paragraph 1 seemed to exclude the possibility of replacing one rule of *jus cogens* with another — a possibility that was envisaged in article 64 of the Vienna Convention.

In draft conclusion 16, the expression “unilateral act” could, in the context, give rise to the misunderstanding that purely factual acts could be invalidated by *jus cogens*. When adopting its Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations in 2006, the Commission, acknowledging that the term “unilateral act” could give rise to misunderstandings, had clarified that it referred to “juridical act[s that] necessarily impl[y] an express manifestation of a will to be bound on the part of the author State”. That should be made clear in the context of the topic of *jus cogens*, for example by replacing the term “unilateral act” with “unilateral commitment”.

Regarding draft conclusion 17, he agreed with the Special Rapporteur that it was useful to cover, in the context of *jus cogens*, the acts of international organizations that created legal obligations and that such acts, if and insofar as they conflicted with *jus cogens* norms, were invalid. However, he was not convinced that the draft conclusion should be limited to binding resolutions, and even less so that it should single out one specific form of binding resolutions — those of the Security Council of the United Nations. The fact that there had been major debates on the relation of Security Council resolutions with norms of *jus cogens* did not justify such a narrow focus in a project that was aimed at formulating general rules. Otherwise, the Commission would risk being misunderstood as taking a generally distrustful position *vis-à-vis* the Security Council and its resolutions.

He broadly agreed with draft conclusions 18 to 21, although he suggested that, in draft conclusion 21, the word “serious” should be inserted before the phrase “breach of a peremptory norm”, consistent with the language of article 41 (2) of the articles on State responsibility for internationally wrongful acts.

He was not convinced by the assertion in the Special Rapporteur’s report that draft conclusions 22 and 23, on criminal responsibility, were “effects of peremptory norms of general international law (*jus cogens*) on individual criminal responsibility in international criminal law”. First, the Commission’s work on the topic of *jus cogens* was based on a distinction between the rules regarding the methodology for determining all rules of *jus cogens* and their effects, on the one hand, and the rules that might be contained in a possible, “illustrative”, list of specific rules of *jus cogens*, on the other. The Special Rapporteur had confirmed that distinction by asking members, when introducing his second report (A/CN.4/706), to convey their views on whether an illustrative list of specific norms of *jus cogens* should be formulated. Given that no proposal had been made by the Special Rapporteur to that effect and that the Commission had not yet taken a decision on the matter, the third report should attempt only to address the effects that were applicable to all rules of *jus cogens*. Draft conclusions 22 and 23, however, concerned only certain, specific rules of *jus cogens*, the prohibitions of international crimes, and a limited number of possible specific effects that might result from those prohibitions. For that reason alone, draft conclusions 22 and 23 were not part of what the Commission had agreed to cover as part of the topic at the current stage.

Secondly, even if the term “effect (or consequence) of *jus cogens*” were to extend, at the current stage, to the possibility of addressing specific consequences of specific rules of *jus cogens* — which was not the case — the Commission would then also have to deal with other such specific consequences. The right of self-determination, for example, was said to produce certain specific consequences, but those were not addressed in the report. It was therefore

selective to cover a limited number of possible specific effects of international crimes and not of other specific *jus cogens* norms.

Thirdly, even if it were appropriate, in the current context, to address specifically the effects of international crimes as norms of *jus cogens*, the third report did not do so in accordance with the methodological requirements set out provisionally by the Drafting Committee. A thorough analysis of State practice in all its forms was necessary, according to provisionally adopted draft conclusions 5 and 6, by identifying, first, a norm of general international law — most commonly a rule of customary international law — and, secondly, a specific *opinio juris* of States according to which a particular rule of customary international law had a peremptory character. Those requirements constituted a high threshold that were not addressed in the third report. If in his report the Special Rapporteur was asserting that draft conclusions 22 and 23 were not themselves *jus cogens* but nevertheless effects of *jus cogens*, he wondered what criteria should be used for determining that a simple rule of customary international law was the effect of a *jus cogens* norm.

The Special Rapporteur, in his report, merely attempted to demonstrate that draft conclusions 22 and 23 had some support in practice, and that they flowed from the character of international crimes. The Commission did not usually consider that type of reasoning to be sufficient for identifying a rule of customary international law or a norm of *jus cogens*, as confirmed in its recently adopted conclusions on the identification of customary international law and in the provisionally adopted draft conclusions on the topic of *jus cogens*. It was not sufficient, in order to demonstrate certain further effects, to demonstrate that international crimes were *jus cogens* norms; rather, it was necessary to show that a large majority of States accepted and recognized as *jus cogens* a particular effect of such a norm. The third report did not fulfil such requirements. Instead, the Special Rapporteur had attempted to draw conclusions by way of theoretical reasoning, despite having rejected that approach in his general remarks at the beginning of the third report. It was also not sufficient to invoke certain instances of practice when they were far from being generally accepted as rules of *jus cogens*. Thus, even if the reasoning behind draft conclusions 22 and 23 established that those draft conclusions reflected customary international law, it would be insufficient to show that they were effects of international crimes.

Fourthly, the reasoning provided in respect of draft conclusion 23 (2) was particularly incomplete and therefore unpersuasive. The assertion that the rule that the Commission had provisionally adopted as draft article 7 in the context of the topic “Immunity of State officials from foreign criminal jurisdiction” was an effect of the norm of *jus cogens* that prohibited the commission of core international crimes was surprising. In its debate on that draft article at its previous session, the Commission had also discussed whether it constituted a rule of customary international law, in the sense of a rule of ordinary customary international law; varying views had been expressed by members in that regard. Even among those members who had ultimately voted in favour of draft article 7, a majority had not made the claim that it expressed a rule of customary international law. The Special Rapporteur herself had spoken only of a “trend” to that effect. It was puzzling that a norm that a majority of the Commission did not recognize as a rule of simple customary international law, could be characterized, just one year later, as being the effect of a norm of *jus cogens*.

During the debate in the Sixth Committee on draft article 7 of the topic of immunity of State officials from foreign criminal jurisdiction, the Member States that had made statements had been evenly split on the question of whether or not draft article 7 (1) reflected customary international law. More importantly, only 5 States had more or less clearly expressed the view that draft article 7, paragraph 1, reflected customary international law, whereas 16 States had more or less clearly expressed the view that draft article 7, paragraph 1, did not reflect customary international law. In his view, the third report on the current topic was attempting to

reopen the debate in an inappropriate context. Under the circumstances, he failed to see how it could be asserted, at the current stage, that the proposition contained in draft conclusion 23 (2) was a norm of *jus cogens*, or the effect of a rule of *jus cogens*.

The question of how to deal with draft conclusions 22 and 23 on the current topic was not one that should divide the Commission along the same lines as draft article 7 of the topic of the immunity of State officials from foreign criminal jurisdiction. Those colleagues who had voted in favour of that draft article 7 should not simply take draft conclusions 22 and 23 on the current topic as an opportunity to reaffirm their positions on draft article 7. Such an approach would be based on a misunderstanding: although that draft article resembled draft conclusions 22 and 23, there was a crucial difference in whether a rule was an effect of a *jus cogens* norm, or simply a rule of ordinary customary international law — or even a proposal *de lege ferenda*. In addition, draft article 23 (2), if adopted, would not include the procedural safeguards that the Commission would have to discuss in the framework of the topic of immunity of State officials from foreign criminal jurisdiction. For many members, the question of procedural safeguards was inextricably connected with draft article 7 as provisionally adopted. Draft conclusion 23 (2) would close the door to any possibility of arriving at a consensual approach regarding draft article 7 on the topic of immunity of State officials from foreign criminal jurisdiction. He was, moreover, concerned that the Special Rapporteur, in proposing two draft conclusions whose content was more specifically addressed in the context of other topics already on the Commission's agenda, had not addressed the concern that those draft conclusions could interfere with the Commission's consideration of those other topics. Failure to do so risked aggravating an already difficult situation.

On the substance, he failed to see how draft conclusion 23 (2) could be an effect of *jus cogens*. The International Court of Justice had stated in general terms that substantive norms of *jus cogens*, such as the prohibitions of international crimes, on the one hand, and rules on immunity — which were procedural in character — on the other, were two sets of rules that addressed different matters. Draft conclusion 23 (2) therefore directly contradicted the Court's case law since its judgments in the cases concerning *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* and the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*. Moreover, if the Commission were to consider adopting draft conclusion 23 (2), it would have to explain why the envisaged effect of the *jus cogens* prohibitions of international crimes would be limited to establishing an exception to immunity *ratione materiae*, and why they should not also extend to immunity *ratione personae*.

For the aforementioned reasons, he was opposed to referring draft conclusions 22 and 23 to the Drafting Committee. That did not mean the Commission could not take up the draft conclusions at a later stage, if the Commission decided that it should elaborate an illustrative list of specific rules of *jus cogens* and once definitive conclusions had been reached in the context of the topics of immunity of State officials from foreign criminal jurisdiction and of crimes against humanity. He was in favour of sending all the other proposed draft conclusions to the Drafting Committee.

Regarding methods of work, he recalled that the proposed draft conclusions contained in the Special Rapporteur's first report on the current topic had been referred to the Drafting Committee, which had provisionally adopted them. However, those draft conclusions had been left pending in the Drafting Committee. The Commission as a whole had been informed of the Drafting Committee's work through an interim report issued by the latter's Chair, a report that had been published, not very prominently, on the Commission's website. That same procedure had been repeated in 2017 with the second report, and he understood that it would be so again with the Special Rapporteur's third report. The Drafting Committee did not refer its work back to the Commission for its consideration in plenary meeting, which in turn meant that no commentaries were produced that the Commission as a whole and States could con-

sider until the first reading of the draft conclusions. That was a serious problem, in that Member States could not properly follow the Commission's work on the topic and could not comment meaningfully in such cases. Member States were able to access a mere summary of the debate and the interim reports of the Drafting Committee Chair, which were not included in the Commission's annual report to the General Assembly and had not been discussed by the Commission in plenary meeting. Proceeding in such a way raised two major problems. First, the authority of the Commission's work rested on its procedure and on its transparent interaction with Member States, as represented in the Sixth Committee. It might under certain circumstances be acceptable to postpone the elaboration of commentaries and the adoption by the Commission as a whole of provisionally adopted draft conclusions until the following session; however, such exceptions should not become the rule.

Secondly, the response by States to the Commission's work was often limited. The Special Rapporteur himself had, in a different context, suggested that that might be attributable in part to the lack of resources by a number of States to digest the Commission's work within the available time frame. If the Commission did not express its considered view on the progress made at each session, and if it presented the results of its work over several years by presenting a single large set of commentaries to an entire set of draft conclusions, it would be impossible for many States, especially developing States, to take a meaningful position on the Commission's work.

He was aware that the way in which the Commission had proceeded with the topic of identification of customary international law had set a certain precedent for the method that seemed to be envisaged for the topic currently under discussion. The difference between the two situations, however, was that the draft conclusions on the topic of identification of customary international law had been dealt with essentially over two sessions — in 2014 and 2015 — and that the consideration of the topic in 2014 had taken place at such a late stage in the session that it had been impossible to prepare commentaries. For the current topic, the Drafting Committee was already in its third year of work, yet had produced no output in a form on which States could confidently comment on.

In raising such concerns, he did not mean to suggest that the Special Rapporteur or the Commission were consciously disregarding important aspects of established procedures; rather, it seemed that they were, almost unconsciously, slowly and nearly imperceptibly changing the Commission's working methods. While the Special Rapporteur no doubt had understandable concerns of efficiency, he wished to note that such an approach entailed serious costs for the legitimacy and transparency of the Commission's work and for the ability of States to respond meaningfully to the work. Such a question of procedure was not one that could simply be delegated to the Working Group on methods of work; the Commission had a usual method of work and, if it wished to change it, it should do so only on the basis of a conscious, well-considered decision.

3406th Meeting, 18 May 2018

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Provisional

For participants only

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International Law Commission
Seventieth session (first part)**Provisional summary record of the 3406th meeting**

Held at Headquarters, New York, on Friday, 18 May 2018, at 10 a.m.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (continued)***Report of the Drafting Committee***

(p. 9) Mr. Nolte (Special Rapporteur), responding to the point raised by Mr. Saboia regarding paragraph 2, said that he had re-read the statement of the Chair of the Drafting Committee, and it did not indicate or imply that the term “subsequent practice” had been used to mean anything in that paragraph other than what it did in the other draft conclusions. The reason for the proposal to insert the words “of the parties” had been to emphasize the distinction between the practice of an international organization on the one hand and the subsequent practice of the parties on the other. And since there were two kinds of subsequent practice that had been distinguished, the one referred to under article 31 (3) (b) had to be “of the parties”, because that meant of all the parties, but the subsequent practice under article 32 did not have to be that of all the parties, it could also be that of fewer parties. So that was the explanation of the Chair of the Drafting Committee.

(p. 10) Mr. Nolte (Special Rapporteur), responding to the issue raised by Mr. Tladi, noted that Mr. Tladi had referred to the fact that paragraph 1 of article 31 had been “excluded”. The reference to paragraph 1 of that article had been deleted from paragraph 3 of the draft conclusion, not in order to exclude paragraph 1, but to include more than paragraph 1. The Drafting Committee had, in a sense, reverted to the usual formulation whereby, when a treaty was applied, it was applied according to articles 31 and 32. Consequently, article 31 (1) was there, it was just not explicitly mentioned.

The reason it had been mentioned in the text adopted on first reading had been in order to preclude the possible misunderstanding of the reference to article 31 as a whole as suggesting that the Commission considered the practice of international organizations to be practice that was covered by article 31 (3), which referred to the subsequent practice of all the parties. That was a concern that the Drafting Committee had not found necessary to pursue because article

31 (3) (a) and (b) explicitly referred to the practice of “the parties” and consequently could not relate to the practice of an international organization.

As a result, the Drafting Committee had reverted to the usual formulation whereby a treaty must be interpreted in accordance with articles 31 and 32, as a whole, in a single combined operation, using all means of interpretation, including articles 31 (3) (c) and (4), and including the practice of international organizations, but not specifically meaning the rules of international law that were set forth in article 31 (3) (c), as such, but together with the other means of interpretation. It was in that sense that the question had been debated in the Drafting Committee, and he would be happy if Mr. Tladi could accept that, and if the Commission could adopt draft conclusion 12 as it was currently worded.

(p. 12) Mr. Nolte (Special Rapporteur) said that he wished to express his gratitude to the Chair of the Commission, the Chair of the Drafting Committee and all the other Commission members for the cooperative and collegial spirit they had shown in finalizing the work on the topic. Although that work would not be complete until the commentaries had been adopted, the Commission had just taken a very important step in that direction. He also wished to thank the Secretariat, in particular the Secretary to the Commission, and Mr. Nanopoulos, both of whom had made excellent contributions to the work on the topic and had provided excellent support to the Commission. It was his hope that the draft conclusions would help those who were called upon to interpret treaties in the future and would make a contribution to international law.

3404th Meeting, 16 May 2018

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International Law Commission
Seventieth session (first part)**Provisional summary record of the 3404th meeting**

Held at Headquarters, New York, on Wednesday, 16 May 2018, at 10 a.m.

Provisional application of treaties (*continued*)

(p. 3) Mr. Nolte said that he wished to thank the Special Rapporteur for his rich and thought-provoking report, which contained a comprehensive review of the development of the topic in the Commission thus far, together with an extensive collection of materials and a number of final proposals. It would provide a useful basis for the Commission's deliberations on the topic. He welcomed the third memorandum on the topic by the Secretariat (A/CN.4/707), which was a valuable source of relevant treaty practice.

Regarding the two new draft guidelines proposed by the Special Rapporteur, like Mr. Murase, Ms. Galvão Teles and Mr. Murphy, he saw no need for draft guideline 8 bis (Termination or suspension of the provisional application of a treaty or a part of a treaty as a consequence of its breach). A clear and simple special procedure for termination was provided for in article 25 (2) of the 1969 Vienna Convention on the Law of Treaties that did not require terminating States to provide any reasons or follow any of the procedures set out in articles 65 to 68 of the Convention that would, on the contrary, apply to the termination of a treaty under article 60 of the Convention. Article 25 (2) covered all contingencies that had so far been relevant in practice. Consequently, he also saw no reason to refer to article 60 in the context of the current topic.

Although there was admittedly some truth to the maxim *a maiore ad minus*, to which Mr. Reinisch had referred, it could not be the complete answer. In keeping with the explanations provided by Mr. Nguyen and Mr. Murphy, he was of the view that a separate draft guideline 8 bis, as proposed by the Special Rapporteur, ran the risk of creating misunderstanding and unnecessary confusion regarding the relationship between termination under article 25 (2) and termination under article 60. Such difficulties would be compounded if the Commission went a step farther, as had been proposed by Mr. Reinisch, and referred also to other grounds for termination. It should be sufficient to have a general draft guideline that indicated that the draft guidelines were without prejudice to the rules of the 1969 Vienna Convention.

Concerning the proposed draft guideline 5 bis (Formulation of reservations), he too did not think it would be useful to adopt a draft guideline on reservations, particularly if it consisted only of a “without prejudice” clause, which could lead to misunderstanding. The Special Rapporteur had indicated in his introductory statement that many of the examples that had been submitted to him were not reservations but interpretative declarations. Mr. Murphy had expressed the view that the lack of practice in that respect was, in and of itself, sufficient reason not to address the question of reservations in a draft guideline. In his own view, a lack of practice did not make it impossible to state the law, as courts were, after all, sometimes confronted with that situation and were required to make a decision, even if by analogy. He nevertheless agreed with Mr. Murphy and Mr. Nguyen that there were no simple answers to that question and that the Commission should therefore not address reservations in the context of the current project.

On the question of the model clauses proposed by the Special Rapporteur, he wished to keep an open mind. Their purpose was to offer States a full panoply of choices regarding provisional application. However, those proposed in the report were few in number and very abstract, and they failed to address some of the most important issues related to provisional application. One such issue was the widespread use of clauses containing agreed limitations on the scope of provisional application in order to ensure that provisional application was compatible with internal laws, in whole or in part. It would be very useful for States to have model clauses for that purpose. The Secretariat had noted in its memorandum that clauses on provisional application were often formulated in rather general terms. It would therefore be helpful if the Commission could provide States with clauses from practice that did not overly restrict the scope of provisional application, while ensuring that there would be no need to amend their internal laws, particularly their parliamentary legislation, in order to enable ratification and entry into force of the treaty. In that sense, he agreed with Mr. Murphy that the Commission should select some clauses from State practice that it found particularly useful from among those compiled by the Secretariat in its excellent memorandum.

Concerning the designation of the Commission’s outcome on the topic, model clauses certainly ought to be conceived of as “guidelines”. However, to the extent that the current draft guidelines constituted interpretations of article 25 of the 1969 Vienna Convention and were based on State practice and case law, they could just as well be called “conclusions”. On the other hand, in contrast to the draft conclusions on the topics “Subsequent agreements and subsequent practice in relation to the interpretation of treaties” and “Identification of customary international law”, the Commission’s output on the current topic did not concern methodological questions and was addressed not to a broad range of users but rather to specialists in government ministries. Accordingly, the output could be referred to as “guidelines”. Nevertheless, the designation “guidelines” did not indicate a greater degree of normative force in the strictly legal sense.

In conclusion, he was not persuaded that the two proposed draft guidelines were necessary or useful for the project, and he agreed with Mr. Murphy that they should not be referred to the Drafting Committee. If they were referred to the Drafting Committee, it should be on the understanding that the latter had the liberty to decide whether draft guidelines on termination and reservations should be proposed at all. The draft model clauses, on the other hand, should be referred to the Drafting Committee, with the understanding that additional model clauses from the memorandum should be considered as well.

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International Law Commission
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Identification of customary international law (*continued*)

(p. 8) Mr. Nolte said that the Special Rapporteur had guided the deliberations skilfully, drawing on his outstanding experience and inimitable persuasive style. The work on the topic was in its final stages and, once completed, it would be one of the Commission's most significant outcomes for a long time.

He was confident that the final outcome would be a singular achievement, which would be recognized as providing a reliable framework for the identification of one of the two most important sources of international law. The framework should provide sufficient, but not too much, room for identifying and developing rules of customary international law. Much depended, however, on how the Commission handled the Special Rapporteur's latest proposals — not all minor or merely technical — which were principally intended to accommodate the comments of some States. For the reasons set out below, he considered that, in most cases, the Commission should retain the wording of the draft conclusions as adopted on first reading.

Until the late 1980s, the main problem for the identification of customary international law had been a lack of information, with only a few academic journals from developed countries publishing accounts of the practice of certain States. That had been the main reason for the Commission's efforts to make the ways and means of customary international law more readily available. Since the early 1990s, however, the opposite problem of information overload had emerged, as illustrated by the impressive memorandum prepared by the Secretariat. In principle, even the least developed States could easily register their position on any question on a government website and, even if a State did not publish a digest of its practice, it left a digital footprint of such practice which might, in principle, be identified. It had also become possible to identify customary international law in more areas than before. More international and national courts, among other actors, were being called upon to decide whether there was a rule of customary international law that they must apply.

Those developments posed a fundamental challenge for customary international law as a source of international law. At first sight, they appeared very positive; the means to identify

customary rules were more readily available, and there were more areas and actors for which such rules were relevant. However, the explosion of information and the number of relevant actors made it more likely that the standards for the formation and identification of customary international law would become confusing and diluted. There was a risk that not only States, but also courts, tribunals and other actors would apply different standards and use the available information selectively, perhaps swayed by the prevailing preferences in certain fields. The Commission must therefore ensure that a common standard was maintained and that the identification of customary rules was not taken lightly. Otherwise, the authority and value of that source of international law would be diminished, particularly in the eyes of national legal authorities. For those reasons, he strongly supported the Special Rapporteur's overall approach, which was to require some rigour in the identification of customary international law and to emphasize the primary role of States in the formation of customary rules, as well as to maintain continuity regarding the standards for the identification of such rules by emphasizing the long-standing case law of the International Court of Justice.

However, the baby should not be thrown out with the bathwater; the rules on the identification of customary international law could not and should not be so strict that they made it difficult or impossible to identify even rules that had been generally assumed to exist for a long time. They should also not discourage international cooperation. Yet, some of the changes proposed by the Special Rapporteur, at the initiative of a few particularly active States, could have a suffocating effect on customary international law.

The proposal that clearly went too far was the insertion of the word "deliberate" in paragraph 1 of draft conclusion 6. It would mean that a general practice, which must indeed be widespread and representative, could only be formed if almost all States not actively engaging in the practice deliberately refrained from doing so, in a demonstrable manner. Given such a requirement, it would be realistically impossible in many deserving cases to demonstrate that an omission was deliberate, despite the vastly expanded sources of information available. That would be particularly true if some States, or groups of States, developed no views on the rule in question. He was still impressed by the comments made by Mr. Tladi on the inactivity of many States regarding many rules. He was very much in favour of helping those States develop and express their views on all topics at the international level, and it was his understanding that a side-event would soon be organized where such possibilities could be discussed. However, it could not be right that the lack of a demonstrable deliberate omission by a substantial number of States could prevent the formation and identification of rules of customary international law in the case of an otherwise widespread practice. That was not to say that the position of passive States was not important. It was, and such States could now make their views known much more easily than before, including through regional organizations. Nevertheless, States should not be able to inadvertently prevent the further development of customary international law simply by the absence of deliberate omission regarding the practice of other States, which they could easily take note of, but which was presumably of less interest to them.

Regarding the related issue of specially affected States, he supported the position of the Special Rapporteur. Mr Tladi had made an impassioned plea, in the name of the sovereign equality of States, for the concept and role of specially affected States not to be recognized. However, the concept did not and should not privilege the great powers, or stronger States in general. On the contrary, a great power that claimed to be affected by everything could not claim to be specially affected and could then only claim to be generally affected. A smaller State with recognizable specific interests, on the other hand, could more plausibly invoke the concept. Smaller States needed the concept of specially affected States more than larger States in order to protect their voice and their interests in the formation of customary international law.

The proposal to replace the word “consistent” with “virtually uniform” in paragraph 1 of draft conclusion 8 could also limit the development of customary international law. While the expression had occasionally been used in court decisions, it would create an unrealistic expectation that virtually all States needed to engage in a specific conduct.

His second major concern was that some of the proposed amendments, including the changes relating to the relationship between States and international organizations in the formation of customary international law, would excessively discourage international cooperation. The Special Rapporteur was proposing to substantially reduce the role of international organizations and those proposals should not be adopted.

As he himself had hinted in a question he had posed to Mr. Hmoud in an earlier meeting, he had observed that States that were more fully integrated in international organizations, particularly regional organizations, tended to support the text as adopted on first reading, whereas States that were less integrated were inclined to downplay the role of such organizations in the formation of customary international law. He suspected that States that were less integrated were concerned that those that were more integrated could increase their relative influence on the formation of customary international law simply by establishing more international organizations. Conversely, States that were more integrated were concerned that they would lose influence if the role played by international organizations was not recognized. Both concerns should be addressed in the draft conclusions.

He considered that the text as adopted on first reading had succeeded in striking a good balance by emphasizing the primary role of States in paragraph 1 of draft conclusion 4. The word “primarily” in that context should not be given up. The insertion of the word “may” in paragraph 2 would unnecessarily raise the threshold for the practice of international organizations to be relevant. If an international organization took action in an area where its members would otherwise have acted, that practice needed to count, because otherwise its members would have given up their role in the formation of customary international law by establishing an international organization and allowing it to act on their behalf. Apart from that substantive consideration, he saw some discrepancy between the Special Rapporteur’s reasoning in paragraphs 41 to 45 of his report, with which he largely agreed, and his proposed changes to draft conclusion 4, which were perhaps the result of efforts to accommodate a few States; those concerns could perhaps be addressed in the commentary. He therefore recommended that the debate on such an important draft conclusion should not be fully reopened.

The same considerations applied to the Special Rapporteur’s proposal to add the words “in certain circumstances” to paragraph 2 of draft conclusion 12. The formulation “may, in certain circumstances” was problematic, since “in certain circumstances” was already covered by the word “may”. It was therefore redundant and risked creating additional uncertainty.

Regarding draft conclusion 15, he shared the Special Rapporteur’s position. He was not convinced by the argument put forward by Mr. Murase that the concept of persistent objector was a matter of application, not identification, of customary international law. In his own view, even if the persistent objector rule was considered a form of application, such application would involve and imply the need to identify the rule in question.

He regretted that three important points had not been covered in the proposed draft conclusions and commentaries. First, the relationship between customary international law and general principles of law should have been addressed; there should at least be a “without prejudice” clause and the matter should be given some attention in the commentaries. Fortunately, the Commission would have an opportunity to address that relationship if and when it decided to work on the topic “General principles of law”.

Secondly, the Special Rapporteur seemed to be seeking to put the important dimension of the formation of customary international law to rest by proposing to drop the word “formation” from the draft altogether. However, replacing that word with “creative” would remove the dimension of process — formation — almost entirely, which was so important for customary international law. It would facilitate shortcut arguments for recognizing existing law, and he had thought the Special Rapporteur wished to guard against such an impression. Less informed readers might easily understand the word “creative” as simply a synonym of “expressive”. Even though the International Court of Justice had occasionally used the expression “expressive or creative”, the Commission should retain “formation” as the established term, since it better captured the often-complicated and slow-moving process of customary law.

The third point concerned the references in the commentaries to the teachings of the most highly qualified publicists of the various nations. The lack of references to authoritative literature in the commentaries was difficult to understand, since the Special Rapporteur himself played a leading role in academic debates, in addition to his role as a foremost practitioner. Even if he did not wish to be described as an academic, he was undeniably one of the most highly qualified publicists. The question that should be asked is why he had chosen to omit references to academic publications in the commentaries, because it was unlikely that he had decided to do so simply to keep the commentaries succinct. He wondered whether that had anything to do with the Special Rapporteur’s assessment that the increase in the number of publications and the diversity of views expressed therein made that category of material less useful than before for reaffirming the unity and rigour with which customary international law should be identified. In his own view, however, while that goal might be easier to achieve by focusing on the case law of the International Court of Justice, the Commission should not risk placing the responsibility for explaining and justifying the existence of rules of customary international law almost exclusively on one or a few courts. The Commission should continue to base its work on all the means of interpretation, determination and identification mentioned in Article 38 of the Statute of the International Court of Justice. Selecting among the various authors might require some courage, but it was necessary and justified.

Lastly, he agreed that “conclusions” was the right term for the Commission’s output on the topic, since it reflected the rich basis of the Commission’s work. It was particularly appropriate when it came to the rules of interpretation and identification of international law. The term “guidelines”, on the other hand, was only apparently more normative; it was suggestive of decision makers who were interested in practical guidance, but also in flexibility. It should be possible to explain that difference to law students.

He thanked the Special Rapporteur once again for his outstanding work and recommended referring all the draft conclusions to the Drafting Committee.

3396th Meeting, 7 May 2018

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International Law Commission
Seventieth session (first part)**Summary record of the 3396th meeting**

Held at Headquarters, New York, on Monday, 7 May 2018, at 10 a.m.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*)

(p. 3) Mr. Nolte (Special Rapporteur) said that the debate had been surprisingly rich, given the broad basic agreement on almost all issues, and he thanked members of the Commission for their thoughtful contributions. Several references had been made to both the rigour and the flexibility of his approach; he hoped that the former applied to the substance of his work and the latter to his spirit of compromise, although a rigorous approach to substance implied certain limits on the possibility of finding compromises. Ms. Lehto had said that, as she was joining the debate at the stage of the second reading of the draft conclusions on the topic, she intended to be cautious in her comments. However, even those who had participated in the debate from the beginning sometimes needed to be reminded of its history. Mr. Jalloh had observed that, if possible, the general agreement that had been reached thus far should not be called into question without compelling reasons and that many issues had been addressed in the commentaries. The draft conclusions represented a collective effort of the Commission, which had refined the text a number of times over the years. Moreover, a number of members had rightly said that the comments by States gave no reasons for major amendments.

Very few comments had been made on draft conclusion 1 [1a] (Introduction), and only one of them concerned a substantive matter, namely the suggestion by Sir Michael Wood that the words “between States” should be added at the end of the draft conclusion, or that the relationship between the topic and the rules on interpretation in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations might be explained in the commentary. He was open to the latter suggestion concerning the commentary; however, he took the view that, although the draft conclusions mainly dealt with treaties between States, they might also be relevant to treaties to which non-State actors were also parties. He therefore considered, along with some other members, that the scope of the topic should not be narrowed down at the last minute.

There had also been very few substantive comments on draft conclusion 2 [1] (General rule and means of treaty interpretation). The most radical point had been made by Mr. Rajput when he had stated that subsequent agreements and subsequent practice, under article 31 (3) of the 1969 Vienna Convention on the Law of Treaties, were an appendage to context for the purposes of interpretation and should therefore not be unduly emphasized. Sir Michael Wood, on the other hand, had expressed the view that subsequent agreements and subsequent practice were of equal weight to the means of interpretation referred to in article 31 (1) of the 1969 Vienna Convention. The Special Rapporteur reminded members that the question of the role and the relative importance of subsequent agreements and subsequent practice among the various means of interpretation had been the subject of a thorough debate in 2013 that had resulted in the current formulation of the draft conclusion; that formulation had satisfied proponents of different views. He therefore proposed that the existing formulation should be changed only when there were widely accepted reasons to do so.

Sir Michael Wood had proposed a different, fundamental change to the draft conclusion, namely the deletion of paragraphs 2, 3 and 4. He had taken the view that the inclusion of parts of article 31 (3) in paragraph 3 detracted from the unity of the general rule of treaty interpretation and that no separate reference to “other subsequent practice” was needed or helpful in the draft conclusion. The Special Rapporteur reminded members that the question of how to describe and reflect the pertinent provisions of the 1969 Vienna Convention for the purpose of the draft conclusions — including the concern that articles 31 and 32 should not be called into question or misrepresented and that subsequent agreements and subsequent practice should not be overemphasized in the context of treaty interpretation — had also been the subject of thorough debate in the Commission. He therefore hoped that those questions would not be reopened in the Drafting Committee and was encouraged by Sir Michael Wood’s remark that his concerns might be accommodated in the commentary.

Mr. Rajput had expressed concern that the word “rule”, in the singular, in the phrase “the rule on supplementary means of interpretation” in paragraph 1 of the draft conclusion was inconsistent with the reference to “supplementary means of interpretation”, in the plural, in article 32 of the 1969 Vienna Convention. Similarly, Sir Michael Wood had stated that the reference to “the rule on supplementary means” obscured the division in article 32 between the broadly envisaged use of supplementary means to “confirm” the meaning of a treaty and the tightly conditioned use of such means to “determine” the meaning. The Special Rapporteur noted that the question of whether article 32 actually consisted of two rules or provisions rather than simply two aspects of a single rule was a substantive issue and not merely a technical point of drafting. However, it was not necessary at the current stage to determine whether that understanding of article 32 was correct. The distinction between “confirm” and “determine” was flagged in the commentary to the draft conclusion and could be elaborated upon as far as necessary there.

He considered that the unity of the process of treaty interpretation, as reflected in articles 31 and 32 of the 1969 Vienna Convention, was well captured in draft conclusion 2 as it currently stood, and that there was a logic in the current order of the paragraphs. He would not, however, be fundamentally opposed to Mr. Grossman Guiloff’s proposal that paragraph 5 should be moved, so that it would become paragraph 2, if that was the preference of the other members of the Commission. He was also willing to confirm in the commentary that the rules on interpretation set out in articles 31 and 32 applied, as a matter of customary international law, to treaties that predated the 1969 Vienna Convention, as proposed by the United Kingdom and supported by Mr. Grossman Guiloff, Mr. Hassouna and Mr. Ruda Santolaria. Lastly, he was pleased that the Spanish-speaking members, namely Mr. Grossman Guiloff, Ms. Escobar Hernández, Mr. Ruda Santolaria and Mr. Vázquez-Bermúdez, accepted his proposal to replace the words “*en el sentido del*” in the Spanish version of paragraph 4 with the words “*en virtud*”

del' and agreed that it was necessary to verify whether that change had implications for the other language versions of the text.

Support had been expressed for draft conclusion 3 [2] (Subsequent agreements and subsequent practice as authentic means of interpretation) by Mr. Hassouna and Mr. Rajput. Mr. Cissé had expressed some doubts about the usefulness of the draft conclusion but had not objected to it or proposed an alternative formulation.

On draft conclusion 4 (Definition of subsequent agreement and subsequent practice), one set of comments had focused on the proposal by Mr. Grossman Guiloff to move the definition of "agreement" from draft conclusion 10 [9] (Agreement of the parties regarding the interpretation of a treaty) to draft conclusion 4, so as to facilitate the understanding of the term "subsequent agreement". Mr. Reinisch had expressed openness to that proposal but Ms. Lehto and others had expressed the view that the legal nature of a subsequent agreement had been sufficiently addressed in the commentary to draft conclusion 4. He wished to point out that the set of draft conclusions was structured in such a way as to move from the general to the specific, so that not every question that came to the mind of the reader was immediately addressed. Accordingly, any questions that arose regarding the term "agreement" were addressed in draft conclusion 10. If the definition of the term were moved to draft conclusion 4, additional drafting issues would arise. He therefore proposed to rely on the reference to draft conclusion 10 made in the commentary to draft conclusion 4 and/or on the capacity of the reader to digest the set of draft conclusions quickly.

A second set of comments on draft conclusion 4 concerned the use of the expression "the parties" in paragraph 1. Mr. Park, supported by Ms. Oral, Mr. Ruda Santolaria, Mr. Ouazzani Chahdi and Mr. Rajput, had proposed that the expression should be changed to "all the parties". It was true that, in that paragraph, "the parties" meant "all the parties"; that point was made clear in the commentary. By contrast, in the definition of subsequent practice in paragraph 2, it was appropriate, as also suggested by Mr. Park, not to refer to "all the parties", because it was not the case that every party must have engaged in subsequent practice and also because the necessary agreement of the remaining parties might, in certain circumstances, be established by their silence. That reasoning was consistent with the position expressed by the Commission in its 1966 commentaries to the draft articles on the law of treaties: "By omitting the word 'all' the Commission did not intend to change the rule. ... It omitted the word 'all' merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice." In the Special Rapporteur's view, the use of the word "all" in paragraph 1 but not in paragraph 2 could give rise to a misunderstanding by suggesting that only subsequent agreements and not subsequent practice required the agreement of all the parties. He therefore preferred to retain the existing formulation of paragraph 1, a position supported by Mr. Šturma and Mr. Vázquez-Bermúdez.

Draft conclusion 5 (Attribution of subsequent practice) had given rise to an important debate regarding the use of the term "attribution", a debate which he had himself invited by stating his sensitivity to the concern of the United States that the use of that term could give rise to a misunderstanding that all conduct that could be attributed to a State under the articles on responsibility of States for internationally wrongful acts could be seen as subsequent practice for the purpose of treaty interpretation under articles 31 and 32 of the 1969 Vienna Convention. Indeed, when he had first proposed what later became draft conclusion 5, he had referred not to attribution in the sense of the articles on State responsibility but to attribution "to a State party for the purpose of treaty interpretation" (see A/CN.4/660, para. 125). It was only after the debate in the Commission, in which some members had insisted that a reference should be made to the articles on State responsibility, that he had agreed to refer to the articles in the commentary.

The debate at the current session had resulted in broad agreement, in substance, on the need to further clarify the fact that “attribution” in the sense of the articles on State responsibility did not fully cover what was referred to in draft conclusion 5. In their comments, members had taken one of two basic approaches. The first approach consisted in dropping the concept of attribution and referring only to “conduct”; an explanation could then be given in the commentary as to what kinds of conduct could and should be regarded as subsequent practice. If that approach were to be taken, it should also be made clear in the commentary that the conduct must be attributable in the sense of State responsibility as a necessary, but not a sufficient, condition for it to count as subsequent practice. The second approach consisted in retaining the concept of attribution but reformulating paragraph 1 to make it clearer that conduct must not only be attributable to a State in the sense of State responsibility but must also be undertaken in a recognized application of a treaty, along the lines of the proposal in the report. In that case, it would need to be made clear in the commentary that such attribution was not the only condition for conduct to count as subsequent practice. He considered that either approach was appropriate to achieve the generally accepted aim and was confident that the Drafting Committee would, in a spirit of cooperation, find a satisfactory solution. He had taken note of the various proposals by members regarding the formulation of the provision and would take them up in the Drafting Committee.

Paragraph 2 of draft conclusion 5 had been addressed by only a few members, most of whom had expressed their support. Mr. Nguyen had expressed certain doubts and had proposed amended wording, which the Drafting Committee could discuss.

With regard to draft conclusion 6 (Identification of subsequent agreement and subsequent practice), comments had been made only on paragraph 1. He had created some confusion by recommending, in his report, that the word “normally”, rather than being deleted, should be replaced with the word “always”. He had viewed that change as necessary following his recommendation to take up the proposal of Ireland that the words “for example” should be inserted after the words “this is not normally the case”. However, in his introduction of the report at the current session, he had retracted the proposal to add the word “always”, which had also been rightly questioned by Mr. Park. His recommendation, therefore, was to insert the words “for example” and simply delete the word “normally” without replacing it. In substance, all members who had commented on the paragraph, namely Mr. Šturma, Mr. Grossman Guiloff, Ms. Oral and Mr. Hassouna, had expressed support for that recommendation, which should provide a good basis for the deliberations of the Drafting Committee.

On draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation), Mr. Rajput had proposed a reformulation of the second sentence of paragraph 1, so as to avoid creating the impression that a hierarchy existed among the alternatives given. The Special Rapporteur was not persuaded that the text created such an impression. With regard to paragraph 2, Mr. Grossman Guiloff had proposed that the word “clarification” should be replaced with the word “confirmation”, since the word “confirm” was used in article 32 of the 1969 Vienna Convention. However, “confirm” was not the only term used in article 32 — “determine” was also used — and “clarification” was a general term that encompassed both those alternatives. In a similar vein, Mr. Nguyen had proposed that “clarification” should be replaced with “identification”. The Special Rapporteur hoped that Mr. Rajput, Mr. Grossman Guiloff and Mr. Nguyen could accept the existing formulation of paragraphs 1 and 2, which had been the subject of thorough deliberation.

With regard to the first sentence of paragraph 3, Mr. Rajput had expressed doubts about the use of the word “presumed” on the grounds that it amounted to a legal fiction that subsequent agreement or practice had to be presumed to be limited to treaty interpretation and did not extend to amendment or modification. However, the word “presumed” referred to an interpretative presumption, in other words, an aid for interpreters when they had to determine whether

a specific subsequent agreement or subsequent practice amounted to an effort to amend or modify a treaty. Interpretative presumptions were commonplace in law, for example presumptions in national law that laws were constitutional. In a similar vein, the Commission itself had formulated an interpretative presumption when it had stated, in its 1964 commentaries to the draft articles on the law of treaties, that “the Commission’s approach to treaty interpretation was on the basis that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties”. The question of whether a subsequent agreement or a subsequent practice was aimed at interpreting or modifying a treaty was a preliminary question that needed to be resolved before the role of the subsequent agreement or subsequent practice in the interpretation of the treaty could be determined. That question fell squarely within the scope of the topic and was of practical importance. Mr. Murphy had expressed the view that there was no basis for the presumption expressed in that sentence, at least as it related to an agreement subsequently arrived at. He had therefore proposed that the sentence should be deleted. A number of other members had expressed doubts about the same sentence, albeit for different reasons, while further members had stated that they found the current formulation of the paragraph to be satisfactory or acceptable.

As had been noted before, the three sentences in paragraph 3 were interrelated. They were based on a wealth of court decisions and other supporting material, which were described in the commentary. In several of the decisions cited, the courts had concluded, despite certain indications to the contrary, that an agreement subsequently arrived at or a practice in the application of a treaty had had the effect of contributing to an interpretation of a particular treaty provision and did not amount to an amendment or modification of, or an attempt to amend or modify, the treaty. The need to determine whether a subsequent agreement or subsequent practice contributed to the interpretation of a treaty or aimed at its amendment or modification was itself a question of interpretation, which was an important aspect of the topic. Indeed, as part of its work on the law of treaties, the Commission had considered the effect of subsequent agreements and subsequent practice with respect both to the interpretation and to the amendment or modification of a treaty. It had had good reason to do so, because it was appropriate to help interpreters to determine where interpretation ended and amendment or modification began. The matter was addressed in paragraph 3 precisely in order to provide a safeguard against the draft conclusions being used to advocate modification of a treaty through subsequent practice, as had been noted by Mr. Hmoud. The “without prejudice” clause — the third sentence of the paragraph — was not enough on its own to provide interpreters with guidance. For those reasons, he was convinced that paragraph 3, as a whole, was well grounded and should be maintained. He was nonetheless open to the possibility of making smaller changes that reinforced the basic thrust of the paragraph. One such change, favoured by Ms. Galvão Teles, Mr. Ruda Santolaria, Ms. Lehto and Mr. Grossman Guiloff, would be to make the third sentence of paragraph 3 a separate paragraph so as to emphasize the distinction between interpretation and amendment or modification.

As to draft conclusion 8 [3] (Interpretation of treaty terms as capable of evolving over time), Ms. Oral and Mr. Ouazzani Chahdi had expressed doubts about the word “presumed”, while Mr. Murphy had said that it should be deleted unless the Special Rapporteur could explain why “presumed intention” was a superior formulation to “intention”. Mr. Murase had said that the expression “presumed intention” seemed to prioritize the original intent of the parties and subordinate other factors. Mr. Reinisch, Mr. Hmoud and Mr. Ruda Santolaria, on the other hand, had argued in favour of retaining the expression. Mr. Hmoud in particular had pointed out that the International Court of Justice had used the word “presumed” to refer to the intention of the parties to a treaty in its 2009 judgment in the case concerning *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*. Paragraph (9) of the commentary to the draft conclusion also addressed Mr. Murase’s concern by quoting the Commission’s

early commentary to the draft articles on the law of treaties: “the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation”. There was thus considerable support for the expression “presumed intention” in the context of the draft conclusion. However, should the members of the Commission continue to have doubts, the alternative would not be simply to delete the word “presumed” but rather to remove the reference to “intention”, whether presumed or not. In fact, in his original proposal he had deliberately omitted any reference to “intention”, and the Commission had agreed on the current formulation only after a long debate. If members wished to discuss the possibility of removing the reference, the debate on the draft conclusion would have to be fully reopened, which did not seem warranted at the current stage.

With regard to draft conclusion 9 [8] (Weight of subsequent agreements and subsequent practice as a means of interpretation), the only issue that had been addressed by members was the proposal by the United Kingdom that reference should be made in paragraph 2 to the consistency and breadth of subsequent practice, a proposal which he, in turn, had recommended. Mr. Murphy had strongly objected, stating that the proposed change made no sense because there must already exist consistency and breadth in order for the practice to establish the agreement of all the parties as required by article 31 (3) (b) of the 1969 Vienna Convention. Mr. Murase and Mr. Park had voiced similar concerns. The reason for the recommendation to accept the proposed change was that, since subsequent practice under article 31 (3) (b) did not need to be the practice of all parties but must only establish the agreement of all parties, the number of parties that actually engaged in a practice would often be relevant for the question of the weight of a subsequent practice in the process of interpretation. That explanation could be included in the commentary so as to prevent confusion, which would allay the concern expressed by Ms. Lehto. Another possibility would be to consider Mr. Murase’s proposal that paragraph 2 should be amended to read as follows: “The weight of subsequent practice under article 31 (3) (b) depends, in addition, on whether and how conduct is repeated and how many parties actively engage in the subsequent practice.” The Special Rapporteur’s preference, however, was to add a reference to consistency and breadth, as recommended in his report, a position for which a number of members had expressed support.

Regarding draft conclusion 10 [9] (Agreement of the parties regarding the interpretation of a treaty), Mr. Murphy, commenting on the first sentence of paragraph 1, had said that, in the context of article 31 (3) (b) of the 1969 Vienna Convention, it was not a requirement that each party should be “aware of and accept” a “common” understanding of all the parties. For example, the Supreme Courts of three States parties to a treaty might all render decisions in which they arrived at the same interpretation of a treaty provision without being aware of each other’s decisions. In that case, according to Mr. Murphy, there would be no need to establish that each Supreme Court was aware of a common understanding of all three Supreme Courts. He had therefore proposed that the words “a common” should be replaced with the words “the same”, so that the phrase in question would read “requires the same understanding regarding the interpretation of a treaty which the parties are aware of and accept”. Sir Michael Wood and Ms. Oral seemed to lean in the same direction. Most members, however, preferred to keep the existing formulation of the sentence. As pointed out by Mr. Ouazzani Chahdi, it was noted in the report that the expression “common understanding” was used in the 1964 and 1966 commentaries to the draft articles on the law of treaties.

The Special Rapporteur was sensitive to the concern expressed by Mr. Murphy; in fact, the Commission had already taken account of it to some extent by stating, in paragraph (8) of the commentary to the draft conclusion, that “in certain circumstances, the awareness and acceptance of the position of the other party or parties may be assumed, particularly in the case of treaties that are implemented at the national level”. The example given by Mr. Murphy might be just one of those circumstances. The Special Rapporteur therefore proposed to ex-

pand on such circumstances in the commentary, without, however, changing the formulation of the draft conclusion or the point of principle that was reflected therein.

With regard to the second sentence of paragraph 1, Sir Michael Wood and Mr. Hassouna had confirmed the point made therein, which was that a subsequent agreement need not be legally binding. Mr. Hmoud had said that he remained of the view that such an agreement should be legally binding; the Special Rapporteur did not, however, regard that observation as a fundamental objection. Sir Michael Wood had proposed a purely linguistic change, which the Drafting Committee would consider.

Paragraph 2, which dealt, *inter alia*, with the role of silence, had not given rise to many comments, except for an expression of support by Mr. Nguyen and Mr. Grossman Guilloff and the expression of certain doubts by Mr. Šturma, who had not, however, proposed an alternative formulation.

On draft conclusion 11 [10] (Decisions adopted within the framework of a conference of States parties), most comments had related to the question of whether the word “consensus” in paragraph 3 should be changed or removed. Mr. Hmoud had proposed that it should be removed because consensus was procedural and did not reflect unanimity; Ms. Oral had made the same proposal on the grounds that the reference added an element of confusion. Other members, however, had expressed support for or acceptance of the reference. Mr. Gómez-Robledo had proposed that, since there was no agreed definition of the word “consensus”, it would be preferable to refer to decisions that were adopted with or without a vote.

The Special Rapporteur considered that the reference to consensus should be kept. It was true that the term was procedural, but that was exactly the point: consensus was the most important procedure in practice in the given context. The reference should not, therefore, give rise to confusion. With regard to the formulation, there seemed to be some support for placing the reference in parentheses, as he had proposed in his report, but also support for retaining the reference as it stood. He therefore leaned towards the view that no change was necessary; however, it was for the Drafting Committee to consider the matter.

With regard to paragraph 3, Mr. Murphy had proposed that the word “all” should be inserted before “the parties” in the phrase “agreement in substance between the parties”, given that not all the parties were necessarily present at a conference of States parties. The Special Rapporteur did not think that such a change was necessary, for reasons similar to those he had described in relation to the proposed addition of the word “all” in paragraph 2 of draft conclusion 4. It was true that a decision of a conference of States parties at which not all parties were present could not, as such, embody a subsequent agreement of the parties regarding its interpretation. However, it might embody such an agreement after some time had passed, if the parties that had not been present did not object when the circumstances called for some reaction in the sense of draft conclusion 10, paragraph 2.

With regard to draft conclusion 12 [11] (Constituent instruments of international organizations), in order to accommodate the request of some States to make a clearer distinction between the subsequent practice of the parties and the practice of an international organization, he had recommended in his report that the words “of the parties” should be added to paragraph 2 after both occurrences of the words “subsequent practice”, as proposed by Romania and Spain. Most members had expressed agreement with that proposal.

Mr. Murphy had proposed a reformulation of paragraph 3 of the draft conclusion, which would reopen the debate on the whole paragraph. The wording of the paragraph had been agreed upon after a thorough debate in the Drafting Committee and it had been accepted by the Commission as a whole, together with the commentary, which had been adopted word by word. The paragraph could not, therefore, be described as a last-minute compromise. It also

did not state, as Mr. Murphy suggested, that the practice of an international organization constituted the object and purpose of a treaty; it merely stated that such practice might contribute to the interpretation of the organization's constituent instrument when applying articles 31 (1) and 32 of the 1969 Vienna Convention. Such reasoning had been used in the judgment of the Caribbean Court of Justice referred to in the report. It was true that the primary element of the judgment — that a particular decision of the Caribbean Community was “furthering a fundamental Community goal of free movement ... envisioned by the RTC [Revised Treaty of Chaguaramas establishing the Caribbean Community]” — was not related to the issue at hand. However, the Court had also held that the Community's decision clarified one aspect of the goal of the Treaty. Hence it had drawn, *inter alia*, on the practice of the organization when determining the object and purpose of the Treaty, even if it had not explicitly referred to article 31 (1). That decision was just one example of how the practice of an international organization might contribute to the interpretation of its constituent treaty; further examples were given in the commentary. During the debate, Ms. Lehto had expressed her support for the reference to articles 31 (1) and 32 for the reasons explained in the commentary; Mr. Ouazzani Chahdi had also expressed similar agreement. The Special Rapporteur therefore hoped that Mr. Murphy could agree to retain the current formulation of paragraph 3.

Draft conclusion 13 [12] (Pronouncements of expert treaty bodies) had given rise to the most comments, no doubt because he had exceptionally chosen to reopen the debate on a paragraph that had not been included in the draft conclusion as adopted on first reading. The reactions to his proposal to add that paragraph to the draft conclusion as a new paragraph 4 had been mixed. He reminded members of his two reasons for making the proposal at such a late stage.

The first reason was that a letter had been received from the Chair of the Human Rights Committee after the completion of the first reading, stating: “In the Committee's view, the contribution that pronouncements of expert treaty bodies can have, whether or not they give rise to a subsequent practice by the parties, would merit clearer recognition in the draft conclusions than in the form of a saving clause in paragraph 4 of conclusion 13 [12].” That observation deserved to be considered in a plenary debate. Indeed, certain States, such as the Netherlands, had stated in the Sixth Committee that a more elaborate discussion of the legal characterization of the practice of expert treaty bodies would have been welcome.

The second reason was that he felt that the debates in the Commission and the Sixth Committee had suffered from some confusion, for which he felt partly responsible, resulting from the frequent failure to distinguish between the subsequent practice of the parties to a treaty and other forms of relevant practice, such as the practice of an international organization. Such other forms of relevant practice were not only those referred to in draft conclusion 12, paragraph 3. The pronouncements of the Human Rights Committee, for example, had been referred to as the “practice of the Human Rights Committee” by the International Court of Justice in its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. In his view, the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties” was not confined to the practice of States; if the pronouncements of treaty bodies could be counted as “practice”, they fell squarely within the scope of the topic. The debates in the Commission and the Sixth Committee, however, had focused on the judgment in the case concerning *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, in which the Court had referred to the pronouncements of the Human Rights Committee as “interpretative case law” rather than “practice”. The discussion had thus turned into a debate on the role and value of such pronouncements more generally. However, the Court's use of the term “interpretative case law” had not, in his view, been intended to change its basic characterization of those pronouncements as a form of practice. For the reasons explained, his proposal should not be seen as surprising or

illegitimate, as suggested by Mr. Murphy; nor was he was creating an artificial reason to refer to the role of expert treaty bodies, as Mr. Rajput had said.

The debate had shown that the number of members who supported the proposal was almost equal to the number who opposed it. Mr. Šturma and Mr. Park had said that they were open-minded about it but had pointed out that the proposed new paragraph 4 would have to be reconciled with the existing “without prejudice” clause. Ms. Escobar Hernández, while expressing some sympathy for the proposal, had also made her own proposal for amendment. There were, however, no clear conclusions to be drawn from the debate because different members had given different reasons for their points of view. Some members who had endorsed his proposal, for example, had said that they did not consider the pronouncements of expert treaty bodies to be subsequent practice of the parties; others who had opposed it had done so on the grounds that such pronouncements did not fall within the scope of the topic. In order to adopt a proposed formulation, it would be necessary to reach an understanding on the question of whether the pronouncements of expert treaty bodies constituted a form of practice that fell within the scope of the topic.

He agreed with those members who considered that the current topic was not the appropriate context in which to address in a comprehensive and general manner the legal significance and effect of the pronouncements of expert treaty bodies. For that reason, he proposed to keep the “without prejudice” clause. However, the retention of that clause did not preclude the addition of the proposed new paragraph. “Practice” was, after all, the term that had been used by the International Court of Justice to refer to such pronouncements. The real question, which had not been fully addressed in the debate, was the extent to which such pronouncements played a role that was analogous to the practice of international organizations in the application of their constituent instruments. He hoped that the Drafting Committee would give him an opportunity to explain that limited aspect of the question with a view to arriving at a good solution.

Few other comments had been made on draft conclusion 13. Mr. Hmoud and Mr. Nguyen had endorsed the recommended change to the reference to silence in the second sentence of paragraph 3. Sir Michael Wood had expressed doubts about the term “pronouncements”, despite having agreed to it on first reading, while Mr. Gómez-Robledo had proposed that it should be replaced with the term “determinations”. The Special Rapporteur had explained, in his fourth report (A/CN.4/694), that he had chosen the term “pronouncements” because of its comprehensiveness and neutrality; after debates in the plenary and the Drafting Committee, the Commission had accepted it. In the debate at the current session, Mr. Jalloh and other members had endorsed it. The Special Rapporteur therefore hoped that Sir Michael Wood and Mr. Gómez-Robledo could find it acceptable.

With regard to the final form of the draft conclusions, Mr. Murase had proposed that the term “guidelines” rather than “conclusions” should be used. While the Special Rapporteur appreciated that Mr. Murase’s aim was as to attribute greater legal authority to the outcome of the Commission’s work on the topic, he considered that it was more appropriate to emphasize the fact that the Commission’s work rested on conclusions from the identification and interpretation of sources such as articles 31 and 32 of the 1969 Vienna Convention and from the observation of practice. Many other members supported that approach.

He proposed that the Commission should refer the draft conclusions to the Drafting Committee.

3390th Meeting, 30 April 2018

Available at:

http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr3390.pdf&lang=E

A/CN.4/SR.3390

Provisional

For participants only

4 June 2018

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International Law Commission
Seventieth session (first part)**Provisional summary record of the 3390th meeting**

Held at Headquarters, New York, on Monday, 30 April 2018, at 3 p.m.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties

(p. 4) Mr. Nolte (Special Rapporteur), introducing his fifth report on subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/715), noted that the topic had been on the Commission's agenda since 2013; if the Commission could conclude its work thereon by the end of 2018, it would have completed its task within the comparatively short time of six years. It was true that, between 2009 and 2012, the Commission had dealt with many of its aspects within the framework of a Study Group on Treaties over time. The Study Group format for the topic showed that the Commission did not always immediately accept proposals for new topics, but sometimes tested the viability of proposals through different formats.

It followed that, in a sense, most of the draft conclusions adopted on first reading in 2016 had been considered twice by the Commission, first within the framework of the Study Group, and then again, between 2013 and 2016, in the usual format of the Commission's work, namely through its debates on the Special Rapporteur's reports, the elaboration of draft conclusions in the Drafting Committee and their adoption by the plenary, together with commentaries. States had always had the benefit of the Commission's commentaries when reacting in the Sixth Committee of the General Assembly to the work on the topic. In the Sixth Committee's four debates thereon, in 2013, 2014, 2015 and 2016, between 25 and 35 States had regularly offered comments on the submitted draft conclusions and commentaries. For that reason, the comments and observations by States addressed in the fifth report were mostly statements from the Sixth Committee's debates from 2013 to 2016; while they had been summarily reported in the Special Rapporteur's report of the year following their submission, they had not been able to be immediately fed back into the work on the topic, since the Commission had by then moved on to the next draft conclusions. Only in the fifth report therefore were those comments and observations described and evaluated in detail.

The fifth report also took into account statements by States received by the Commission after the Sixth Committee's debates in 2016 and which dealt with the set of draft conclusions as a whole. There appeared to be two reasons why such statements had been submitted by only 13 States. First, almost all the draft conclusions, with perhaps one exception, had received broad-based support among States, whose comments concerned mostly nuances or details in the commentaries and did not call into question the substance or formulation of the draft conclusions themselves. Where, exceptionally, a State had expressed substantive criticism, such criticism had not usually been shared by other States, or was shared by only a very limited number of States. Secondly, States saw no reason to repeat the comments they had made between 2013 and 2016, given that the text of the draft conclusions had not changed on first reading. Members should keep that background in mind as a superficial reading of the fifth report could give a misleading impression. The report considered practically all comments by States that reflected individual expressions of nuance or disagreement, which should not, however, distract from the basic consensus underpinning the draft conclusions and their commentaries. He hoped that the Commission would therefore be able to fine-tune and conclude its work on second reading. He had felt encouraged by the reactions of States to maintain most of the draft conclusions with only a few changes; for convenience, they were reproduced, together with his proposed changes, in the annex to the report.

He recommended that draft conclusion 1 [1a] (Introduction) should be maintained unchanged, as it had attracted few observations, none of them being seriously critical. Draft conclusion 2 [1] (General rule and means of treaty interpretation) had been generally supported by States. The only question with respect to which States had expressed different views had been whether the draft conclusion, or the commentary, should refer to the "nature of the treaty" as a relevant factor for determining whether more or less weight should be given to certain means of interpretation. After a long debate, the Commission had decided, against the view of the Special Rapporteur, not to refer to the "nature of the treaty" in the text of the draft conclusion. Since, moreover, the views of States on the question were more or less evenly divided, it seemed preferable to maintain the reference to the question in the commentary. He therefore recommended that draft conclusion 2 should remain unchanged, except to replace the words "en el sentido" with the words "en virtud del" in the Spanish version.

With regard to draft conclusion 3 [2] (Subsequent agreements and subsequent practice as authentic means of interpretation), which had been generally approved in substance, as the two proposed terminological changes would cause the text to depart from the Commission's established terminology, he recommended that it should be maintained as adopted on first reading. Draft conclusion 4 (Definition of subsequent agreement and subsequent practice) had likewise been generally supported by States. Some specific comments and observations regarding paragraph 1 were aimed at adding substantive elements that were not necessary in a draft conclusion on definitions or were articulated elsewhere in the draft instrument or concerned the commentary. Two States had proposed changing the text to make it clear that "practice" could not consist of a single event; he did not consider that necessary or appropriate. He did, however, agree with the proposal to move the inverted commas around the term "subsequent practice", to indicate more clearly that the term to be defined was "other subsequent practice". No further changes were recommended.

Turning to draft conclusion 5 (Attribution of subsequent practice), he said that substantive considerations militated in favour of changing its formulation, which could currently be misconstrued to mean that conduct attributable to a State under the rules of State responsibility was thereby also automatically relevant for the interpretation of treaties. As had been pointed out correctly by the United States, however, there were certain acts, for example the actions of a State agent taken contrary to instructions, that were attributable to a State for the purposes of State responsibility but were not considered State practice for the purposes of the interpreta-

tion of treaties. He therefore recommended that the words “in the application of the treaty” in paragraph 1 should be moved to the end of the sentence, to make it clear that attribution under the rules of State responsibility was a necessary but not a sufficient condition, and that conduct could thus only be relevant for the interpretation of a treaty if undertaken in a recognized application of the treaty. The paragraph should therefore be reformulated as follows: “Subsequent practice under articles 31 and 32 ... may consist of any conduct which is attributable to a party to the treaty under international law and is in the application of the treaty”.

As for paragraph 2 of that draft conclusion, most States had accepted its formulation, although some States had emphasized that international organizations would play a different role from that of other non-State actors. The Commission had indeed recognized, in draft conclusion 12, that the practice of an international organization might contribute to the interpretation of its constituent treaty. Since, however, the draft conclusions had addressed that important case and not specifically other situations outside the purview of the 1969 Vienna Convention on the Law of Treaties, he considered that the general rule, as formulated in paragraph 2, should be maintained.

Draft conclusion 6 (Identification of subsequent agreement and subsequent practice) had received relatively few comments from States, most of which were supportive, with some suggesting minor improvements. In that connection, he accepted the proposal by Ireland to insert the words “for example” in the second sentence of paragraph 1. He had further replaced the word “normally” with “always” in the proposed new text. He had, however, realized subsequently that the latter change might give rise to a fresh misunderstanding and that it might be better to omit both “normally” and “always”. Nonetheless, he felt that the Drafting Committee should be able to resolve that minor point easily.

On draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation), most of the comments received concerned paragraph 3, which addressed the difficult question of the relationship between an interpretation and an amendment or modification of a treaty, including the possible role that subsequent agreements and subsequent practice might play in that context. The different views expressed on the general question of whether subsequent practice of the parties could lead to the modification of a treaty were not meant to be reconciled by the formulation of the paragraph. It was indeed because the Commission had been aware of the long-standing divergence of views among States and courts that it had chosen the language used in the paragraph, which expressed the widest possible agreement among States and gave a nuanced answer to the question posed. The three sentences in paragraph 3 were interrelated. The commentary offered a variety of sources and described the different points of view that had existed among States at least since the elaboration of the 1969 Vienna Convention; it also provided an explanation for the language chosen in paragraph 3. As that paragraph, while not fully resolving the question for all conceivable circumstances, offered a general direction and was therefore acceptable, he recommended that the draft conclusion should be maintained in its current form.

Draft conclusion 8 [3] (Interpretation of treaty terms as capable of evolving over time) had likewise been carefully weighed and debated by the Commission. The widespread agreement on its formulation might spring from the fact that the draft conclusion did not claim to resolve the question of evolutive interpretation in the abstract or to adopt one particular theory of such interpretation at the expense of another, but attempted, rather, to address one specific aspect of that question, namely, the possible role of subsequent agreements and subsequent practice in cases where an evolutive interpretation of a term of the treaty was appropriate. However, it did so without seeking to determine the circumstances under which such would be the case, except by providing certain widely accepted examples from international case law.

Some States had nevertheless shown concern about possible misunderstandings of the draft conclusion. The United States, for example, had stated that the term “presumed intention” did not seem to capture the important distinction that while the broad purpose in treaty interpretation set forth in articles 31 and 32 was to discern the intention of the parties, that would not be achieved through an independent inquiry into intention and certainly not into presumed intention. While confirming that broad purpose in treaty interpretation, he recalled that the Commission’s traditional position was that such could not be achieved through an independent inquiry into intention.

Since, as was explained in the commentary, the expression “presumed intention” had been chosen precisely to indicate that any interpretation, including one that gave a term a meaning capable of evolving over time, must result from the application of articles 31 and 32 of the 1969 Vienna Convention and its means of interpretation, he did not see a need to further elaborate on the language of the draft conclusion.

Moving on to draft conclusion 9 [8] (Weight of subsequent agreements and subsequent practice as a means of interpretation), which had met with general agreement and a few proposals for improvement, he said that he accepted the proposal by the United Kingdom to include the criteria of “consistency” and “breadth” in paragraph 2 as relevant for the weight of subsequent agreements and subsequent practice, so that the paragraph would read: “The weight of subsequent practice under article 31, paragraph 3 (b) depends, in addition, on its consistency, breadth and on whether and how it is repeated”. No further changes were recommended.

On draft conclusion 10 [9] (Agreement of the parties regarding the interpretation of a treaty), which had been generally accepted by States, there was an interesting divergence of views between the United States, on the one hand, and Sweden and other States, on the other, over whether it was correct that the parties needed to “be aware of and accept” a subsequent practice or whether the existence of a parallel practice, of which some of the parties were unaware, was sufficient. He considered that the Commission should continue its long-standing approach of requiring “awareness and acceptance” but should at the same time make it clear in the commentary, as indeed it had already done, that in certain circumstances, the awareness and acceptance of the other party or parties might be assumed, particularly in the case of treaties that were implemented at the national level.

Draft conclusion 11 [10] (Decisions adopted within the framework of a Conference of States Parties) had also been generally supported by States, sometimes with minor proposals to improve the text or the commentaries. He did not consider it necessary or even appropriate to make assessments in the text of the draft conclusion regarding the general likelihood of States Parties adopting a subsequent agreement under article 31 (3) (a), of the 1969 Vienna Convention, beyond what was already expressed in the last sentence of paragraph 2.

Draft conclusion 12 [11] (Constituent instruments of international organizations) had received many comments, mostly supportive. Spain and Romania had usefully proposed, in the interests of greater clarity, that the words “of the parties” should be inserted in the first and second lines of paragraph 2, after the words “subsequent practice”, to highlight how paragraphs 1 and 2 differed from paragraph 3, whose object was not the subsequent practice of States, but the practice of the international organization as such. He did not consider it necessary, however, to follow the proposal of Romania to further emphasize that difference by inserting the words “as such” after “Practice of an international organization” in paragraph 3, as doing so could give rise to misunderstandings if the paragraph was not read in conjunction with the commentary.

Although States generally supported paragraph 3, some States had expressed concern that it might give too much weight to the practice of international organizations. Greece, in particular had recommended that it should be made clear in the commentary that the practice of an

international organization that was not generally accepted by its member States carried less weight than if it were the case. The purpose of the words “may contribute” in paragraph 3 was indeed to indicate that the weight of the practice of an international organization might vary. It could be stated even more clearly in the commentary that the agreement of the members with such practice was a primary factor for the determination of its weight. The United States and the Russian Federation had gone one step further by proposing that the reference in paragraph 3 to article 31, paragraph 1, of the 1969 Vienna Convention should be removed. However, he considered that the justification for that reference provided by the Commission in its commentary was valid and that the reference to that paragraph was based on key pronouncements in the case law of the International Court of Justice.

Draft conclusion 13 [12] (Pronouncements of expert treaty bodies) had been intensely debated, with particular reference to the “without prejudice” clause in paragraph 4, considered by some States to open further discussion of other ways in which a pronouncement by an expert treaty body could contribute to the interpretation of a treaty. They had therefore requested that the Commission should re-examine the issue, during the second reading, on the basis of observations of Member States.

He recalled that the “without prejudice” clause was what remained of his more ambitious, but nevertheless modest proposal, in his fourth report (A/CN.4/694), to acknowledge the significance of pronouncements of expert treaty bodies, as such, along the lines of the finding of the International Court of Justice and according to other authoritative sources. The Commission had ultimately decided, on the basis of the debate in 2016, to adopt the current “without prejudice” clause in paragraph 4, rather than to take up the proposal contained in his fourth report to include the following wording in what had become draft conclusion 13: “A pronouncement of an expert body, in the application of the treaty under its mandate, may contribute to the interpretation of the treaty when applying articles 31, paragraph 1, and 32”. It had taken that decision not because members had called into question his substantive findings and those of the International Court of Justice, but rather because some members had expressed doubts whether pronouncements of expert treaty bodies constituted “practice in the application of the treaty” that would fall within the scope of the topic.

He proposed that the Commission should revisit its decision to replace his original proposal with the current paragraph 4, as “practice in the application of a treaty” was not confined to one particular act on the ground (as, for example, the execution of an order by the police), but often consisted of forms of cooperation among different organs within a State in which not every organ had a competence to make a binding decision. Like international organizations, expert treaty bodies had been created by States to act as their agents in the process of ensuring the proper application of treaties. The fact that such expert treaty bodies did not have the final decision-making power, but were merely an advisory element in the process of correctly applying the treaty, did not distinguish them from State organs that were involved in the application of a treaty without having the final decision-making power. More details about his proposal could be found in paragraphs 137 to 144 of his fifth report (A/CN.4/715).

He also drew members’ attention to paragraphs 123 and 133 to 135 of his report, which addressed the second sentence of paragraph 3 of draft conclusion 13 and the role of silence. In that connection, he recalled that the Human Rights Committee had indicated, in a letter dated 4 April 2017 addressed to the Chair of the Commission at the time, that the second sentence, to the effect that “[s]ilence by a party shall not be presumed ... to constitute subsequent practice under article 31, paragraph 3 (b), accepting an interpretation of a treaty as expressed in a pronouncement of an expert treaty body”, was too restrictive. The Committee had also indicated that the contribution that pronouncements of expert treaty bodies could make, whether or not they gave rise to a subsequent practice by the parties, would merit clearer recognition in

the draft conclusions than in the form of a saving clause in paragraph 4 of the draft conclusion.

His own view was that the sentence was not too restrictive since, while it reflected a broad-based understanding among States regarding the feasibility and desirability, as a general rule, of their reacting to pronouncements of expert treaty bodies, that understanding, as expressed in that sentence, did not exclude the fact that certain kinds of pronouncements by specific expert treaty bodies might under certain circumstances be considered as being accepted by States even if they had not reacted after their adoption.

He noted in conclusion that, with the exception of draft conclusion 13, the draft conclusions rested on a broad-based agreement among States and should therefore require only minor revisions. He hoped that the Commission would be able to adopt the draft conclusions, together with the commentaries, and conclude its work on the topic during the current session.

On that basis, he proposed that the Commission should recommend to the General Assembly to take note of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties in a resolution, to annex the draft conclusions to the resolution, and to encourage their widest possible dissemination; and to commend the conclusions, together with the commentaries thereto, to the attention of States and all who might be called upon to interpret treaties.

69th Session (2017)

3378th Meeting, 20 July 2017

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http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr3378.pdf&lang=E

A/CN.4/SR.3378

Provisional

For participants only

18 August 2017

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International Law Commission Sixty-ninth session (second part)

Provisional summary record of the 3378th meeting

Held at the Palais des Nations, Geneva, on Thursday, 20 July 2017, at 10 a.m.

Immunity of State officials from foreign criminal jurisdiction (continued)

(p. 12) The Chairman [Mr. Nolte], speaking as a member of the Commission, said that he was opposed to the adoption of draft article 7. Neither of the two main objections to the text that he had outlined in an earlier statement to the plenary (A/CN.4/SR.3365) had been adequately addressed. First, the exceptions to immunity *ratione materiae* formulated in the draft article were not based on customary international law, nor had it been established that there was any trend to that effect. There had been no effort in the Drafting Committee to agree that the commentary would clarify the character of draft article 7 as expressing *lex lata* or *lex ferenda*, existing law or new law. Even if it was sometimes difficult to make such distinctions, the Commission needed at least to make an effort to do so. That was particularly important when the outcome of its work was not merely addressed to States, but also to national courts, as in the present case. National courts needed to apply existing law, *lex lata*, and they were often not sufficiently experienced to distinguish existing law from proposals for new law. It was therefore necessary for the Commission to be as clear as possible; otherwise, the draft article risked being misleading.

Secondly, the crucial relationship between any possible exceptions to immunity *ratione materiae* and the procedural safeguards which would ensure that such exceptions were not abused had not been sufficiently recognized. The draft article should only be adopted in conjunction with procedural safeguards. It should therefore have been retained in the Drafting Committee until the Commission's next session.

Everyone agreed that the questions addressed in draft article 7 were very important. He had made a constructive proposal to reconcile the requirements deriving from the principle of sovereign equality with the goal of ending impunity for international crimes, thereby trying to bridge the differences between members of the Commission. That proposal had not been explored.

For those reasons, he could not agree to the adoption of draft article 7.

3365th Meeting, 30 May 2017

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http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr3365.pdf&lang=EA/CN.4/SR.3365

Provisional

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13 July 2017

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International Law Commission
Sixty-ninth session (first part)**Provisional summary record of the 3365th meeting**

Held at the Palais des Nations, Geneva, on Tuesday, 30 May 2017, at 10 a.m.

Immunity of State officials from foreign criminal jurisdiction
(continued)

(p. 3) The Chairman [Mr. Nolte] invited the Commission to resume its consideration of the fifth report of the Special Rapporteur on immunity of State officials from foreign criminal jurisdiction (A/CN.4/701).

Speaking as a member of the Commission, he said that the principle of individual responsibility for international crimes was one of the great achievements of the post-war era, in response in particular to the wars of aggression and unprecedented atrocities by Nazi Germany. Progress in the development of a functioning multilevel system for the prosecution of the perpetrators of such crimes had been achieved with the establishment of the international criminal tribunals for the former Yugoslavia and Rwanda, the International Criminal Court, other international and hybrid tribunals and national prosecutions. Nonetheless, international crimes continued to be committed on a shocking scale and existing national and international legal and cooperation mechanisms remained unsatisfactory. The Commission's work on the topics of crimes against humanity and immunity of State Officials from foreign criminal jurisdiction were part of the international effort to provide a clearer and stronger legal framework for the fight against impunity. He supported the modern project to develop individual responsibility for international crimes, but he also supported international law in general. He endorsed the Special Rapporteur's systemic approach in the sense that the law needed to be developed in a way which served and balanced all the values and interests enshrined in it. He believed that individual responsibility for international crimes must be implemented in such a way as to safeguard sustainable international cooperation and peaceful relations between States.

In that context, the basic principle of international law that safeguarded sustainable international cooperation was the sovereign equality of States, one of the most important aspects of which was that the courts of one State could not, as a general rule, sit in judgment of another State, thus ensuring that the judgments of national courts were respected by other States. A perception of bias could, however, easily occur if the courts of one State adjudicated claims

involving official acts by another State. The International Court of Justice and other courts had recognized on numerous occasions that, in such cases, claims must be dismissed, regardless of their possible merits. Otherwise, there would be a risk of mutual recriminations between the two States concerned, challenges to the objectivity of the prosecutors and the judiciary of the forum State, and potential retaliation that would endanger peaceful relations and cooperation between States.

Of course, the principle of State immunity was not absolute, but the issue was where the balance and limits lay exactly, and who determined them. There was no easy answer, but the balance between two fundamental principles must ultimately be determined by the rules of customary international law. An effort was made in the report to identify the pertinent rules of customary international law. However, that was not the only relevant dimension of the issue, since, as the Special Rapporteur had rightly pointed out, the Commission's role was not limited to identifying existing law, but also to contribute to the progressive development of new international law. He would address both dimensions, first by commenting on the analysis of relevant practice in the report, and, secondly, by discussing whether more general legal or policy considerations should affect the conclusion drawn based on that analysis.

According to the report, the relevant practice established an exception to the general rule of immunity of State officials for official acts in cases where it was alleged that a State official, through an act performed in his or her official capacity, had committed an international crime. It was argued that, even if that conclusion was not accepted, practice revealed a "clear trend" in that direction. However, he agreed with the members who had presented detailed analyses of why reference could not be made to a settled practice that would support the exceptions proposed by the Special Rapporteur or the existence of a trend.

Regarding national judicial practice, he did not agree with the assertion in paragraph 121 that "with regard to immunity *ratione materiae*, it can be concluded that the majority trend is to accept the existence of certain limitations and exceptions to such immunity". First, the identification of a "majority trend" obviously depended on which decisions were counted. The report relied on certain cases which were irrelevant, such as those in which an official invoked immunity against the State for which he or she served or had served, including the *Fujimori*, *Hailemariam* and *Adamov* cases. Cases in which a court had relied on a limitation of immunity provided for by a treaty should also be excluded, such as *Bouzari*, *Pinochet*, *Jones v. Saudi Arabia*, and *Fang v. Jiang Zemin*, in which the courts had denied immunity *ratione materiae* on the grounds that the definition of torture in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment showed that States parties to the Convention had agreed to lift immunity with respect to criminal proceedings. Limitation of immunity by treaty did not reflect the state of customary international law.

The identification of a majority trend obviously also depended on which cases were counted as forming part of the minority. Footnotes 239 and 240 of the report referred to certain cases that denied an exception to immunity *ratione materiae* with respect to international crimes. There were, however, more such cases, such as the decision by French prosecutors not to prosecute former United States Secretary of Defense, Donald Rumsfeld, and the suit against the former President of China, Jiang Zemin, before the Supreme Court of New South Wales, Australia, in which the immunity of the former Head of State had been upheld. The report should have counted only those decisions in which the State of the official concerned had actually unsuccessfully invoked the immunity *ratione materiae* of one of its officials, which would have made clear that there was neither a significant number nor a majority of national court decisions in favour of an exception that would include international crimes.

In addition, the national court judgments cited in support of the proposition that there was an exception to immunity for international crimes, or its emergence in customary international

law, were based on very different reasoning, which unfortunately had not been critically analysed in the report. While some cases had invoked *jus cogens* as a basis for an exception, others had held that certain acts, in particular international crimes, could not be considered as acts performed in an official capacity. The Special Rapporteur seemed to argue that, taken together, the individual judgments, with their different and sometimes questionable reasoning, added up to a group of cases that ultimately contributed to establishing an exception to a rule of customary international law, or at least to a trend towards its emergence. However, two or more weak arguments did not add up to a convincing argument.

For those reasons, and those given by others, it was clear that the proposed exceptions to immunity for international crimes did not reflect settled customary international law. While there might have been a trend in the past, that was no longer the case. The *Pinochet* judgment of the House of Lords had indeed sparked a debate 20 years previously, and there had been several judgments by national courts that could be interpreted as reflecting a “trend” towards the recognition of exceptions to immunity for core crimes. However, such decisions had soon been countered by others that called the trend into question. Indeed, the majority of the national court decisions cited in the report had been rendered before international and national courts had come to the conclusion that some of the arguments on which previous judgments were based did not reflect rules of customary international law. For example, in the case concerning *Jurisdictional Immunities of the State (Italy v. Germany: Greece intervening)*, the International Court of Justice had stated that norms of *jus cogens* possessed a substantive character which, as such, did not contradict the rules on immunity of States, which were of a procedural character. That reasoning necessarily also applied to immunity *ratione materiae* of State officials. The European Court of Human Rights had consolidated its jurisprudence in *Oleynikov v. Russia*, according to which the rules of international law on immunity constituted inherent limitations of the right of access to justice. The Supreme Court of the United Kingdom, in the *Jones* cases, had also explained the reasons for the continued existence of rules on immunity. The court decisions of the past 10 years did not reveal a trend; on the contrary, international and national courts had reinforced the reasons for maintaining immunity, even for core crimes. It seemed that the Special Rapporteur’s policy preference had led her to downplay more recent countervailing developments. The Commission should be transparent in accurately describing the current state of affairs, and not nourish the illusion that the world was still living in the late 1990s or the early twenty-first century.

He agreed with the Special Rapporteur that it was necessary to look at the international legal system as a whole and assess whether developments in the field of international criminal law called for exceptions to immunity *ratione materiae*. However, the project of international criminal justice had thus far been carefully crafted by treaties and specific decisions in order to ensure acceptance by States. From the point of view of a systemic approach, that should also be the case with respect to the immunity of State officials. It was also necessary to fully assess the importance of the principle of sovereign equality in relation to international criminal law. Fortunately, States often voluntarily renounced aspects of their sovereign rights and entered into treaties by which they accepted foreign decisions as a way of enhancing cooperation. Nevertheless, they could not be expected to accept a decision by a foreign court that an official act by one of their officials justified prosecution, if that had not been agreed beforehand. It was therefore not surprising that States had already reacted strongly and jeopardized bilateral relations in such cases. He was concerned that more and stronger tensions would arise between States should the proposed draft article 7 be adopted by the Commission and then applied as law by national courts without additional acceptance by States in the form of a treaty.

He was not convinced that the goal of preventing impunity would justify such tensions; rather, future tensions might, in practice, lead to a two-tier system of justice, under which stronger

States would be able to shield their officials from prosecution, while weaker States would not. Such a situation would risk exacerbating the problem currently faced, whereby African States complained that the International Criminal Court was selectively concentrating its efforts on Africa. Suspicion of unequal treatment could undermine the whole cause of international criminal justice. Did the Commission really want to incur that risk? He agreed with other members that exceptions to immunity were inextricably connected with procedural safeguards, which were an essential element of a systemic approach. Thus, exceptions could not properly be addressed without knowing the procedural rules that would apply to them.

Since the exceptions for core international crimes proposed by the Special Rapporteur did not reflect settled customary international law, he wondered whether the Commission could at least indicate that the law was unclear and that it had a mandate to pursue both the codification and progressive development of international law. The question of what the existing law was could then be left open, and the Commission could propose an exception that was based, at least in part, on a policy preference in favour of an exception. One member had argued that it was the practice of the Commission not to distinguish clearly between codification and progressive development, but that had been at a time when the Commission was still mainly elaborating treaties, for which it did not make a great difference whether a proposed rule reflected existing customary law or would be new law. The negotiating States would, after all, decide what to include in a treaty and whether to accept the treaty. However, in the context of the current topic, the Commission did not seem to be elaborating a treaty. Any views it expressed on existing law might be used by national and international courts, which needed to know what the existing law was. The Commission therefore needed to be transparent about whether it was stating existing law or proposing new law. The Commission had not yet taken a clear position on whether it was proposing a draft treaty or not but, assuming it was, it would have to think carefully about whether a treaty with draft article 7 as proposed would be widely ratified. The Commission must carefully consider the implications and possible safeguards of the draft article prior to its adoption. Since the proposed exceptions in draft article 7 (1) (i) did not reflect settled customary international law, the Commission needed to clearly state the unsettled nature of the law and address the question of what was the desirable new law through progressive development.

He would be in favour of the Commission taking the bold step of proposing a treaty in which States agreed to waive immunity for their officials for core crimes, thus enabling the prosecution of all alleged offenders and strengthening the fight against impunity. That would clarify the situation and remove any concerns arising from sovereign equality for the parties to such a treaty. States had already waived their immunity under the Rome Statute of the International Criminal Court, but that waiver did not apply to procedures not covered by the Statute. If the Commission did not want to risk asking States to accept exceptions to immunity *ratione materiae* by way of a treaty, it should try to propose a solution that would take into account, within the framework of the existing law, the common interest that all international crimes, including those committed by State officials, needed to be punished.

In that spirit, he wished to make a constructive proposal, based on the duty to prosecute. It was not a stretch to say that there existed a duty, based on customary international law, to prosecute core international crimes. Although the Commission had not addressed the question in its work on the topic “*Aut dedere aut judicare*”, the International Court of Justice, the International Committee of the Red Cross and the General Assembly had confirmed the customary duty to prosecute the crime of genocide, war crimes and crimes against humanity. States could not avoid that duty by invoking immunity for the benefit of their officials. Other States had a legitimate interest in playing a role in ensuring that a State that invoked immunity *ratione materiae* for the benefit of one of its officials would actually prosecute the official if there was enough evidence to open an investigation, subject to procedural safeguards. The

Commission should therefore propose an alternative for States that resulted in some form of pressure to prosecute their own officials for core international crimes, which might be called the obligation to “waive or prosecute”. The Commission should remind States that there existed a duty to prosecute core international crimes, and that the purpose of the rules on immunity was not to enable impunity. States needed to exercise their right to invoke the immunity of their officials for official acts in a way which did not deny the need to prosecute core international crimes, and should therefore have to choose between either waiving the immunity of their officials before the courts of a foreign State, or undertaking to fulfil their obligation to prosecute their own officials. Such an obligation to waive or prosecute could follow a paragraph reminding States of the generally accepted limitations and exceptions to immunity, including waiver and what the Special Rapporteur called the “territorial tort exception”.

On that basis, he proposed that draft article 7 should read:

“Limitations and exceptions

1. Immunity shall not apply:
 - (i) If the State of the official waives immunity, either in a specific case or through a treaty;
 - (ii) In the case of alleged crimes that cause harm to persons ... when a crime is alleged to have been committed in the territory of the forum State and the State official is present in said territory at the time that such a crime has been committed.
2. The State of the official shall either waive immunity or submit the case for prosecution before its own courts in relation to the following alleged crimes:
 - (i) Genocide, crimes against humanity, war crimes, and torture;
 - (ii) [Possible other crimes].
3. Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* during their term of office.
4. [Without prejudice clause]”.

That formulation offered an appropriate and fair compromise between the requirements of the principle of sovereign equality and stable international relations on the one hand, and the requirement for accountability and the need to prevent impunity for core international crimes on the other. It was in line with the framework formulated by the International Court of Justice in its judgment in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*. Thus, States in which an alleged offender was arrested or prosecuted could seek assurances when another State invoked its immunity with regard to the alleged offender that the allegations would be submitted for prosecution in the State of which the alleged offender was an official. Such a solution admittedly carried the risk that the State invoking immunity might not undertake proper investigations, but that risk was inherent in all comparable mechanisms based on *aut dedere aut judicare*.

It was clear to him and some other members that there was little evidence to support the Special Rapporteur’s proposition that there was growing evidence in the other direction, and that there were powerful policy reasons for exercising caution. The Special Rapporteur had referred in her introductory statement during the current session to the question posed by Mr. McRae at the sixty-eighth session, namely on which side of history the Commission wished to stand. However, experience had shown that it was important to be modest and cautious when attempting to look into the future, not to rely on unspecified assumptions about the past, not to underestimate the staying power of certain classical principles and practices, and not to act

prematurely and inadvertently produce counterproductive effects. Even if it were true that, as one member had suggested, it was unthinkable that the customary regime of immunities would have remained untouched by the quarter of a century of developments that had taken place in international criminal law, it was not clear that an exception like the one proposed in the report would follow from there.

In conclusion, he could not support simply sending draft article 7 to the Drafting Committee. The Commission needed to clarify and agree on certain basic parameters of its further work on the proposal contained in the fifth report, based on the plenary debate. Given the divergence of views among the members of the Commission on an extraordinarily important question, if work continued on the basis of such disagreement, the authority of the Commission's work on the topic and more generally would be jeopardized. In accordance with the definition of consensus adopted by the Commission at its previous session, it was necessary to make every effort to achieve general agreement.

3353rd Meeting, 8 May 2017

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International Law Commission
Sixty-ninth session (first part)**Provisional summary record of the 3353rd meeting**

Held at the Palais des Nations, Geneva, on Monday, 8 May 2017, at 3 p.m.

Crimes against humanity (*continued*)

(p. 13) The Chairman [Mr. Nolte] said that it had been his understanding that the question of amnesties would be discussed in the Drafting Committee, which would then decide whether to request a memorandum by the secretariat.

Speaking as a member of the Commission, he said that by drafting a successful convention on crimes against humanity, the Commission would provide an essential missing element for the system of international criminal justice. The Commission had a responsibility to do what it could to ensure that the future convention was ratified by as many States as possible. However, in the current climate, it could not be taken for granted that that would happen. In recent years, there had been a marked slowdown in the conclusion and ratification of multilateral treaties in other areas, and there had even been challenges to some existing treaties. Many were of the view that if the Rome Statute were to be negotiated and submitted to ratification today, it would not be nearly as successful as it had been 15 years earlier. There were a number of specific issues on which States were sensitive or having second thoughts, which might cast doubt on their readiness to ratify a convention on crimes against humanity.

The Commission could, of course, say that if States were reluctant to accept certain obligations, they could still modify the Commission's text when they negotiated it among themselves. The text of the Commission, however, would set the terms of the debate and would receive the support of a core group of States, even if others considered that it went too far; however, any treaty on crimes against humanity needed to be supported and ratified by more than just a core group. A convention on crimes against humanity needed to reach a number of ratifications similar to those of the Genocide Convention or the Geneva Conventions of 1949. It would send a very unfortunate signal if the future convention were ratified only by a simple majority or even less. The Commission should therefore aim to reduce as far as possible the number of potential difficulties for States, even if that meant that some worthy aims were not fulfilled.

He understood that the Special Rapporteur had tried to meet that challenge by proposing certain well-known and proven models and by leaving out certain potential sticking points. That was a generally wise approach, but certain models that might be appropriate in other contexts might be less so when applied to crimes against humanity. For example, he had doubts as to whether the draft articles on extradition and on mutual legal assistance should follow the long-form model of the provisions in the Convention against Corruption. He would favour the short-form model that appeared in treaties whose subject matter was more closely related to crimes against humanity. The Special Rapporteur argued that the provisions of the Convention against Corruption had been widely ratified and tested in practice, which was a strong argument. From that perspective, the long version seemed to offer the requisite solutions to practical problems. On the other hand, the greater the level of detail, the greater the risk that a provision would raise questions or become outdated.

Given that several members had expressed their preference for shorter versions of the provisions on extradition and mutual legal assistance, he proposed that the Special Rapporteur should submit to the Drafting Committee both short and long versions so that it could choose which to use as the basis for its work. That approach could also help in making a distinction between the main text of the proposed convention, which would contain a short version of the basic rules on extradition and mutual legal assistance, and an annex which might contain more detailed provisions, as had been proposed by several members. Such an annex would also allow for different rules regarding the possibility of future amendments that might become necessary in the light of experience under the convention. Regardless of which form the Commission chose to pursue, it was important to leave States considerable freedom to keep or enact national legislation regarding possible limitations on cooperation.

He agreed that there was no need for a political offence exception but that it was necessary to ensure that a State did not extradite an alleged offender if a requesting State was pursuing the extradition on account of the individual's political opinions. He was in favour of adding the words "or membership in a particular social group" at the end of the list of factors in draft article 11 (11), as was done in the Convention on Enforced Disappearance. He would go even further in providing human rights safeguards, in line with article 33 of the Convention relating to the Status of Refugees.

He generally agreed with draft article 14 on victims, witnesses and others, and with the explanations given by the Special Rapporteur. That was an important area, but one in which national legal traditions regarding criminal procedure and possible forms of compensation differed widely. He therefore supported the approach taken by the Special Rapporteur to leave room for the definition of "victim" in national law and of the possible forms of reparation, in particular for cases of mass atrocities. Otherwise there was a serious risk that States would hesitate to ratify the future convention.

In his view, the Special Rapporteur had given a very good reason for not including a provision on immunity. Any attempt to declare immunity irrelevant, along the lines of article 27 of the Rome Statute, would need to be explained, either as creating a new legal rule or as reflecting existing international law. In the present inter-State context, if the Commission were to say that a provision along the lines of article 27 created a new rule, many States might hesitate to ratify the future convention. If, on the other hand, the Commission said that such a provision reflected existing customary international law, then it would pre-empt the debate on the immunity of State officials from foreign criminal jurisdiction. Of course, the Commission could avoid prejudicing that debate by making it clear that the inclusion of a rule like that in article 27 of the Rome Statute would be without prejudice to the status of that rule under customary international law. States would then be alerted and could freely choose whether to take the risk of binding themselves further than was now the case under customary international law. If the only concern was for consistency in international law, he would favour such a transpar-

ent solution, which would force States to show whether they believed that under no circumstances should they be entitled to claim immunity for their officials when crimes against humanity were alleged to have been committed. However, that was likely to make many States hesitant about ratifying the draft convention.

The same concerns applied with regard to the inclusion of a provision on amnesties. It would be helpful to know how many States would support a blanket prohibition or some form of prohibition of amnesties, but he would advise not risking the success of the draft convention by burdening it with that question, important as it was.

The question of reservations raised the same concern. He saw a deep irony in the fact that the Commission was now discussing whether to exclude or to seriously restrict the possibility of formulating reservations, as set out in articles 19 to 23 of the Vienna Convention on the Law of Treaties. After all, it had been the objective of ensuring that as many States as possible ratified the Genocide Convention that had originally led the International Court of Justice to recognize the liberal rules on reservations that were contained in the Vienna Convention.

In conclusion, he said that if a convention on crimes against humanity was not widely ratified, or if the ratification process languished for a long time, it might affect the working and perception of international criminal justice more generally. The Commission had no option but to make the project a success.

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Sixty-ninth session (first part)**Provisional summary record of the 3348th meeting**

Held at the Palais des Nations, Geneva, on Monday, 1 May 2017, at 3 p.m.

Introductory remarks of the Chairman**(p. 3) Introductory remarks of the Chairman [Mr. Nolte]**

The Chairman extended a special welcome to the new members and recalled that, when he had first joined the Commission, he had wondered whether 34 independent, eminent persons from all the regions of the world would be able to agree on something meaningful. He had quickly learned, however, that they could, not least owing to the common institutional spirit, or esprit de corps, within the Commission. The latter's strength was due to its members' intellectual rigour and capacity, their technical knowledge and vision, their respect for each other's views, their ability to dialogue and their discipline and hard work. The Commission was also fortunate to be supported by an extremely knowledgeable and competent secretariat.

In 2007, before attending his first session, he had read some academic articles which had cast doubt on the future of the Commission. Some commentators had been of the opinion that the Commission had exhausted suitable topics, while others thought that a commission that dealt with general matters of international law was obsolete, on account of the multitude of special regimes which had come into being. Indeed, initially he had also felt that the Commission focused mainly on completing old topics. He had, however, discovered that the Commission, albeit slow, was receptive and creative. By 2012, the Commission had embarked upon a completely different programme of work and, since then, it had been so productive that the time might have come to review its working methods in order to ensure that its output was thoroughly considered before submission to States' scrutiny.

The success and productivity of the Commission depended not only on the initiative and hard work of its members, but also on whether the climate of international relations was conducive to agreement on general questions of international law. In retrospect, the history of the Commission showed that there had been phases when it had been more productive than others. Current indications from a variety of regions suggested that the world was entering a period when it might be more difficult to reach agreement among States on some significant issues. If that were true, the Commission's responsibility as a guardian of the general rules of interna-

tional law was all the greater. The Commission was not just another diplomatic negotiating venue for States. Its competitive advantage stemmed from its Special Rapporteurs' rigorous and impartial scientific research and from broad-minded debate among its members, to whom States had entrusted the preliminary identification and the cultivation of common legal rules and interests, including those of humankind as a whole. That task was especially important when States were reluctant to move forward and agree on the development of international law. The ability of the Commission members to reach agreement on such matters became all the more valuable when the environment outside the meeting room was challenging. He therefore hoped that the current session would set an example of how effective the Commission could be.

68th Session (2016)**3325th Meeting, 21 July 2016**

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Provisional application of treaties (*continued*)

(p. 6) Mr. Nolte said that he wished to thank the Special Rapporteur for his rich report, which provided a meticulous account of the topic. The fact that the Special Rapporteur had taken up proposals made by Member States was to be welcomed, but the Commission also needed to integrate all the various aspects of the topic, whether they had been raised by Member States or not, into a cohesive framework.

Regarding the section of the report dealing with reservations, he agreed with the statement in paragraph 36 that “nothing would prevent the State, in principle, from effectively formulating reservations as from the time of its agreement to the provisional application of a treaty”. However, he would even go one step further and say that a State that had formulated a reservation could be presumed to intend that the reservation should apply not only when the treaty entered into force but also to its provisional application. It would be helpful for States if the Commission were to spell out such a presumption, as a matter of guidance.

He found the heading “Invalidity of treaties” somewhat confusing, as the section concerned did not so much address that subject as the different aspects of the relationship between a treaty and the internal law of a State. On a more substantive point, paragraph 43 of the report should not ask to what extent the regime set out in article 25 of the 1969 Vienna Convention constituted a sort of subterfuge for failing to comply with the requirements of the internal law of each State. Article 25 was not a subterfuge but rather a way offered by the Convention for States to reconcile respect of their internal legal order and the possible need to adapt their domestic law, on the one hand, with the procedure for being bound by a treaty and beginning their cooperation under the treaty before it could enter into force. It was of course true that States could not invoke domestic law against their obligations under a treaty; however, that

was precisely why they usually gave very careful consideration to the extent of their commitment to provisionally apply a treaty.

It was therefore true, but also somewhat misleading, when paragraph 49 of the report emphasized that a very different phenomenon occurred when the treaty expressly referred to the internal law of the negotiating States and subjected the provisional application of the treaty to the condition that it would not constitute a violation of internal law. It was true that, if the treaty itself limited the scope of the provisional application of a treaty to the extent that it did not result in a violation of internal law, the question of invocation of domestic law did not arise. However, paragraph 49 was misleading because in such a case the question was no longer one of validity or invalidity of a treaty, or of primacy of treaty law or internal law, but one of treaty interpretation.

More precisely, the question of interpretation related to what the treaty said regarding the scope and content of the obligations it established and whether it limited those obligations so that they did not go beyond what was permitted by the internal law of the negotiating States. It was quite clear why States might have a very legitimate interest in limiting the scope of provisional application, pending the final entry into force of the treaty; negotiators clearly needed to ensure that their respective States would be able, under their domestic law, to apply the treaty provisionally. Thus, a clause limiting the scope of provisional application to the extent permitted by internal law had nothing to do with the situation contemplated in article 46 of the Vienna Convention, namely the invocation of internal law against an existing treaty obligation.

The Special Rapporteur elaborated on that question by referring to the example of article 45 of the Energy Charter Treaty, which had been interpreted in different ways, in the *Yukos* case, by an arbitral tribunal, on the one hand, and a Netherlands court, on the other. The Commission should be extremely cautious about drawing any general conclusions from that case, or endorsing one or other of the decisions because, as the intricate but conflicting reasoning of the arbitral tribunal and the Netherlands court had shown, the question of provisional application in that case was complicated by the unusual interplay between two different rules on provisional application contained in the aforementioned article of the Treaty. For that reason, it could not simply be said, as the report did in paragraph 54, that article 45 (2) (a) of the Treaty “would seem to suggest that, if a signatory State does not submit such a declaration, it is accepting the real possibility of applying the treaty provisionally, as provided for in article 45, paragraph 1”. The Netherlands court had provided a very detailed explanation of why article 45 (1) and (2) operated independently of each other. That explanation would have to be studied by the Commission if it wished to adopt a position on the legal issues which had arisen in that case. He did not fully agree with the Special Rapporteur’s statement in paragraph 65 of the report that it would be premature to draw any conclusions from the decision by an internal tribunal — the Netherlands court — since the parties affected could appeal the decision. In fact, the Commission regularly quoted or assessed decisions by internal courts which were under appeal, not for their authority as a final resolution of the case, but for the quality of their arguments. In that particular case, the Netherlands court had put forward some weighty arguments, relying on the fact that article 45 (1) of the Treaty referred not only to the Constitution, but also to other “laws or regulations” of the contracting States as limiting the scope of the provisional application of the Treaty. Neither the arbitral tribunal nor the Netherlands court had been of the opinion that the State concerned could determine whether provisional application would be consistent with its internal law, as paragraph 53 of the report seemed to suggest.

While it was unnecessary and inappropriate to adopt a position on the question of the interplay between article 45 (1) and (2) of the Energy Charter Treaty, the Commission should make the general point that it was permissible for parties to the Treaty to limit its provisional application by invoking their internal law.

He therefore thought that proposed draft guideline 10 should address the most important concern, namely that of the numerous cases where a treaty clause establishing the obligation provisionally to apply the treaty was itself limited in some way by the domestic law of a signatory State.

Chapter III of the report on the practice of international organizations in relation to provisional application of treaties was a mine of information, but he was unsure whether it could be used as the basis for any draft guidelines. The same could be said of paragraphs 88 to 101 on State succession.

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Jus cogens (continued)

(p. 9) Mr. Nolte said that the Special Rapporteur's first report provided a solid introduction to the topic and that he shared many of the views it set forth. For example, he agreed that the basis of the work on the topic should be actual State practice, not "untested theories". Almost fifty years after the adoption of articles 53 and 64 of the Vienna Convention, there was no longer any doubt about the existence of *jus cogens* norms, as the Special Rapporteur had amply demonstrated. Shortly after the Second World War, it had been necessary to establish that international law contained certain basic peremptory norms, such as the prohibition of genocide, of the use of force, or of torture. Such peremptory norms were now established. Today there was a different issue at stake — the difficulty in determining which of the many claims that a particular rule had the character of *jus cogens* were well founded. Less obvious claims were being made than had previously been the case, such as claims by individuals that their right of access to a court was violated by the national implementation of certain Security Council resolutions that established sanctions.

In *Al-Dulimi and Montana Management Inc. v. Switzerland*, the European Court of Human Rights had recently affirmed that the human right of access to a court was not a *jus cogens* norm. That and other cases suggested that today's challenge was not to establish and expand *jus cogens* norms, but to strike the right balance between ordinary rules of international law which could be modified by regular procedures, on the one hand, and certain exceptional foundational rules which could not be thus modified, on the other. In order to strike that balance, it was necessary to look closely at State and judicial practice, to use the procedures available, such as that under article 66 of the Vienna Convention, and not merely to postulate morality and justice. It was the right time for the Commission to address the topic with a view to helping States and courts deal with *jus cogens* in practical terms and as a matter of *lex lata*. The Commission should help States and courts find the right balance between not enough and too much *jus cogens*.

His preference was not to draw up an illustrative list of *jus cogens* norms, as he was concerned that it would lead to fruitless debate about why certain norms were included over others. It would be better to give a few examples in the commentaries that illustrated how *jus cogens* norms could be identified and what legal effects they produced. However, the existence of such norms should not be recognized for their own sake. That approach had the additional advantage of obviating discussion of the difficult question of the theoretical foundations of *jus cogens*. He was not convinced by the Special Rapporteur's proposition, in paragraph 59 of the report, that it was impossible and unnecessary to resolve the opposition between positivist and natural law approaches to *jus cogens*. In his view, articles 53 and 64 of the Vienna Convention offered a satisfactory solution by emphasizing the acceptance and recognition of a norm by the international community of States and the possibility of the emergence of new *jus cogens* norms by such acceptance and recognition. Furthermore, he did not consider the rules of the Vienna Convention, which were positive law, to be, in the Special Rapporteur's words, at odds with the idea of a higher set of norms from which no derogation, even if by consent or will of States, was permissible, or an expression of "*le froid cynicisme positiviste*". Articles 53 and 64 of the Vienna Convention demonstrated that a positivist approach was not necessarily cold or amoral. An enlightened positivist approach could prevent natural or moralistic approaches to the law that invited those who applied it to project their own preferences thereon.

On methodology, he agreed that the topic raised different issues which were interrelated and that the Special Rapporteur should proceed cautiously. However, he was not convinced that that required a "fluid" approach where everything remained provisional. The Special Rapporteur had quite rightly drawn parallels between the present topic and the topics of identification of customary international law and of subsequent agreements and subsequent practice in relation to the interpretation of treaties, all of which raised issues that were difficult to disentangle. Yet the nature of the Commission's work was such that once a draft conclusion was provisionally adopted it was no longer "fluid": any change called for another decision, usually by consensus. He would therefore prefer to defer the adoption of certain aspects of the proposed draft conclusions until their implications were clearer.

Regarding the proposed draft conclusions, he endorsed the substance of draft conclusion 1, but suggested that the Drafting Committee might find a way to express it in simpler terms. One possibility could be: "The present draft conclusions concern the identification of norms of *jus cogens* and their legal consequences."

He had two difficulties with draft conclusion 2. The first concerned the second part of the first sentence which read "unless such modification, derogation or abrogation is prohibited by the rule in question". He did not agree that there was a general rule in international law whereby the parties to a treaty could establish a treaty obligation that contained an immutable prohibition to change that obligation. On the contrary, the parties to a treaty could, in principle, modify any rule that they had established by agreement, including a treaty rule that prohibited modification of the treaty. For example, if the parties to the Charter of the United Nations had added a clause to Article 51, whereby, due to its inherent nature, the right of self-defence could not be modified, the parties could, after abrogating the clause, amend Article 51. There might well be exceptions, but it was certainly not generally recognized that the parties to a treaty could bind themselves forever simply by proclaiming that a particular treaty rule could not be changed by their own agreement. A rule did not acquire the character of *jus cogens* solely by agreement of the parties to a treaty. That being said, his intent was not to deny the special nature of *jus cogens*, merely to indicate that he found the formulation of draft conclusion 2 too broad. His second difficulty with draft conclusion 2 related to the second sentence, which concerned the ways in which a modification, derogation or abrogation could take place. He agreed with the Special Rapporteur that the latter could take place through treaty or custom, but he did not consider that the process of customary international law should be de-

scribed as one of several possible forms of “agreement”. An obligation under customary law could arise even for a State that had not agreed to such a rule.

He had several concerns with regard to draft conclusion 3 (2), the first being that the expression “fundamental values” was too limited. In his report, the Special Rapporteur developed the expression based on a judgment of the International Court of Justice related to the Genocide Convention and on the humanitarian character of certain norms. That dimension of humanitarian rules was certainly one important source for *jus cogens* norms, but *jus cogens* was not limited to norms designed to protect individual human beings. There were also important inter-State rules, such as the prohibition of the use of force, which had the character of *jus cogens*. Such norms were more formal in nature and thus protected humanitarian values more indirectly than fundamental rules of a humanitarian character. He therefore proposed that the expression “the fundamental values” should be replaced with “the most fundamental principles”.

Furthermore, while he agreed that the project should deal only with *jus cogens* rules of a universal character, he did not deem it wise to exclude, at least at the current stage, regional or other forms of *jus cogens*. Since, as the Special Rapporteur had rightly observed, the concept of *jus cogens* originated in domestic law, and *jus cogens* norms were a typical feature of domestic law, there was no reason why such a feature should not be recognized within a limited community of States. In Europe, certain rules were recognized as elements of the European public order, which, together with the principle of the primacy of European Union law, produced effects that were very similar to what was known as *jus cogens* at the universal level. He did not consider that the concept of “norms of *jus cogens*” should be limited to rules which were “universally applicable”; however, he had no objection to the scope of the project being limited to *jus cogens* rules which were universally applicable.

His final concern with regard to draft conclusion 3 (2) related to the expression “hierarchically superior”. The concept was not as clear as it appeared because the legal effects of “hierarchically superior” norms could be different. The meaning of “hierarchically superior” was wrapped up with the issue of the legal consequences of *jus cogens* rules, which the Special Rapporteur intended to address at a later stage. He therefore shared the doubts expressed about the advisability of prejudicing the issue at that juncture by introducing the ambiguous term “hierarchical superiority”.

In conclusion, he said that the report was an excellent point of departure for the Commission’s work on the topic.

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Held at the Palais des Nations, Geneva, on Wednesday, 1 June 2016, at 10 a.m.

Protection of the atmosphere (*continued*)

(p. 16) Mr. Nolte said that the Special Rapporteur had once again demonstrated his mastery of the subject matter and had provided the Commission with a document that would serve as an excellent basis for its future work on the topic. He would concentrate on certain substantive issues and, to a lesser extent, on points of detail. First, he supported the proposal for the Commission to revise the provisionally adopted preamble by replacing the words “pressing concern of the international community as a whole” with “common concern of humanity”. Like Mr. Tladi, he thought that the main reason why the Commission had not chosen the term “common concern of humanity” in the first place was that States had stopped using it after the United Nations Framework Convention on Climate Change. Now that the concept had been reaffirmed in the Paris Agreement, that argument was no longer valid. Moreover, he was not persuaded by the argument that the Paris Agreement contained no reference to, or did not address, the atmosphere as such, but that it dealt instead with climate change, since those concepts were inseparable, even if the word “atmosphere” had broader implications than “climate change”.

As noted by Mr. Tladi and Mr. Murphy, the report went beyond the scope of the topic as defined in the 2013 understanding, in that it dealt with the precautionary principle and with common but differentiated responsibilities. The understanding could be criticized for excluding such important aspects of the topic, but, if the Commission wanted to be able, in the future, to adopt decisions regarding its work that took into account the views of different members, such understandings needed to be respected.

He did not share Mr. Peter’s view that the understanding had given rise to a form of blackmail, since its purpose had been simply to determine the scope of the topic. He agreed with Mr. Tladi that, by not dealing with certain issues, the understanding excluded all substantive considerations that might lead to the conclusion that a particular principle was recognized as a rule of customary international law. He did not think that the understanding was being re-

spected if one established a primarily terminological distinction between the precautionary principle and a precautionary approach, or if one used criteria that did not make it possible to establish a distinction, such as burden of proof. On the other hand, it should be recognized that there might be some overlap between the principle of prevention, which had been included, and the precautionary principle, which had not, and between the principle of the individual responsibility of States, which had been included, and that of common but differentiated responsibilities, which had not. The Special Rapporteur could perhaps come to useful conclusions on that basis, even if such conclusions would not cover every aspect of the topic as he and others saw it. Draft guideline 3 should therefore be formulated more cautiously, and any commentary should not address the precautionary principle.

He understood the point made by Mr. Kamto and Mr. Peter that producing draft guidelines gave the Special Rapporteur and the Commission more leeway. That being said, the reasoning behind a particular guideline was of great importance, and the Commission should be transparent by indicating whether it reflected existing law or political considerations.

With regard to the reasoning that underpinned draft guideline 3, he tended to share the view expressed by Mr. Tladi, but also agreed with certain reservations voiced by Mr. Murphy, Mr. Forteau and Sir Michael Wood about the drafting. Unlike Mr. Forteau, however, he believed that it might be justified, in some cases, to formulate and recognize legal principles that were not specific enough to establish clear rules of conduct. Such principles could provide general guidance and served an important purpose in many legal systems. As had been mentioned, that was particularly true in international law, for example in the Declaration on Principles of Friendly Relations and Co-operation among States, which were not always very precisely defined. That did not exclude, of course, that general principles should be formulated prudently so as not to produce unintended effects or overburden a law with expectations that it could not fulfil.

Concerning draft guideline 4, he was impressed by the analysis provided in the report, but was not sure that it supported the broad formulation of the proposed draft guideline. After all, an environmental impact assessment made sense only for projects whose potential impact on the atmosphere as a whole could be measured. In that respect, he tended to agree with Mr. Forteau that draft guideline 4 was formulated too broadly.

With regard to draft guideline 5, he had no objection in principle to its underlying idea. While it might be true, in a formal sense, that the atmosphere was technically not finite, as Mr. Murphy had stated, he thought that it was finite in terms of its essential function for humankind and all States, as noted by Mr. Peter. That point could be clarified in the commentaries. On the other hand, he doubted that the expression “emerging principle of customary international law” was appropriate to describe the draft guideline. Like Mr. Tladi, he thought that the Commission should distinguish as clearly as possible between *lex lata* and *lex ferenda*, and not try to establish a legal definition of an emerging principle. It would therefore seem preferable to replace the expression “is required under international law” in subparagraph 2 with a more cautious formulation, like the one used in subparagraph 1 of draft guideline 5.

Lastly, like other members, he was not sure that the Commission should explicitly address geoengineering in a guideline, and he supported the comments made by Mr. Murphy, who had cautioned against what the draft guideline implicitly permitted. Should the Commission wish to retain draft guideline 7, he would propose the deletion of the term “geo-engineering”, since the essence of the text would remain. In substance, however, he thought that the scope of the draft guideline should be restricted to “activities intended to modify atmospheric conditions” that “could affect the atmosphere as a whole”. That could be the “threshold” that Sir Michael Wood had identified as lacking.

To conclude, he supported the referral of draft guidelines 3, 4, 5 and 7, and draft preambular paragraph 4, to the Drafting Committee, subject to the comments that he had made about their substance and to their compatibility with the 2013 understanding.

3307th Meeting, 31 May 2016

Available at:

http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr3307.pdf&lang=E

A/CN.4/SR.3307

Provisional

For participants only

8 July 2016

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International Law Commission
Sixty-eighth session (first part)**Provisional summary record of the 3307th meeting**

Held at the Palais des Nations, Geneva, on Tuesday, 31 May 2016, at 10 a.m.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*)

(p. 5) Mr. Nolte (Special Rapporteur) said that, in his summing up of the debate, he wished to highlight the main points, address some criticism and explore possible ways forward.

He trusted that differences of opinion with regard to, for example, the status of the Working Group on Arbitrary Detention and the Committee on Economic, Social and Cultural Rights, could be clarified on a bilateral or, if necessary, technical basis. He did, however, wish to respond to a remark by Mr. Murphy that the report had “singled out” the United States of America by quoting only the reaction of that State to draft general comment No. 33 of the Human Rights Committee, and not that of other States. The reaction in question was the only easily accessible statement by a State and had been accepted by the Human Rights Committee. The report thus did not single out the United States. Rather, it quoted the United States as an example of a State whose reaction had given rise to a general agreement on a particular question.

Most speakers had considered draft conclusion 13 to be unnecessary, with some speakers expressing reservations about giving domestic courts “instructions”. While it was true that draft conclusion 13 was, strictly speaking, unnecessary, since it considered and applied to domestic courts draft conclusions that had already been provisionally adopted, without requiring any revision of those conclusions, he had included it because he had felt bound to do so. After all, in the original workplan for the topic, it had been stated that the practice of domestic courts would be considered, both for the sake of having a full analysis and in order to verify whether such practice was in conformity with the practice and sources at the international level.

It would not necessarily be inappropriate to formulate a draft conclusion that addressed domestic courts directly. Many domestic courts recognized a need to coordinate among themselves, or at least to inform themselves about relevant international case law, including that of other domestic courts. While it would not be appropriate to try to “instruct” domestic courts, it

would be appropriate to offer domestic courts some respectfully worded guidance on their coordination efforts.

Nevertheless, he recognized that members of the Commission were reluctant to consider the adoption of draft conclusion 13 and he therefore withdrew his proposal in that regard. He did, however, wish to pursue the proposal by Mr. Forteau and Mr. Šturma to include a certain number of findings from the report in the commentaries to the draft conclusions. The research presented in the report contained useful elements that would nuance and improve the commentaries.

Given the current lively debate among international lawyers and politicians with regard to the legal relevance of the pronouncements of expert bodies, it was no surprise that draft conclusion 12 had elicited the most responses. Indeed, the debate had shown that the report, which concentrated on the most authoritative legal sources in an effort to treat opposing views in an unbiased manner, should have addressed certain questions in greater detail.

Mr. Murase, Mr. Forteau, Mr. Hmoud, Mr. Murphy, Mr. Park and Mr. Kolodkin, among others, had expressed the view that pronouncements of expert bodies were not a form of subsequent practice within the meaning of the present topic, while Mr. Hmoud and Mr. Forteau had even suggested that the report characterized such pronouncements as “subsequent practice” in order to fit them into the project. Mr. Kittichaisaree, on the other hand, had drawn attention to paragraph 109 of the advisory opinion of the International Court of Justice on the *Legal consequences of the Construction of a Wall in the Occupied Palestinian Territory*, in which the Court had referred to the “constant practice” of the Human Rights Committee as a means of interpreting certain provisions of the International Covenant on Civil and Political Rights. Mr. Tladi had also accepted that such pronouncements could be a form of practice.

That apparent divergence of views on the basic question of whether pronouncements of treaty bodies fell within the scope of the topic might result, at least in part, from a misunderstanding. Some members assumed that, since draft conclusion 5 limited the term “subsequent practice” to conduct by States parties, the project itself could deal only with conduct by States parties. In 2014, the Commission had, however, adopted draft conclusion 11 (3), which stated that “practice of an international organization in the application of its constituent instrument may contribute to the interpretation of that instrument when applying articles 31, paragraph 1, and 32”.

That draft conclusion demonstrated that at least that form of non-State practice under a treaty was dealt with by the project. The issue of whether the practice of international organizations should be characterized as “subsequent practice” within the meaning of article 31 of the Vienna Convention, or whether it should simply be termed “practice” in order to distinguish it from the conduct of States parties was of lesser importance. As Mr. Murphy had suggested, what was important was that there were different forms of practice that were recognized as a means of interpretation of a treaty, even if only in connection with the subsequent practice of the States parties to the treaty in question.

Most members did not exclude the possibility that pronouncements of expert bodies constituted a kind of “practice” which might be relevant for the interpretation of a treaty, even if it were not subsequent practice in a narrower technical sense. As Mr. Šturma and Mr. Niehaus had remarked, any doubts in that connection seemed to be prompted by a wide variety of substantive, rather than terminological, concerns.

Mr. Forteau and other members had held that the pronouncements of human rights treaty bodies, albeit a form of practice, were not practice within the meaning of the topic, because such pronouncements were more in the nature of international judicial decisions. Although the International Court of Justice had, in the *Diallo* case, spoken of the “jurisprudence” of the Hu-

man Rights Committee, that did not mean that the Court had considered those pronouncements to be forms of judicial decisions. Indeed, the Court had been careful to characterize the Committee not as a court but as an independent body which had been established specifically to supervise the application of the International Covenant on Civil and Political Rights. Nor had the Court characterized the Committee's decisions as "judicial". As Mr. Šturma had observed, it was widely accepted that pronouncements of expert bodies were not in the same category as judicial decisions. There was no apparent reason to assume that, in 2010, the Court, by using the term "jurisprudence" in the *Diallo* case had intended to change its own findings in the aforementioned advisory opinion that such pronouncements were a form of practice. One view did not exclude the other.

Mr. Murphy, on the other hand, had doubted whether expert bodies had any mandate to interpret their treaty, since the treaties at issue did not accord to those bodies an express power to do so. However, in the *Diallo* case, the Court had recognized that the International Covenant on Civil and Political Rights accorded the Human Rights Committee a power to interpret that treaty when it had spoken of the "interpretation adopted by this independent body". A further source in support of that view was a 2010 statement by the Government of the United States, in which it referred to the interpretations of the Human Rights Committee as one of the bases of its exhaustive review of whether the United States should continue to urge a strictly territorial reading of the Covenant.

Addressing what might have been Mr. Murphy's main concern, he noted that most members, in particular Mr. Hmoud, Mr. Kamto and Mr. Tladi, had reached the conclusion, that, while expert bodies usually did have a mandate to interpret their respective treaties, since otherwise they could not fulfil their mandate under the treaty, their competence to interpret the treaty did not necessarily imply that their interpretation had any particular legal effect. Indeed, the pronouncements of expert bodies did not acquire a binding character by virtue of the competence of such bodies to interpret the treaty, as Mr. Tladi had emphasized.

Proposed draft conclusion 12 sought to convey the idea that the legal effect of the pronouncements of expert bodies, as practice and for the purpose of the present project, lay somewhere between being a legally irrelevant statement and a court judgment. In order to capture that middle position, draft conclusion 12 (3) recognized that pronouncements of expert bodies "may contribute to the interpretation of a treaty". That middle position was supported by the case law of the International Court of Justice and by most authorities, as Mr. Saboia had confirmed. The proposed draft conclusion did not attempt to resolve differences of view on whether, for the purposes of interpretation, the legal effect of pronouncements of expert bodies was closer to that of judicial decisions and thus quasi-judicial, as Mr. Šturma and Sir Michael Wood had suggested, or more akin to that of administrative practice, as Mr. Hassouna had suggested.

Proposed draft conclusion 12 left ample room for accommodating different viewpoints on the legal effect of the pronouncements of expert bodies, since, as Sir Michael Wood had said, it was difficult to generalize given the disparity in the competences and functions of different expert bodies under different treaties. It was clear that different treaties provided for specific terms and tasks for those different bodies, as Mr. Murphy had emphasized. He agreed with Mr. Murphy, Mr. Murase and Sir Michael Wood that caution was warranted regarding the powers of certain expert bodies, such as the Commission on the Limits of the Continental Shelf and the Compliance Committee under the Kyoto Protocol to the United Nations Framework Convention on Climate Change. The concern for leaving room for the diversity of treaties that established expert bodies was the reason for proposing draft conclusion 12 (5). Mr. Park had rightly observed that the report dealt more with human rights treaty bodies than with other expert bodies. The reason for that was that the debate about the legal weight of such

pronouncements had mainly centred on the former. The references to other expert bodies were merely illustrative.

It might not be possible to persuade Mr. Murphy that pronouncements of expert bodies possessed a judicial quality, or to persuade Mr. Forteau that the interpretative value of such bodies was slight or non-existent. The point of the proposed draft conclusion was not, however, to make a comprehensive statement on the interpretative weight of such pronouncements, but to recognize, for the purpose of the present project, that they were a form of practice under a treaty which might be relevant for its interpretation, either in connection with State practice, or as such, and that such pronouncements might have additional legal effects possibly deriving from their more or less quasi-judicial character. The commentary could make clear that the reference to article 31 (1) of the Vienna Convention covered that possibility.

Mr. Hmoud had said that the references in draft conclusion 12 to articles 31 and 32 of the Vienna Convention were not sufficiently grounded in practice and that the draft conclusion therefore represented a deductive approach. He took it that Mr. Hmoud had meant that international and national courts had only rarely explained the relevance of the pronouncements of expert bodies in terms of the Vienna Convention. However, the Commission did not need such explanations in order to conclude that those pronouncements, whether or not together with the reactions of States, were a means of interpretation which fitted the rules of interpretation of the Vienna Convention, since, at the outset of its work on the topic, the Commission had already found that articles 31 and 32 were the framework for treaty interpretation. It was therefore within the *lex lata* for the Commission simply to state the role that pronouncements of expert bodies might play as a means of interpretation under the aforementioned articles 31 and 32, whether in conjunction with the reactions of States, as suggested by Mr. Šturma, or by themselves. Mr. Hmoud had also accepted that such pronouncements could constitute a supplementary means of interpretation under article 32. While it was true, as Mr. Hmoud and Mr. Murphy had said, that examples of such pronouncements from which an agreement of the parties had arisen were more difficult to find, the report quoted examples to show that they did exist. Another example was General Assembly resolution 65/221 of 21 December 2010, which, in paragraph 5, reaffirmed elements of general comment No. 29 of the Human Rights Committee concerning the interpretation of article 4 of the International Covenant on Civil and Political Rights.

The question of silence was relevant in that context. Mr. Murase had considered that draft conclusion 12 (4) was inconsistent with draft conclusion 9 (2). However, the intention of paragraph 4 was to specify the circumstances under which a reaction was called for. As Mr. Hassouna had proposed, the commentaries could provide further clarification in that respect.

Mr. Murase, Sir Michael Wood, Mr. Hassouna and Mr. Saboia had wondered why the report dealt only with expert bodies which were not organs of international organizations. The reason, a purely formal one, was that he did not consider that the topic should delve any further into the law of organizations than the 1969 Vienna Convention did. He tentatively agreed with Mr. Šturma and Sir Michael Wood that the pronouncements of expert bodies which were organs of international organizations and the reactions of States thereto would mostly have the same effect as the pronouncements of the bodies covered in the report.

Although he had defended the proposed draft conclusion 12 as contained in his fourth report, that did not mean that he was unreceptive to the various critical comments which had been made. In fact, as the project was a collective enterprise, he was quite prepared to reformulate certain elements of draft conclusion 12 to accommodate the concerns expressed by some members. It would be worthwhile confirming that the practice of States in relation to the pronouncements of an expert body, and the practice of that body, might play a role in the interpretation of a treaty, as that aspect had not been appropriately covered by the previous conclu-

sions. The following points could be addressed in a reformulated proposal and considered by the Drafting Committee. First, in order to meet the concerns of Mr. Murphy and Sir Michael Wood, it could be stated explicitly at the beginning of the draft conclusion that it was first and foremost the treaty which determined the interpretative weight to be given to pronouncements of expert bodies, whether in connection with the reactions of States or as such. Secondly, it could be made clear that the draft conclusion did not claim to determine all aspects of the possible interpretative weight of pronouncements of expert bodies and the reactions of States thereto, but was confined to their weight as a form of “practice”. That should meet the concerns of Mr. Forteau and others who wished to leave room for a quasi-judicial function of such pronouncements. It would also make it even clearer that the Commission recognized the position of the International Court of Justice in that regard. Thirdly, the commentaries could be kept to a minimum and omit any reference to article 38 of the Statute of the International Court of Justice, as Mr. Tladi and Mr. Murphy had requested. Fourthly, the draft conclusion, or the commentary thereto, could reaffirm that observations by States that disagreed with the interpretations contained in the pronouncements of expert bodies precluded any agreement under article 31 (3) (b). Fifthly, in order to allay Mr. Murase’s concerns, it could be made plain that draft conclusion 12 (2) did not conflate reactions by States with the pronouncements of expert bodies themselves. Sixthly, he was prepared to replace the term “expert body” with “expert treaty body” and to replace the expression “individual capacity” with “personal capacity”, as proposed by Mr. Murphy, Mr. Hassouna and Mr. Kamto. Seventhly, the drafting proposals of Mr. Park and Mr. Kamto could also be considered. He hoped that those proposals would enable the Drafting Committee to find enough common ground to arrive at a reformulated draft conclusion 12.

Turning to draft conclusion 4 (3), he said that he had taken note of the reservations expressed by Mr. Murphy, Mr. Murase, Sir Michael Wood, Mr. Hmoud, Mr. Kamto, Mr. Kolodkin and Mr. Park about his proposal to replace the phrase “conduct by one or more parties” with “official conduct”. The intention behind that proposal was to make clear that the practice of an international organization, pronouncements of expert bodies or other forms of conduct mandated by the treaty as elements of its application were not to be placed on the same footing as the private conduct of non-State actors, but that they might contribute to the interpretation of a treaty when combined with the practice of the parties to the treaties themselves. Although the report might not have sufficiently explained why the expression “official conduct” had been chosen, he remained convinced that it was an apt means of characterizing the practice of international organizations and the pronouncements of expert bodies as distinct from the private conduct of non-State actors. Nevertheless, he recognized that a majority of members were reluctant to place such practice on the same level as State conduct, in the same way as they had questioned the status of the practice of international organizations for the purpose of the formation and identification of customary international law. In that context, the Commission was about to give the practice of international organizations a sort of intermediate status that neither equated it with State practice nor put it on the same level as the conduct of private actors. Moreover, as Mr. Kamto had said, States had wanted the treaty-mandated conduct of international organizations and expert bodies to be characterized as forms of practice for the purpose of interpretation.

In a sense, draft conclusion 11 (3) recognized that intermediary status by indicating that the practice of an international organization might contribute to the interpretation of a treaty under articles 31 (1) and (2) of the 1969 Vienna Convention. If the same idea were to be expressed in a reformulated draft conclusion 12, it would then be unnecessary to explain the status of such pronouncements for the purpose of interpretation in more general terms. That task could be left until the second reading of the draft conclusions. On that basis, he would be

prepared to withdraw his proposed revision of draft conclusion 4 (3), thereby obviating any need to discuss the revision of draft conclusion 5, a possibility raised by Mr. Kolodkin.

In light of the statements made during the debate, he withdrew the proposal to adopt draft conclusion 13 and, for the time being, the proposal to revise draft conclusion 4 (3). However, it was still his wish that the Commission should adopt draft conclusions 1a and 12, as well as the general structure of the set of draft conclusions proposed in paragraph 113 of the report. The question of whether the draft conclusions should be renamed “guidelines”, as Mr. Murase had proposed, should be addressed on second reading and take account of the views of States.

3303rd Meeting, 24 May 2016

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http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr3303.pdf&lang=E

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Provisional

For participants only

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International Law Commission
Sixty-eighth session (first part)**Provisional summary record of the 3303rd meeting**

Held at the Palais des Nations, Geneva, on Tuesday, 24 May 2016, at 10 a.m.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties

(p. 10) Mr. Nolte (Special Rapporteur) said that the main part of the report concerned pronouncements of expert bodies. The best-known such bodies were those established under human rights treaties to monitor and contribute to the application of those treaties; their pronouncements were addressed to States parties, who were encouraged to take them into account in their application of the treaty in question. Thus, both the pronouncements of expert bodies and the reaction of States thereto constituted a body of practice whose purpose under the treaty was to contribute to its proper application.

Regarding terminology, the term “pronouncement” had been chosen to describe the various forms of action of expert bodies because it was sufficiently neutral and was able to cover all relevant factual and normative assessments by such bodies, as indicated in paragraph 14 of the report. The term “expert body” had been chosen in preference to “treaty body” in order to make clear that only bodies that were composed of independent experts were dealt with in the report. However, as indicated in the second sentence of draft conclusion 12 (1), for the purposes of the draft conclusions, the term “expert body” did not include expert bodies that were organs of an international organization, since the project was limited to the scope of application of the 1969 Vienna Convention on the Law of Treaties and did not therefore address the practice of international organizations and their organs, with the exception of practice relating to their constituent instruments, in keeping with article 5 of the Convention.

The aim of the report was modest: it made no general claim as to the strength or otherwise of the legal effect, for the purpose of treaty interpretation, of pronouncements of expert bodies; rather, it emphasized that any such effect depended, first and foremost, on the treaty itself, as properly interpreted. The report and the proposed draft conclusions simply aimed to articulate how the practice of expert bodies and the related conduct of States parties contributed to the proper interpretation of the treaty in question under articles 31 and 32 of the Vienna Convention.

It emerged from an assessment of relevant sources that there appeared to be general agreement that pronouncements of expert bodies did not, as such, constitute subsequent practice under article 31 (3) (b) because they did not, by themselves, establish agreement between the parties regarding the interpretation of the treaty concerned. On the other hand, it seemed to be equally generally agreed that subsequent agreements and subsequent practice under articles 31 (3) and 32 “may arise from, or be reflected in” such pronouncements, although it was often not easy to establish that States parties had reached agreement on the basis of such pronouncements.

The more difficult question was what interpretative weight, if any, pronouncements of expert bodies established under human rights treaties might have as such. According to the International Court of Justice, great weight should be ascribed to the interpretation adopted by such bodies. For its part, the Commission, in the commentary to its Guide to Practice on Reservations to Treaties, had stated that States parties were obliged to take account of the conclusions of the expert bodies of human rights treaties in good faith, even though those conclusions were not legally binding. The report suggested that the distinction between the formulation of the Court and that of the Commission corresponded to the distinction in the 1969 Vienna Convention, between the formulation of an obligation, in article 31, to take certain means of interpretation into account, and the formulation of a permission, in article 32, to take certain other means of interpretation into account. Based on a number of considerations, the report then suggested that the Commission should adopt the approach of the International Court of Justice and recognize that the formulation that appeared in the commentary to the Guide to Practice was limited to the special case of pronouncements regarding reservations. Such an approach, if applied to the rules of the Vienna Convention on interpretation, would mean that pronouncements of expert bodies should be recognized as a form of other subsequent practice that might be taken into account under article 32 of the Convention. The other possibility would be to recognize that the duty of cooperation in good faith under a treaty usually implied a duty of States parties to consider, and thus to take into account, the pronouncements of those bodies which they had established pursuant to the treaty. In that case, such pronouncements would constitute a form of practice that States parties were obliged to take into account, just as they needed to take into account the means of interpretation that were referred to in article 31 of the Vienna Convention.

The report was not limited to pronouncements of expert bodies established under universal human rights treaties. It only highlighted those expert bodies because their activities had given rise to the most profound debate regarding the interpretative weight of their pronouncements. Those bodies were part of a larger group of expert bodies, all of which had been mandated by different kinds of treaties to give non-binding recommendations regarding the application and, explicitly or implicitly, the interpretation of those treaties. In paragraphs 66 to 92, the report described some other, particularly important, expert bodies, for example the Commission on the Limits of the Continental Shelf and the Compliance Committee established under the Kyoto Protocol to the United Nations Framework Convention on Climate, and examined the weight of their pronouncements for the interpretation of the treaties concerned. The report sought thereby to show that the issues that had been discussed regarding expert bodies established under human rights treaties also arose, *mutatis mutandis*, with regard to expert bodies more generally.

By proposing a general draft conclusion, draft conclusion 12, on pronouncements of expert bodies which applied to all such bodies, as defined in paragraph 1 thereof, the report did not aim to level the differences that existed between different expert bodies and the interpretative weight of their pronouncements. On the contrary, draft conclusion 12 was formulated carefully so as to leave room for possible specificities; paragraph 3 thus attempted to express the relevance of pronouncements of expert bodies without being unduly prescriptive. As ex-

plained in paragraphs 49 to 65 of the report, the weight of such pronouncements as a means for the interpretation of a treaty depended on a multitude of factors that might or might not be present in a specific case.

Draft conclusion 12 (4) addressed the question of the relevance of silence in the context of determining the interpretative weight of a pronouncement of an expert body. Such weight depended to a significant extent on the degree to which a particular pronouncement had been accepted by States parties. Since most treaties that provided for the establishment of expert bodies had many parties, the question as to whether silence signified acceptance would often arise in that context. According to the general rule set out in draft conclusion 9 (2), which the Commission had provisionally adopted in 2014, the answer depended on whether the circumstances called for some reaction. That in turn gave rise to the question of whether the adoption of a pronouncement of an expert body could generally be regarded as a circumstance calling for some reaction by States parties. Paragraph 4 proposed, on the basis of the reasoning contained in paragraphs 47 and 48 of the report, that a pronouncement of an expert body was usually not such a circumstance, although that presumption might be refuted.

The terminology chosen for draft conclusion 12 followed, as far as possible, that of draft conclusion 11, which the Commission had provisionally adopted in 2015. Draft conclusion 11 was similar insofar as it also dealt with treaties that provided for the establishment of a body mandated to contribute to the application of the treaty concerned.

The fourth report also addressed decisions of domestic courts, which merited separate attention for two reasons. First, such decisions themselves might be a form of subsequent practice in the application of a treaty and the way in which they dealt with subsequent agreements and subsequent practice as a means of treaty interpretation was particularly significant for the uniform interpretation of a given treaty. Decisions of domestic courts, being official acts by State organs, did not raise specific problems as far as their recognition as possible forms of subsequent practice under article 31 (3) (b) and 32 of the Vienna Convention were concerned. Accordingly, the possibility of their constituting such practice was simply confirmed in paragraph 1 of the proposed draft conclusion 13. Since decisions of domestic courts were not formally coordinated at the international level, it could not be lightly assumed that such decisions reflected the agreement of the parties under article 31 (3) (b) of the Convention. Even if those decisions had been informally coordinated, such informal coordination in itself would not be sufficient to establish an agreement of the parties in substance.

The second reason why decisions of domestic courts merited separate attention was that one of the purposes of the work on the topic was to provide guidance to domestic courts on the proper interpretation and application of treaties. Such guidance could also be provided by reviewing the way in which domestic courts had approached subsequent agreements and subsequent practice as means of treaty interpretation and by assessing whether such practice reflected the draft conclusions that the Commission had provisionally adopted thus far. Such an assessment must necessarily be incomplete, as it was impossible to comprehensively review the practice of domestic courts in that regard; nevertheless, even a limited assessment could be helpful and provide important indications, as long as the review of the available decisions of domestic courts merely served to provide an illustration for questions that had arisen in practice. It was to that end that the report described a number of issues that had arisen in leading cases from jurisdictions around the world.

As suggested by the decisions referred to in the report, the case law of domestic courts relating to the interpretation of treaties had regularly dealt with a number of issues concerning the use of subsequent agreements and subsequent practice. Those issues included the influence of constraints under domestic law, the classification of subsequent agreements and subsequent

practice, the use of subsequent practice that did not establish the agreement of the parties and the identification of subsequent agreements and subsequent practice.

Proposed draft conclusion 13 (2) was somewhat unusual in the context of the draft conclusions on the present topic in that it contained recommendations, or guidelines, that were addressed specifically to domestic courts. The basis for those recommendations were decisions of domestic courts that were described in the report and assessed in the light of the previously adopted draft conclusions. Thus, while draft conclusion 13 (2) was a conclusion in the sense that it was based on a collection of materials, it differed from the other draft conclusions in that it was not aimed at elucidating and clarifying the pertinent rules of interpretation as such. Draft conclusion 13 (2) was not intended to inappropriately constrain domestic courts; rather, it served to identify certain issues that had given rise to questions in practice and offered approaches in the light of the international rules and practices that had been identified in previous draft conclusions. It should therefore be a particularly useful part of the set of draft conclusions; its specific character could perhaps be set out more clearly by the Drafting Committee.

The report also included a few smaller proposals with a view to enabling the Commission to adopt a full set of draft conclusions on first reading. The first proposal concerned the formulation of an introductory draft conclusion 1 a, which read “the present draft conclusions concern the significance of subsequent agreements and subsequent practice for the interpretation of treaties.” The Commission had adopted a similar draft conclusion for the topic “Protection of persons in the event of disasters” on first reading, and the Drafting Committee had the previous week adopted the same formulation on second reading.

The second proposal, which was contained in paragraph 113 of the report, related to the structure of the set of draft conclusions and was made in order to facilitate the latter’s comprehension and readability. The order of the draft conclusions that the Commission had provisionally adopted had been maintained within the proposed structure, except for draft conclusion 3 (Interpretation of treaty terms as capable of evolving over time). It was proposed to place draft conclusion 3 in part III, which related to the process of interpretation, rather than in part II, which concerned basic rules and definitions. The proposal in paragraph 113 of the report to add a final clause with a new final draft conclusion 14 had been included by mistake.

The third proposal, which concerned draft conclusion 4 (3), was the only one in the report to revise a draft conclusion that the Commission had provisionally adopted. The reason for the proposal was that, as currently formulated, draft conclusion 4 (3) was limited to conduct by States parties to a treaty. However, the Commission had, in the meantime, provisionally adopted draft conclusion 11 (3), which recognized that the practice of an international organization itself might contribute to the interpretation of a treaty under article 32 of the Vienna Convention. In addition, the Commission would hopefully adopt draft conclusion 12 (3), according to which pronouncements of expert bodies might contribute to such interpretation when applying articles 31 (1) and 32 of the Vienna Convention. That suggested that there were certain forms of subsequent practice in the application of treaties that might emanate from a limited group of actors — in addition to States parties — that were mandated by the treaty concerned to contribute to its application.

The proposed revised draft conclusion 4 (3) attempted to circumscribe the conduct of those who were called upon to apply a treaty by using the term “official conduct”, instead of “conduct by one or more parties”. The use of the term “official conduct” was supported by the conclusion of the International Court of Justice in its advisory opinion of 15 December 1989 on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, according to which the term “officials of the Organization”, as contained in Article 105 of the Charter of the United Nations, permitted the application of the

Convention on the Privileges and Immunities of the United Nations to experts on missions. Although those experts were not officials in the sense of occupying an administrative position within the Organization, the Court had considered the nature of their mission to be such that they could be covered by the Convention.

Of course, the term “official conduct” was not the only possible term that draft conclusion 4 (3) could use in order to make clear that the practice of international organizations, as well as pronouncements by expert bodies within their sphere of competence, constituted other forms of subsequent practice under article 32 of the Vienna Convention. An alternative possibility to reach that goal might, for example, be to add the words “or other authorized actors” after the words “conduct by one or more parties”.

Other aspects of the topic could be added to the set of draft conclusions, for example the relevance of subsequent agreements and subsequent practice in relation to treaties between States and international organizations and between international organizations or in relation to the practice of international organizations more generally. However, on previous occasions, the Commission had dealt with such treaties and practice separately. Given the character of the present topic as an elucidation of particular means of interpretation under the rules of interpretation set forth in the Vienna Convention, it seemed neither necessary nor reasonable to aim for completeness. As was the case for certain other topics, it should be sufficient to cover the most important aspects. It would, of course, be possible to add a saving clause, should the Commission consider that to be necessary.

In conclusion, he expressed the hope that, after considering the report, the Commission would be in a position to refer the proposed draft conclusions to the Drafting Committee.

3293rd Meeting, 4 May 2016

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Provisional

For participants only

17 June 2016

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International Law Commission
Sixty-eighth session (first part)**Provisional summary record of the 3293rd meeting**

Held at the Palais des Nations, Geneva, on Wednesday, 4 May 2016, at 10 a.m.

Protection of persons in the event of disasters (*continued*)

(p. 9) Mr. Nolte said that he wished to thank the Special Rapporteur for his excellent eighth report, in which he had diligently considered the wealth of comments received from States and organizations. The importance of the topic under discussion lay not only in the number of disasters that the world had experienced in recent years and the likelihood of yet more to come but also in the recognition by States, international organizations and civil society of a responsibility and a need for global solidarity to reduce the risks associated with disasters and to mitigate their consequences. The Commission's work on the topic had a crucial role to play in recognizing and crystallizing that responsibility and need in an appropriate legal form.

There was, however, no easy answer to the question of the form that the Commission's work on the topic should take. The current draft text contained elements of both codification and progressive development, with many draft articles reflecting existing law, even though the proposed wording of those articles might not correspond exactly to that used by States to accompany their practice. Where a particular draft article constituted progressive development, the Commission should be candid and say so. It would be going too far, however, to make a general statement in the commentaries that would result in a presumption that the draft articles represented progressive development of the law rather than its codification. It should be borne in mind that the Commission's mandate to promote the progressive development of international law did not mean that it had a mandate to make customary international law. Rather, its mandate was to submit proposals to the General Assembly on how international law should be progressively developed; it did not itself have the political competence to make the decisions that progressive development entailed.

International law had long recognized that the main purpose and responsibility of the State was to protect its people. Although that obligation had sometimes been overshadowed by a misleading debate about the "responsibility to protect", the Commission did not need to involve itself in that debate in the context of the current topic. The idea that States had a general obligation to protect, by virtue of their sovereignty, had already been authoritatively articulat-

ed almost one hundred years earlier, in the *Island of Palmas* case, in which it had been stated that “territorial sovereignty [...] has as a corollary a duty: the obligation to protect within the territory the rights of other States”. Following the post-1945 universal recognition of human rights, on both a customary law and treaty law basis, the general obligation to protect was no longer limited to inter-State relations. However, it was not focused on the prevention of international crimes, nor must it carry any implications regarding a possible right of States to intervene in the domestic affairs of other States. It entailed certain more specific obligations that were spelled out in the draft articles as a matter of *lex lata*, such as the duty of the affected State to seek external assistance if a disaster exceeded its capabilities. On the other hand, the draft articles contained certain other rules that were in the area of progressive development, for example regarding prevention.

The need to indicate whether a particular draft article purported to reflect existing law or not would depend on the intended outcome of the project. In that regard, it might be wise for the Commission to refrain from expressing a clear preference for either a draft treaty or for a draft declaration by the General Assembly and to leave it to States to choose the path they wished to pursue. In any event, it was clear that the draft articles would have the character of a framework for action or of principles; they would not constitute a set of specific rules.

Concerning draft article 3, he agreed with other speakers that it would be going too far to include the word “economic” in the definition of a “disaster”. Its inclusion might wrongly suggest that the Commission had given careful consideration to the difficult questions raised by the dire consequences of international economic shocks and the ensuing need for international cooperation.

Regarding draft article 4 (a), there was no need to restrict the definition of “affected State”, as proposed by Mr. Murphy. The latter’s concern that, under the current broad definition, every State that had a national located in a disaster zone would constitute an affected State was perhaps based on a misunderstanding regarding the concept of jurisdiction, as used in the current draft. That concept was not identical with the general jurisdiction of States to prescribe, but referred rather to the specific concept of jurisdiction as it had been developed by various human rights courts and bodies, as well as by the International Court of Justice, in the context of the responsibility of States for human rights violations. It would be sufficient to make that clear in the commentaries.

He agreed that the new reference to “military assets” in draft article 4 (e), should be reconsidered, both because it was formulated as a substantive rule in an article on definitions and because it might unnecessarily restrict recourse to important forms of assistance. If a cautioning reference to the military was considered necessary, it should perhaps refer not to “assets” but to “arms”.

Draft article 5 should remain where it was. Human dignity was not merely an overarching principle or source of inspiration: it also represented the very core of human rights and was central to the current topic. International and national courts had demonstrated on various occasions that human dignity, while admittedly a rather general and indeterminate concept, was not inherently too vague and uncertain to operationalize. The article was therefore appropriately placed at the beginning of the substantive provisions and just before the draft article on human rights. A reference to its function could, however, perhaps be included.

He would prefer to keep the original text of draft article 6, as adopted on first reading, since the expression “fulfilment of their human rights”, in the amended text recommended by the Special Rapporteur, seemed somewhat inappropriate in the current context.

Concerning draft article 7, he shared the doubts of those members who had questioned whether the inclusion of a “no harm” principle or the word “independence” would be helpful. It was not clear what those concepts meant in the context of the topic in question.

Draft article 8 should not lose the element of “duty”, which was clearly recognized as a legal duty in its inter-State dimension and was not purely voluntary in that dimension. A distinction should perhaps be made between States and international organizations, for whom such a duty existed, and “other assisting actors”, for whom its existence was less clear. He was not convinced of the advisability of replacing the expressions “other competent intergovernmental organizations” and “relevant non-governmental organizations” with “other assisting actors”, in various draft articles. The Commission made a distinction between intergovernmental organizations and other actors in other contexts, and with good reason: that distinction might, for example, be legally relevant in the context of the duty to cooperate.

With regard to draft article 12, he was not in favour of replacing the word “role” as proposed by Mr. Forteau, since, although the term did not have a specific legal content, it served the important purpose in the current context of describing the main functions of the State.

The Special Rapporteur’s proposal to turn draft article 13 into a self-judging provision went too far in taking certain concerns of States into account. The proposal to insert the word “manifestly” went in the right direction and should accommodate the concerns of those States that had expressed scepticism about whether a duty of the affected State existed. The questions raised by some States regarding the potential consequences of a breach of such a duty had also drawn attention to the important practical issue of whether the application of the rules of State responsibility would be helpful in that context. On a more general level, the intense debates that had resulted in draft articles 13 and 14 should not be reopened unless there were convincing reasons to do so. Like previous speakers, he saw no need to emphasize that offers of assistance must be made in good faith, since that would introduce an inappropriate element of distrust into the set of draft articles.

In conclusion, he was in favour of referring the draft articles to the Drafting Committee.

67th Session (2015)**3277th Meeting, 23 July 2015**

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Provisional

For participants only

24 September 2015

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International Law Commission
Sixty-seventh session (second part)**Provisional summary record of the 3277th meeting**

Held at the Palais des Nations, Geneva, on Thursday, 23 July 2015, at 3 p.m.

Provisional application of treaties (*continued*)

(p. 7) Mr. Nolte said that, if the Commission viewed the provisional application of a treaty as legally binding, it should express its position very clearly. After all, the words “provisional application” could be interpreted as meaning that a treaty should be applied only *de facto* and provisionally, in other words before it produced any legal effects. He therefore suggested that draft guideline 4 might be recast to read: “The agreement to provisionally apply a treaty has the effect that the treaty is legally binding.” Such a formulation would serve the purpose of encouraging States not to circumvent internal procedures when agreeing to provisional application.

States would be very cautious about applying a treaty if there was any risk that the assumption of a legal obligation would be contrary to their own domestic procedures or other rules. Such procedures, and domestic law more generally, formed the very context for agreements on provisional application, but that did not mean that they had an effect on the international obligations arising from such agreements. It was important, however, that the interpretation of international agreements took into account the context from which they originated.

That was particularly true when agreements on provisional application of a treaty contained an explicit reference to domestic law, as was the case with the Energy Charter Treaty, article 45 of which stipulated that the Treaty was to be applied provisionally only to the extent that it was not inconsistent with domestic laws or regulations. In other words, the obligation created by provisional application went no further than what was permissible under the domestic law of the parties to the Treaty. That was perfectly compatible with article 27 of the Vienna Convention on the Law of Treaties.

He failed to understand why the tribunal in the *Yukos* case and the Special Rapporteur, in paragraph 66 of his report, considered that a treaty could not allow domestic law to determine the content of an international legal obligation unless the language of the treaty was clear and admitted no other interpretation. Apart from the fact that the language of article 45, paragraph 1, of the Energy Charter Treaty could hardly be clearer, he was not aware of any rule according to which a particular interpretation was possible only if it was unambiguous. He therefore suggested deleting the final clause of draft guideline 1 and adding a second sentence, to read: “The agreement to provisionally apply a treaty may limit the extent of the provisional application, in particular by making reference to internal law in whole or in part.” He agreed with previous speakers that the Special Rapporteur should not analyse the domestic law of States regarding the provisional application of treaties.

Draft guidelines 2 and 3 should be redrafted to reflect the fact that the “terms of the treaty” were only one of several means of interpreting it. The guidelines should mention either different forms of agreement or different means of interpretation; they should not conflate the two. More generally, he would prefer the outcome of the work to be in the form of conclusions rather than guidelines, as the task at hand was limited to deriving conclusions, for the purpose of interpretation, from diverse sources and materials.

3273rd Meeting, 21 July 2015

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Provisional

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28 July 2015

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International Law Commission
Sixty-seventh session (second part)**Provisional summary record of the 3273rd meeting**

Held at the Palais des Nations, Geneva, on Tuesday, 21 July 2015, at 3 p.m.

Immunity of State officials from foreign criminal jurisdiction (*continued*)

(p. 5) Mr. Nolte said he agreed with the Special Rapporteur that the distinction between immunity *ratione personae* and immunity *ratione materiae* was important, but that such a distinction did not mean that the two categories of immunity did not have elements in common, especially in respect of the functional dimension of immunity in a broad sense. One of those elements in common was respect for the principle of sovereign equality of States, embodied in the maxim *par in parem non habet imperium*, which the Special Rapporteur called the “teleological criterion”. That criterion not only applied to immunity *ratione materiae*, it was the foundation on which all forms of State-related immunity rested. That was not a minor point in terms of the question posed in paragraph 103, namely, which came first: State immunity as a consequence of functional immunity or functional immunity as a corollary of State immunity. For the purpose of existing law, the answer to that question was that a State could waive the immunity of a State official, but not vice versa. Moreover, while the distinction between civil and criminal immunity must be taken into account, both forms of immunity derived from common ground.

A completely different distinction, which needed to be stressed, was that between international and national law on immunity. When the Supreme Court of the United States of America ruled in *Samantar v. Yousuf* that a State official could not be deemed to be included in the concept of a “foreign State”, it was interpreting domestic legislation, namely the United States’ Foreign Sovereign Immunities Act, but that Act did not necessarily make or purport to make a statement regarding the customary rules of international law on immunity.

Regarding the structure of the report, he said that while he was impressed by the wealth of material that the Special Rapporteur had assimilated, he wondered why national legislative and executive practice of States was largely missing. He would also have expected that international judicial practice and the Commission’s previous practice should come first in the analysis of the materials.

He did not share the view that it was possible to distinguish clearly between the concept of “State official”, as defined in draft article 2 (e) by the expression “who exercises State functions”, and the concept of an “act performed in an official capacity”. Nevertheless he did endorse the distinction between an “act performed in an official capacity” and an “act performed in a private capacity” and the view that the distinction between them bore no relation whatsoever to the distinction between lawful and unlawful acts.

However, like other members, he did not understand the Special Rapporteur’s reasoning for the proposition that both official and private acts must be considered, by definition, to be criminally unlawful, for several reasons. First, such a proposition would be tantamount to saying that State officials always committed crimes when they acted in an official capacity. Secondly, when a person accused of a crime was brought to court, the latter must first establish whether it had jurisdiction. Only thereafter would the court proceed to determine, on the basis of a presumption of innocence, whether a crime had been committed; as a result of those proceedings the accused person might well be acquitted because the acts in question were not found to be criminally unlawful. Thirdly, and most importantly, the whole point of international law on immunity was that a national court must establish, on the basis of neutral criteria, whether a particular official or act came within its jurisdiction. If the lawfulness or unlawfulness of the act was a relevant criterion for establishing jurisdiction or State immunity, including the immunity of public officials *ratione personae* or *ratione materiae*, that entire body of law would be superfluous. Mr. Park’s suggestion to replace the word “crime” with “act” in the proposed draft article 2 (f) would not provide a solution, since acts performed in an official capacity were still not necessarily acts “in respect of which the forum State could exercise its criminal jurisdiction”.

He was not convinced by the Special Rapporteur’s explanation in paragraphs 96 to 110 of the alleged criminal nature of an act performed in an official capacity. Although it might be true that any criminal act was characterized by its highly personal nature, such acts were only a small fraction of all conceivable acts performed in an official capacity. Moreover, the fact that an act performed in an official capacity could also be a criminal act committed by that official as an individual did not affect the official nature of the act. For that reason he did not agree with the Special Rapporteur’s statement in paragraph 97 that “any criminal act covered by immunity *ratione materiae* is not, strictly speaking, an act of the State itself, but an act of the individual by whom it was committed”. In his view, such an act could be both an act of the State, attributable to it, and an act attributable to the individual. The decisive issue was whether the act, as an act performed by the individual in an official capacity, gave rise to immunity *ratione materiae*. He did not dispute the statement quoted in paragraph 99 that “the question of individual responsibility is in principle distinct from the principle of State responsibility”, but it did not resolve the decisive question of the relationship between the two forms of responsibility and of their relationship to the international rules on immunity.

He endorsed the Special Rapporteur’s position that the fact that a particular act might be an international crime did not exclude the possibility that it might also be an act performed in an official capacity; the same was true for acts alleged to be *ultra vires*. Cases of corruption fell into another category, because they could be characterized not by their illegality but by their ostensibly private character or motivation. For those very reasons, however, he proposed that draft article 2 (f), as currently worded, should be deleted. His conclusion as to why the Special Rapporteur had made what he deemed the incorrect assertion in the draft article that an act performed in an official capacity by its nature constituted a crime was that she had conflated the question of what constituted an act performed in an official capacity with the much more general question of over which acts a State could exercise criminal jurisdiction.

In paragraph 32 the Special Rapporteur stated that national law was irrelevant for the purpose of determining whether an act was performed in an official capacity, given the significant

differences that might exist between the legislation of different States. He agreed with her in the sense that States were not entirely free to determine which acts their officials performed in an official capacity and which in a private capacity. Otherwise States might freely determine the extent of their own immunity, or the immunity of their officials, before foreign courts. On the other hand, it was undeniable that, under national law, some States considered that certain acts, such as air traffic control, were private acts, while others considered the same acts to be official. The question of the extent to which a State could determine the range of activities which it considered to be official was in his view, the core of the matter under discussion. However, under the circumstances, the Commission should perhaps leave it to be decided on a case-by-case basis, and give some general guidance.

The Special Rapporteur also addressed questions of attribution in the report, taking as her point of departure the need for an interpretation of the criteria of attribution which ensured that the institution of immunity did not become a mechanism to evade responsibility. While not disputing the relevance of questions of attribution, he considered that the possibility of evading responsibility was not the right point of departure. In *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* the International Court of Justice had stated: “The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful.” Thus the nature of the rules on immunity consisted, not in addressing the question of the lawfulness of a particular activity, but in establishing the jurisdiction of different States. A particular act might not be tried by a particular court, but that in itself did not exclude criminal responsibility for the act before another jurisdiction.

That said, the rules of attribution under the law of State responsibility might help to ascertain whether an act was indeed performed in an official capacity. The Special Rapporteur’s argument in paragraphs 115 and 116 that certain forms of retroactive attribution of acts under articles 9 to 11 of the articles on State responsibility might not constitute acts performed in an official capacity for the purpose of determining immunity *ratione materiae* was plausible. However, he doubted whether the same was true for the acts of persons acting on behalf of the State while remaining outside the official structure of the State, as discussed in paragraph 114. Since there was little State practice or pertinent case law in that regard, the Commission should perhaps limit itself to making some general comments.

The Special Rapporteur attempted to define the concept of an act performed in an official capacity by using “an additional teleological criterion” (para. 118). He agreed in principle that, since immunity *ratione materiae* was intended to ensure respect for the principle of sovereign equality of States, the acts covered by such immunity must also have a link to the sovereignty that, ultimately, was intended to be safeguarded. Nonetheless, the Commission should not try to identify the essence of sovereignty; what was important was to distinguish between acts performed in an official capacity in the exercise of a public function or of the sovereign prerogative of a State, and those which merely furthered a private interest. Moreover, the expression “exercise of elements of governmental authority” was too limiting as it could be construed as meaning “governmental” as distinguished from “administrative”.

Unfortunately, the Special Rapporteur did not elaborate on what the “additional teleological criterion” would entail with respect to different situations, but concentrated on the question of whether international crimes might be acts performed in an official capacity. While he agreed with the statement in paragraph 124 that the argument that an international crime was contrary to international law was not relevant for the characterization of an act performed in an official capacity, he did not agree that the criminal nature of the act was one of the characteristics of any act performed in an official capacity. As a general matter, it might be helpful to refer to case law of the European Court of Justice for a definition of “exercise of official authority”.

Concerning the future workplan, he questioned the advisability of taking up the issue of limits and exceptions to different forms of immunity until all general matters, including the procedural aspects of immunity, had been clarified. The question of exceptions had overshadowed the Commission's debate on the topic from the outset. While it was important that members were aware of the implications of certain general aspects for the question of possible exceptions, there was the danger that a premature focus on the question would narrow their outlook on important general aspects which had no or little bearing on the question of exceptions. That danger had become a reality in the current discussion on the definition of acts performed in an official capacity. Much more emphasis should have been laid on which kinds of activities were sufficiently expressive of the specific public authority of the State to justify their inclusion within the scope of protected immunity. Focusing on that and other general aspects of international law on immunity need not prejudice the identification of possible exceptions to the otherwise existing immunity of State officials. Possible exceptions should, however, be derived from the generally recognized sources of international law, based in particular on the rules on the identification of customary international law. Alternatively, the Commission should make clear that it was proposing changes to existing law by way of progressive development. Since the Commission was committed to drafting articles that would provide guidance to national courts on the application of existing law, it was important that it should clearly designate its draft articles and commentaries as either *lex lata* or *lex ferenda*.

He would appreciate clarification regarding the Special Rapporteur's comment in paragraph 138 of her report that the recent judgement of the Italian Constitutional Court concerning the application in Italy of the International Court of Justice's judgment in *Jurisdictional Immunities of the State* had added complexity to the issue. As he understood it, the Italian Constitutional Court had not called into question the International Court of Justice's judgment or made any pronouncements on international law; it had merely interpreted the Italian Constitution in a way that might prevent the implementation of the judgment in Italy. Perhaps the Special Rapporteur considered that the judgment of the Constitutional Court undermined the authority of the International Court of Justice's judgment regarding the questions dealt with under the topic; however, in its own terms it clearly did not.

In conclusion, he recommended that the proposed draft articles should be referred to the Drafting Committee.

3262nd Meeting, 4 June 2015

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English

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International Law Commission
Sixty-seventh session (first part)**Provisional summary record of the 3262nd meeting**

Held at the Palais des Nations, Geneva, on Thursday, 4 June 2015, at 10 a.m.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*)

(p. 3) Mr. Nolte (Special Rapporteur) said that the debate had been very rich and that he would do his best in his summary to respond to the various points that had been raised. While he was pleased that all the members who had spoken had agreed to the referral of draft conclusion 11 to the Drafting Committee, he had also taken note of the concerns that had been raised. He wished to reassure Mr. Tladi, who had expressed concern that the Commission's work might take it in a direction that it had specifically decided not to take, namely the creation of new law. He had no intention of ascribing extra meaning to article 5 of the Vienna Convention; on the contrary, he was merely restating the most important elements of the pertinent jurisprudence, in particular that of the International Court of Justice. It was the Court, not he himself, which had established that constituent instruments of international organizations were "treaties of a particular type". The case law of the Court showed that it had not limited its analysis to the constituent instrument of an international organization in a particular case, but that it had regularly invoked and taken into account certain features common to most international organizations. It was therefore not imprudent of the Commission to restate the widely accepted case law of the International Court of Justice which was relevant for the purposes of the topic. He also reassured Mr. Tladi and Sir Michael Wood that neither the previous draft conclusions nor draft conclusion 11, as set out in the third report, were intended to accord greater importance, for the interpretation of treaties, to subsequent agreements and subsequent practice than to text, context and object and purpose. It was hard, however, to see how to satisfy Sir Michael Wood, who emphasized both the need to consider subsequent agreements and subsequent practice in the context of the general rules of treaty interpretation and the importance of not broadening the Commission's work to include more general questions of treaty interpretation. Apart from Mr. Tladi and Sir Michael Wood, no other member of the Commission had voiced that matter, which he hoped would be resolved in the course of further work. In any case, he agreed with Mr. Šturma that, while constituent instruments of

international organizations were treaties of a particular type, that particularity should not be overestimated.

It was true, as Mr. Kolodkin had noted, that the report was based more on the case law of international courts than State practice relating to international organizations. It was regrettable, as Mr. Niehaus had indicated, that only a few States and one international organization had provided the Commission with relevant examples. He had been aware of the issue when he had prepared the report and he had come to the conclusion that particular statements or examples of State practice would be less authoritative than widely accepted pertinent decisions of the most important international courts.

With regard to the scope of the report, members had generally agreed with the limitations proposed, although some members seemed to have misunderstood that they applied to the topic as such. Sir Michael Wood and Mr. Murphy had questioned the advisability of dealing with the practice of international organizations as such, since that would not fall under article 31, paragraph 3, of the 1969 Vienna Convention. In that regard he recalled that the scope of the topic was defined by its title and the original proposal for the topic as it had been accepted by the Commission. When, in 2012, the Commission had decided to change the format of the topic “Treaties over time” and to appoint a special rapporteur for the topic “Subsequent agreements and subsequent practice in relation to the interpretation of treaties”, it had agreed for the purposes of the definition of the project that “one or two further reports should be submitted, as it had been envisaged in the original proposal of the topic, on the practice of international organizations and the jurisprudence of national courts (annex A to the report of the Commission on the work of its sixtieth session (2008))”. Thus, since the beginning of the work on the topic, it had been made perfectly clear that the practice of international organizations would be part of it. The Commission had also recognized, in its commentary to draft conclusion 5, that the practice of international organizations could constitute a means of interpretation in its own right. The role played by an international organization’s “own practice”, including that of its organs, was precisely the aspect of the topic that needed to be clarified on the basis of the well-established case law of the International Court of Justice and other courts. For the purposes of such an approach, which had been supported by most members, in particular Mr. Šturma, the term “subsequent practice” was understood as a generic term which was not limited to the particular form of practice mentioned in article 31, paragraph 3 (b), of the Vienna Convention, but which also included other practice in the application of a treaty which might be relevant for its interpretation, without prejudice as to whether the practice in question was actually relevant and what weight it might possess in a particular case. He asked Mr. Murphy, who had expressed concern in that regard, for his understanding for leaving out, for reasons of convenience and for the time being, treaties adopted within an international organization, on the understanding that such a limitation was not definitive.

The fact that the third report was limited to the treaties referred to in article 5 of the 1969 Vienna Convention did not in any way affect the scope of the topic. Mr. Forteau had suggested that the report did not respect that limitation, since it referred to case law relating to treaties, which, in his view, fell under the 1986 Vienna Convention, not the 1969 Convention. While it was true that the Agreement Establishing the World Trade Organization (WTO), including the various agreements annexed thereto, constituted a treaty in the sense of article 1 of the 1986 Vienna Convention, the Agreement also fell under article 5 of the 1969 Convention by virtue of article 3 (c) of that Convention and article 73 of the 1986 Convention. That was also the understanding of the WTO dispute settlement bodies, which had applied articles 31 and 32 of the 1969 Convention when interpreting the WTO agreements, even as applied to the European Union. As Sir Michael Wood had suggested, that point could be made clear in the commentaries. The Commission could, however, if that was what Mr. Forteau proposed, not confine itself to the treaties referred to in article 5 of the 1969 Convention and recognize that the same

rules of interpretation applied to the treaties mentioned in the 1986 Convention and under customary international law.

Mr. Hmoud and other members had agreed that, as had been proposed in the report, the Commission should not address the question of the interpretation of decisions by organs of international organizations as such. In that connection, Mr. Park had raised the legitimate question of how to distinguish between the interpretation of such decisions and the identification of the relevant conduct of the organization for the purposes of the interpretation of its constituent instrument. While that distinction could not always be drawn with certainty, it could be considered that it was not necessary in the context of the topic at hand, inasmuch as the decisions concerned were clear enough to permit an assessment of their role in the interpretation of a constituent instrument.

In response to the concern raised by Mr. Park regarding the difficulty of distinguishing between conferences of States parties established by a constituent instrument of an international organization and those which were not, he said that in his view, the question of whether a conference of parties was created by a constituent instrument should be resolved on a case-by-case basis and that it was not the aim of the topic to establish criteria for that purpose.

Mr. Park had also made the point that the weight of a particular practice could not be sharply distinguished from its relevance for the purpose of interpretation. He himself considered that the two aspects were very closely related and he agreed with Messrs. Park, Kolodkin and Peter, in particular, that the reaction of the member States was an important criterion for the interpretative weight to be attributed to an organization's "own practice". While it was not easy, as Mr. Kamto had rightly pointed out, to decide the interpretative weight to be given to different forms or aspects of subsequent agreements and subsequent practice, it was nevertheless not impossible, as the Commission had previously demonstrated. As had been proposed by Mr. Kolodkin and Ms. Jacobsson, that question could be made the subject of another generic draft conclusion, which would also take into account the specific characteristics of the various constituent treaties.

Mr. Hmoud and other members had agreed that the Commission should not consider decisions by courts or tribunals which were authorized by the constituent instrument of an international organization to adjudicate questions regarding the interpretation of such an instrument as a form of relevant "subsequent practice". Mr. Hmoud had, however, proposed that future commentaries should indicate whether interpretations by such authorized bodies could be overruled by a subsequent agreement or subsequent practice of other bodies or by States parties. That was an interesting question, which in part touched upon the issue addressed by the Commission in paragraph 3 of draft conclusion 7, namely the possible modificatory effect of subsequent practice, a question which could be addressed on second reading.

Several members had commented on recent developments regarding constituent treaties of the European Union legal order and the practice of the parties and organs of the Union. Mr. Forteau had expressed the view that he had exaggerated the autonomy of the legal order of the European Union, in particular when he had stated that the Court of Justice of the European Union did not take subsequent practice by the parties or the organs of the Union into account. It should be noted in that regard, however, that the report was based not only on his research as Special Rapporteur but also on a statement by the European Union itself. Sir Michael Wood and Mr. McRae, on the other hand, had emphasized the special character of the legal order of the Union, which they compared to that of a State. Both Mr. Forteau and Sir Michael Wood were right in that the case law of the Court of Justice of the European Union needed to be approached with caution. The approach of the Court to subsequent agreements and subsequent practice should perhaps be considered as a form of "rule of the organization" in the sense of article 5 of the Vienna Convention. But that should not imply, as Mr. McRae seemed

to suggest, that the mere declaration by a court that a particular constituent treaty created a “new legal order” should be enough to render inapplicable article 5 of the Vienna Convention or even the Convention as a whole, a conclusion which several members, including Mr. Šturma, had rejected with good reason.

He agreed with Mr. Forteau that certain formulations in decisions by the Court of Justice of the European Union could be interpreted as merely excluding the possibility that subsequent practice could amend the founding treaties. Nevertheless, nothing in the jurisprudence of the Court had positively established that the practice of organs or of member States should or could be taken into consideration for the purposes of interpretation. The example relating to the European Currency Unit (ECU) which was cited in paragraphs 59 and 60 of the report and which, in Mr. Forteau’s view, tended to prove the contrary, was not a case in which the Court of Justice of the European Union was “competent to interpret the founding treaties of the European Union”. It was, of course, possible that the Court would in the future take the practice of the member States, and possibly even the organs of the Union, more into account, and such a possible development should be reflected in the commentary. But it seemed that, for the time being, the normal procedure of the Court was to interpret the constituent instrument of an international organization without taking account of the subsequent agreements and subsequent practice of the organs or the parties. At the same time, it should be borne in mind that, to borrow Mr. Šturma’s expression, the institutions of the European Union were the guardians of the founding treaties, but the member States were their masters.

Some members had questioned the relevance of some of the examples cited in the report. Mr. Forteau, for example, had considered that the practice followed within the International Civil Aviation Organization related to the substantive law of the Organization rather than to its institutional law. Sir Michael Wood had even gone so far as to say that only certain provisions of the United Nations Convention on the Law of the Sea could be viewed as a constituent instrument because most of the other provisions were concerned with the substance of the law. Mr. McRae had made a similar point with respect to a case relating to WTO law. All those comments addressed a more general question, which had also been raised by Mr. Kolodkin, namely the scope of article 5 of the Vienna Convention.

Article 5 of the Vienna Convention referred to the constituent instruments of international organizations in general, without making a distinction between the different kinds of provisions which were contained in such instruments. It was true that constituent instruments contained many provisions relating to substantive obligations rather than to the institutional structure of the organization concerned, but they were nonetheless “constituent instruments” which came within the scope of article 5 of the Convention. Furthermore, there were good reasons why article 5 did not distinguish between institutional and substantive provisions. International organizations and their organs were generally entrusted with the interpretation and application of the substantive rules that governed their role. The Declaration on Friendly Relations, for example, referred to the substantive law of the Charter, which did not preclude it from being generally considered, as a constituent instrument of an international organization, to be an important element for the interpretation of the Charter. Similarly, the organs of WTO were responsible for applying and interpreting the Agreement Establishing the World Trade Organization and its annexes, which were considered to be a single undertaking under article II, paragraph 1, of the Agreement. The unity of the provisions of a constituent treaty was also demonstrated by article 20, paragraph 3, of the Vienna Convention, which required the acceptance, by the competent organ of the organization in question, of reservations relating to the constituent instrument of that organization, regardless of whether the provision concerned was substantive or institutional. All those examples showed that substantive and institutional rules were very closely interrelated and that they should not be artificially distinguished. The situation might be different in the case of international organizations which were not compe-

tent to act with regard to certain provisions of their constituent instrument, such as the International Seabed Authority with regard to the provisions of the United Nations Convention on the Law of the Sea, other than those contained in Part XI.

Mr. Forteau had questioned the relevance of the reference in the report to the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea, which, in his view, was a complementary agreement. While that characterization was certainly correct, it did not clarify the exact legal significance of the Agreement for the purposes of interpreting the Convention. The Agreement bound all the States that were parties to it, but it was not a subsequent agreement to the Convention within the meaning of article 31, paragraph 3 (a), of the Vienna Convention because it did not apply to the States parties to the Convention. Unlike Sir Michael Wood, who had expressed the view that the Agreement was in substance an agreement amending the 1982 Convention, he could not see how that Agreement could have such an effect when it had not been made between all the States parties to the Convention on the Law of the Sea and when the amendment procedure that had been provided for had not been used. It would be safer and more reasonable to say that the Agreement purported to interpret the Convention in a way that might be applicable to the parties to the Convention which were not parties to the Agreement. That implied recognizing the Agreement as being a form of subsequent practice that was followed by certain parties to the Convention which could be taken into account, without necessarily being determinative, for the purposes of interpreting the Convention. Numerous examples, both in practice and in the literature, supported such an approach. That did not necessarily mean that that example should be referred to in the commentary, but he had wanted to raise the point with the members of the Commission.

Mr. McRae had questioned the weight given in the report to the decision of the WTO Appellate Body in the *Clove Cigarettes* case. While he had conceded that, on the face of it, that decision appeared to provide an interesting interpretation of the concept of subsequent agreements, he had expressed the opinion that in that case a provision of the WTO Agreement had been disregarded, first by an organ of the Organization and ultimately also by the Appellate Body itself, inasmuch as it had accepted the violation of the Agreement committed by that organ. However, he himself was not convinced that the decision of the Appellate Body had violated the WTO Agreement and that the Commission could therefore not rely on it. In fact, good arguments could be made to show that in that case the procedure provided for in the Agreement had not been circumvented or disregarded. Experts in WTO law, such as Mr. McRae, might argue the contrary, but the Commission should be cautious about asserting that the WTO Appellate Body had rendered a clearly erroneous decision.

Furthermore, Mr. Forteau, while reiterating his reservations with respect to the subject of paragraph 1 of draft conclusion 9, which the Commission had adopted at its previous session, had stated that the decision of the WTO Appellate Body in the *Clove Cigarettes* case appeared to support his argument. Although he himself did not think that it was necessary or appropriate at the current stage to reopen the question, which could be reconsidered during the second reading. He did not consider that the decision of the Appellate Body established a distinction between “hortatory” and “binding” understandings —indeed the Appellate Body nowhere used the terms “binding” or “having legal effect” —but rather a distinction between an understanding “with regard to the meaning” of a term, which was not necessarily binding, and a merely “hortatory” understanding. If it were otherwise, every subsequent agreement within the meaning of article 31, paragraph 3 (a), would be binding on the parties, and that would result, as Mr. Tladi feared, in a means which would elevate subsequent agreements to a higher status in interpretation than text, context and object and purpose.

Some other examples had been questioned by members but, in the interests of time, they would be addressed informally or at a later stage of the work.

The distinction drawn in the report between the three forms of subsequent practice and conduct that might be relevant for the interpretation of constituent instruments of international organizations had been found to be helpful by most members of the Commission. However, some members, in particular Messrs. Forteau, Park and McRae, had been of the view that those three forms of conduct were not sufficiently reflected in draft conclusion 11. That impression had perhaps arisen from the fact that draft conclusion 11 contained four, not three, paragraphs and that, in addition, those four paragraphs did not follow the sequence of the three forms of practice presented in the report. If that was the case, he was not opposed to the Drafting Committee rearranging or merging some paragraphs. From a substantive point of view, the reason why the third category, namely the combination of the practice of organs and the practice of the parties, was not dealt with in a separate paragraph of the draft conclusion was —as Sir Michael Wood had rightly pointed out —that the two forms of practice might in principle both be considered in a particular case, but that did not necessarily mean that they coalesced to form a third category. It therefore seemed more prudent to proceed from two forms of relevant practice and to explain, in a separate paragraph, in the commentary or by way of the formulation of the draft conclusion, that the two forms of practice might often need to be assessed together. That would also meet the concerns expressed by Messrs. Laraba, Niehaus and Peter, who had found the third category hard to grasp.

Pursuing a related point, Mr. Peter had asked for more clarification as to when States acted in their capacity of members of an organization and its organs and when they acted as parties. In that connection, the report contained what might be a helpful reference to the practice of the European Union, and the Drafting Committee might at some point consider recognizing a presumption that States, in case of doubt and subject to the rules of the organization, acted as members.

Some members of the Commission had asked why the concept of “established practice” had been used in draft conclusion 11, in preference to other concepts which could be found in the case law of the International Court of Justice. Mr. Park, in particular, had pointed out that only some of the various similar concepts used in the report had been taken up in draft conclusion 11. There were various reasons for that. First, the use of the expression “*pratique établie*” —instead of “*pratique bien établie*” —for the English expression “established practice” was a translation error. Another reason was that, although in the report he had restated the various terms which had been used in the case law, in particular that of the International Court of Justice, some of those terms which had been mentioned for explanatory purposes, such as the expression “the organization’s own practice”, were not intended for inclusion in the draft conclusion. A third reason for the choice of terminology was substantive. Like Mr. Park, Mr. Forteau had asked why he had chosen to speak of “established practice” and not “generally accepted practice”, a term which he would have preferred. In fact, the concept of “established practice” was used in article 2 (j) of the 1986 Vienna Convention and had been recognized by the Commission itself in its draft articles on the responsibility of international organizations. Furthermore, the concept of “generally accepted practice” was not totally unambiguous, inasmuch as it was used in the context of the identification of customary international law to refer to a practice that was widely accepted, but not necessarily by all States. He had therefore been concerned that using the expression could give rise to the misunderstanding that the interpretation of the constituent instrument of an international organization took place in a way that was comparable to the identification of customary international law. He would nevertheless defer to the Commission if it considered that the expression “generally accepted practice” should be used in the draft conclusion.

Ms. Jacobsson and other members of the Commission had agreed that the preceding considerations should not exclude the use of the expression “established practice of the organization” in that context. While it was true that the expression had not yet played an important role in

the case law, it was nevertheless generally recognized. It might well be the case, as Mr. Forteau had said, that the primary function of that concept was to refer to an informal source of the secondary law of the organization. That informal secondary law, if it was “established” could, however, also serve as a means of interpretation of the constituent treaty, in addition to its primary function as a “rule of the organization”. But, as Sir Michael Wood and Mr. Peter had said, the fact that a separate paragraph was devoted to that point, in addition to a reference to the role of the organization’s “own practice”, might be confusing. In any case, as Mr. Hmoud had said, any draft conclusion on that point should indicate that divergent practice among different organs or opposing statements by member States precluded the formation of “established practice”.

Mr. Forteau had proposed that paragraph 3 of draft conclusion 11 should refer to the “established practice of the organization” and recognize it as a “relevant rule of international law applicable in the relations between the parties” in the sense of article 31, paragraph 3 (c), of the Vienna Convention. He had to confess that he had always considered that that article referred to rules whose source was outside and independent of the treaty which was to be interpreted. He had also thought that the purpose of article 31 was the “systemic integration” of treaties within the larger context of international law. Furthermore, as Mr. Forteau himself had said, the “established practice of the organization” was a form of secondary law, which was derived from its constituent instrument, and the source of the rules which it established was thus not outside the treaty. Those rules might even, as such, not be applicable between the parties in the strict sense of the term, but rather only indirectly as an element of the law of the separate legal entity that was the international organization concerned. He could therefore agree with Mr. Forteau that the “established practice of the organization”, as a rule of the organization, was in some sense “applicable between the parties”. However, if such a rule, which was “internal” to the treaty, did indeed fall under article 31, paragraph 3 (c), one might ask how Mr. Forteau would explain the existence of subsequent agreements between the parties regarding the interpretation of the treaty within the meaning of article 31, paragraph 3 (a). Since he himself interpreted such agreements as having to be legally binding, such agreements would also have to fall under article 31, paragraph 3 (c), which would then raise the question as to why it was necessary to draw a distinction between paragraphs (a), (b) and (c) of article 31.

Like Mr. Forteau, he was seeking to explain the relevance of the conduct of the organization itself as a means of interpretation of a constituent instrument of an international organization. If that could not be done by reference to article 31, paragraph 3 (c), and article 32 did not fully explain, in the light of the established case law, the relevance of the conduct of the organization, then perhaps the way forward would be to take such practice into account in the identification of the object and purpose of a rule under article 31, paragraph 1. Mr. Laraba had expressed an interest in that solution, which was proposed in the report. While that might not be very precise, as Mr. Kolodkin and Mr. Park had, for their part, correctly remarked, it might be difficult to be more explicit, and it would at least give the interpreter some orientation. That was not engaging in the creation of new law, as Mr. Murphy had suggested. But it was important to alert the interpreter to the fact that international courts, in particular the International Court of Justice, had recognized the organization’s “own practice” as a means of interpretation, even if the courts had not always explained that use by pointing to a particular element in the rules of interpretation, as Mr. Kamto would have liked. Given the situation, it would be useful if the Commission could provide him (the Special Rapporteur) with some orientation as to how that practice fitted in with the traditional categories.

As to the various drafting proposals which had been made with regard to draft conclusion 11, only some of which could be addressed in the summary, he welcomed Mr. Forteau’s proposal, which had been supported by Sir Michael Wood and Ms. Jacobsson, to make it clear that the

whole draft conclusion was “subject to the rules of the organization”. In addition, he was not wedded to retaining the expression “conduct of an organ” of an international organization in paragraph 2. He did, however, consider that the case law supported the proposition that such conduct might “give rise” to a subsequent agreement or subsequent practice in the sense of article 31, paragraph 3, while recognizing that the provision could be reformulated—in any case, that was not intended to mean, as Mr. Šturma seemed to think, that practice, in itself, would or could create a relevant agreement of the States.

Mr. Kolodkin and Mr. Murase had suggested that emphasis should be placed on the “competence” of the international organization and its organs. That did not seem necessary, since it was a clear and well-established general principle of the law of international organizations that those organizations could validly act only within their sphere of competence. He was nevertheless prepared to meet that concern by using the expression “competent organ” in the context of the practice of the organization. However, he was not sure that it was necessary, as Mr. Murphy had proposed, to include a reference to “rules of procedure”, since, in contrast to the rules of procedure of conferences of States parties, the basic rules of procedure for international organizations were contained in their constituent instruments.

Messrs. Forteau, McRae, Kolodkin, Peter and Murphy had expressed the view that paragraph 2 of draft conclusion 5, which had been provisionally adopted, could be read as excluding the practice of international organizations. They had therefore suggested that draft conclusion 5 should specify that it applied only “subject to draft conclusion 11”. While, as Mr. Niehaus had pointed out, that might indeed be a useful clarification, it should be made either at the end of the first reading or during the second reading of the draft conclusions. That point, which had already been flagged in the commentary to draft conclusion 5, could be further explained in the commentary to draft conclusion 11. Similarly, Mr. Forteau’s proposal to revisit draft conclusion 4, paragraph 3, and draft conclusion 6, paragraph 3, could also be considered at a later stage, if necessary.

He noted that Mr. Murase wished to alter the designation of the final product of the Commission’s work, but it was his understanding that the term “conclusions” referred not only to purely factual statements but that it might also include normative statements. Like Mr. Niehaus, he considered, therefore, that it was not necessary to reopen the debate on that point or, for that matter, the debate on the outcome of the Commission’s work on the identification of customary international law.

In conclusion, he said that the statements of many of the members of the Commission who had taken the floor seemed to reflect an underlying concern that he wished to diminish the primary role of States in the interpretation of treaties and to elevate the role of international organizations to an inappropriate level. Those concerns were somewhat surprising because he had been careful in trying to adhere strictly to the case law of international courts, in particular that of the International Court of Justice. Furthermore, he had refrained from adopting a “constitutionalist” approach to the interpretation of the constituent instruments of international organizations or any other theoretical approach that was not well established. He reaffirmed the primary role of States in the proper interpretation and development of constituent instruments of international organizations and expressed the hope that the members of the Commission would take a balanced approach which took full account of the accepted judicial practice.

3259th Meeting, 29 May 2015

Available at:

http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr3259.pdf&lang=E**A/CN.4/SR.3259**

Provisional

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27 July 2015

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International Law Commission
Sixty-seventh session (first part)**Provisional summary record of the 3259th meeting**

Held at the Palais des Nations, Geneva, on Friday, 29 May 2015, at 10 a.m.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties

(p. 3) Mr. Nolte (Special Rapporteur) said that his third report addressed the role of subsequent agreements and subsequent practice in relation to the interpretation of treaties that were the constituent instruments of international organizations. The scope of the report was limited to such instruments; it did not cover the interpretation of treaties adopted within an international organization or those concluded by international organizations.

Article 5 of the Vienna Convention on the Law of Treaties provided that the Convention was applicable to treaties that were the constituent instruments of international organizations. At the same time, article 5 suggested, and the case law confirmed, that constituent instruments of international organizations were also treaties of a particular type which might need to be interpreted in a specific way. In particular, the question arose as to which forms of conduct might constitute relevant subsequent practice for the purpose of the interpretation of a constituent instrument of an international organization.

The International Court of Justice, other judicial or quasi-judicial bodies and States had recognized that three forms of conduct might be relevant in that regard. They were: the subsequent practice of the parties to constituent instruments of international organizations which established their agreement regarding the interpretation of such instruments; the practice of organs of an international organization; and a combination of the practice of organs of an international organization and the subsequent practice of the parties to the constituent instrument of that organization.

With respect to subsequent practice establishing agreement between the members of an organization, he pointed out that it was not only such practice that was relevant. Other subsequent practice of parties in applying the constituent instrument of an international organization might also be relevant for the interpretation of that instrument. Such constituent instruments

were sometimes implemented by subsequent bilateral or regional agreements or practice, for example. Although such bilateral treaties were concluded between only a limited number of the parties to the multilateral constituent instrument concerned, and were therefore not, as such, subsequent agreements under article 31, they might imply assertions concerning the proper interpretation of the constituent instrument itself and, taken together, might be relevant for the interpretation of such a treaty.

The International Court of Justice had also sometimes taken into account the practice of organs of an international organization when interpreting that organization's constituent instrument, apparently without reference to the practice or the acceptance of the members of the organization. In particular, the Court had stated that the international organization's own practice might deserve special attention in the process of interpretation. The practice of organs in the application of a constituent instrument should thus, at a minimum, be conceived as being other subsequent practice under article 32.

The third possibility was to take into account a combination of the practice of organs of the organization and the subsequent practice of the parties, in particular their acceptance of the practice of organs. For example, in its advisory opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), the International Court of Justice had arrived at its interpretation of the term "concurring votes" in Article 27 of the Charter of the United Nations as including abstentions primarily by relying on the practice of the organ concerned, in combination with the fact that it was subsequently generally accepted by member States. In that case, the Court had emphasized both the practice of one or more organs of the international organization and the general acceptance by the member States, and it had characterized the combination of those two elements as being a general practice of the organization.

The interpretation of treaties which were constituent instruments of international organizations might also be affected by subsequent agreements under article 31, paragraph 3 (a). Two basic forms of subsequent agreements regarding the interpretation of constituent instruments of international organizations could be distinguished: self-standing agreements between the parties; and agreements between the parties in the form of a decision of a plenary organ of an international organization. Self-standing agreements between the parties regarding the interpretation of constituent instruments of international organizations were rare. While parties mostly acted as members within the framework of the plenary organ, when questions of interpretation arose with respect to such an instrument, they did on occasion act in their capacity as parties. Examples in that regard could be found in the practice of the European Union. Decisions and recommendations of plenary organs of international organizations regarding the interpretation or the application of a treaty provision might also, under certain exceptional circumstances, reflect a subsequent agreement between the parties under article 31, paragraph 3 (a), provided that such acts represented an agreement of the parties themselves to the constituent instrument.

In addition to reviewing relevant case law, the report also considered the positions of leading publicists. Differing views had been expressed as to whether the various uses by international courts and tribunals of practice in the application of constituent instruments of international organizations as a means of interpretation merely represented different manifestations of articles 31 and 32 as the basic rules regarding the interpretation of treaties, or whether such uses also reflected a special or additional rule of interpretation which was applicable to such constituent instruments. However, when considered more closely, those views seemed to differ not in substance, but rather in whether they regarded an international organization's own practice as being relevant under articles 31, paragraph 3 (b), and 32, or on an independent basis. Ultimately, judicial bodies and publicists seemed to agree that an international organization's own practice would often play a specific role in the interpretation of constituent instruments

under the pertinent rules of the Vienna Convention. The different explanations of the possible relevance of an international organization's own practice ultimately remained within the framework of the rules of interpretation reflected in the Vienna Convention. Those rules made it possible, not only to take into account the practice of an organization which the parties themselves confirmed by their own practice, but also to consider the practice of organs as being relevant for the proper determination of the object and purpose of the treaty or as a form of other practice in the application of the treaty under article 32. The previous work of the Commission was in line with that comprehensive approach under the Vienna Convention's rules on interpretation.

The established practice of the organization was also a means for the interpretation of constituent instruments of international organizations. Article 2, paragraph 1 (j), of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations and article 2 (b) of the draft articles on the responsibility of international organizations even listed the "established practice of the organization" as a "rule of the organization". That designation implied that such practice might serve as a means of interpretation of the constituent instrument.

Commentators had maintained that article 5 of the Vienna Convention on the Law of Treaties reflected customary law. However, for the purposes of the present topic, it was not necessary to make a precise determination regarding the customary status of article 5. It was sufficient to say that it had been generally recognized that the rules of the Vienna Convention regarding treaty interpretation were applicable to constituent instruments of international organizations, but always without prejudice to any relevant rules of the organization. The rule which was formulated in article 5 was sufficiently flexible to accommodate all conceivable cases. If it was understood in that broad and flexible sense, it was clear that article 5 reflected customary international law.

In conclusion, he proposed that the Commission should refer draft conclusion 10, as contained in paragraph 86 of the report, to the Drafting Committee, with a view to its provisional adoption by the Commission.

3256th Meeting, 26 May 2015

Available at:

http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr3256.pdf&lang=EF

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International Law Commission
Sixty-seventh session (first part)**Provisional summary record of the 3256th meeting**

Held at the Palais des Nations, Geneva, on Tuesday, 26 May 2015, at 10 a.m.

Crimes against humanity (*continued*)

(p. 10) Mr. Nolte thanked the Special Rapporteur for his first report, which was both rich and constructive and which, although it could have been shorter, was headed in the right direction. In particular, he welcomed the Special Rapporteur's efforts to position his work as a continuation of the Rome Statute and the practice of the International Criminal Court. He endorsed the general remarks made by Ms. Escobar Hernández about the need to put the Commission's work into the larger context of the prevention and punishment of international crimes as objectives pursued by the international community. He shared the view expressed by other members that the Commission's intention to elaborate a draft convention on crimes against humanity must complement existing normative and institutional mechanisms at the national and international levels — in particular the International Criminal Court — whose aim was to prevent and suppress international crimes. The Commission must therefore also bear in mind the cumulative effect of collective measures.

With regard to draft article 1, paragraph 2, it was unclear why the Special Rapporteur limited the obligation imposed on each State to take effective measures to prevent the commission of crimes against humanity to "any territory under its jurisdiction", whereas in paragraphs 95-101 of his report, he highlighted the judgment of the International Court of Justice (ICJ) in *Bosnia and Herzegovina v. Serbia and Montenegro*, in which the Court had taken the view that the obligation to prevent that arose from the Convention was not limited to the territory under the jurisdiction of the State but was determined to a greater extent by "the State's capacity to influence ... within the limits permitted by international law". Since genocide and crimes against humanity were very similar in nature, the duty to prevent described in paragraph 2 should not have a more limited territorial scope than that prescribed by the Genocide Convention. While he agreed with Mr. Forteau that the duty to prevent should not be restricted to those cases in which the commission of a crime against humanity was imminent, he felt that draft article 1, paragraph 2, adequately addressed that concern. The Commission should

also bear in mind that some human rights treaties required States parties to respect and guarantee the rights they embodied “within their jurisdiction”, without that obligation being explicitly limited to the territory of the State party concerned, or at least, without it being interpreted in that way. In light of those considerations, he proposed, in paragraph 2, either that the words “in any territory” should be deleted or that the paragraph should be reformulated by reproducing the language of the aforementioned ICJ judgment, so that it would read: “Each State party shall take effective legislative, administrative, judicial or other measures to prevent crimes against humanity according to its capacity to influence and within the limits permitted by international law”. It was true that, with that amendment, the stated obligation would be a “more open-ended and therefore perhaps less clear obligation with respect to the adoption of specific measures”, which the Special Rapporteur had precisely sought to avoid, as he had noted in paragraph 115 of his report. However, it was not a sufficient reason to implicitly reject the important development represented by the aforementioned ICJ judgment in the area of protection against violations of basic human rights and the most heinous international crimes.

Turning to draft article 1, paragraph 3, he expressed support for the inclusion of a non-derogation clause, while noting that it was necessary to clarify the relationship of that clause with article 31 of the Rome Statute, which concerned grounds for excluding criminal responsibility. If, as he believed to be the case, paragraph 3 was not intended to exclude the grounds for exclusion set out in article 31, then perhaps that paragraph should constitute a separate draft article. That would make it more clear that it was addressed to States and did not concern the criminal responsibility of individuals. Like Mr. Gomez-Robledo, he was of the opinion that the draft convention should expressly provide that States had the duty not to commit crimes against humanity and that the prohibition against committing such crimes did not apply solely to individuals, as the International Court of Justice had established in its case law relating to the Genocide Convention.

With regard to draft article 2, he welcomed the fact that the Special Rapporteur had reproduced article 7 of the Rome Statute in his definition of crimes against humanity and had based the explanations of each element of the definition on specific restatements of the pertinent case law of the International Criminal Court and other international criminal tribunals. That case law was nevertheless likely to develop further, as were the elements of crimes, as pointed out by Ms. Escobar Hernández. There was therefore a risk, if nothing was done, that a future convention on crimes against humanity might be interpreted in a way that deviated from the case law of the International Criminal Court that had since evolved. In addition, when applying the convention, States might decide that they would confine themselves to the case law as it stood on the date on which they had signed the instrument. Therefore, in order to ensure, as far as was reasonably possible, the continuing harmonious and parallel development of the future convention and the system of international criminal law, he proposed to add a paragraph 4 to draft article 2 that would read: “In the interpretation of this provision account shall be taken of the case law of the International Criminal Court”. Such a provision would impose an obligation on those applying the convention, rather than to comply with the case law of the International Criminal Court, to “take into account” that case law, which, according to article 31 of the Vienna Convention on the Law of Treaties, was merely a duty to consider it as one means of interpretation among others.

In relation to the future programme of work, in order to draft a convention, which seemed to be the goal of the project undertaken by the Special Rapporteur, the Commission did not need to distinguish between progressive development and mere codification. He failed to understand Mr. Murase’s point that the Commission had no mandate to draft a convention, when that was precisely its purpose: to draft conventions by codifying existing law and progressively developing the law. The Commission could make as many innovative proposals to States as

it wished; States were free to adopt them or not in the form of a convention. Thus, in the current project, the Commission would not have to specify whether each draft article reflected *lex lata* or *lex ferenda*, as it had to do in other projects aimed at identifying existing customary international law for the benefit of the national courts. On the other hand, it must choose between drafting a convention that many States would be prepared to ratify without much delay but that would not establish a very demanding standard and drafting a convention that established stringent — and perhaps in some instances, innovative — obligations that some States might hesitate to accept, at least in the foreseeable future. It was obviously impossible to resolve that question in the abstract, but it would be useful for the Commission to consider, at a relatively early stage of its work, the general orientation it wished to give the project and the level of ambition it envisaged for the future convention, by listing possible options. To that end, it could engage in some form of preliminary consultations that could be conducted by the Special Rapporteur. One of the questions to be addressed in that context might be whether crimes against humanity should be excluded from the jurisdiction of military courts.

3253rd Meeting, 20 May 2015

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http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr3253.pdf&lang=E

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Provisional

For participants only

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International Law Commission
Sixty-seventh session (first part)**Provisional summary record of the 3253rd meeting**

Held at the Palais des Nations, Geneva, on Wednesday, 20 May 2015, at 10 a.m.

Identification of customary international law (*continued*)

(p. 6) Mr. Nolte said that he agreed in substance with the general approach taken by the Special Rapporteur in his third report but thought that the latter had perhaps attempted to cover too much ground too quickly. He concurred with the quotation in paragraph 13 of the report to the effect that general practice and acceptance as law were not two juxtaposed entities, but two aspects of the same phenomenon. A concern about “double counting” should therefore not lead to the conclusion that a particular practice could never also simultaneously express the subjective element of acceptance of the practice as law. What was needed was for that subjective element to be identified separately, not for it to be manifested in a different act. He was consequently opposed to deleting the word “generally” in draft conclusion 3, paragraph 2. Instead, he proposed to reposition the word “specific” in that paragraph so that the sentence would read: “This generally requires a specific assessment of evidence for each element”. Doing so would give the two-element approach a sharper focus and facilitate the proper identification of differences in the application of the two-element approach with respect to different types of rules, as mentioned in paragraph 17 of the report.

On the question of inaction, he supported the wording of draft conclusion 11, paragraph 3. While he acknowledged Mr. Murase’s point that some States might be more reluctant than others to speak out against a practice with which they did not agree, surely there were subtle forms of disapproval that could be used to express disagreement in such cases. However, it was inaccurate to say that a sharp distinction should be drawn between acquiescence and *opinio juris*, as they were both forms of acceptance of a proposition.

Although he endorsed the Special Rapporteur’s analysis of the role of treaties in the formation of customary international law, he failed to see the difference between subparagraphs (b) and (c) of draft conclusion 12, since both referred to instances in which a treaty had led to the creation of a rule of customary international law. He hoped that the Drafting Committee could improve the formulation of the draft conclusion.

In general, he agreed with the Special Rapporteur's analysis in his report of resolutions adopted by international organizations and conferences, including the proposition contained in paragraph 53. However, since inaction could, under certain circumstances, constitute practice, and since some propositions contained in resolutions could be complied with simply by refraining from action, it was not always necessary for States to modify their national policies, or even legislation, for a rule of customary international law to come into existence. He shared the view that the Commission's work was not merely a collective academic endeavour: the political process of its creation, and the relationship of the work to that of the General Assembly, in particular the Sixth Committee, gave it enhanced authority.

Concerning the treatment in the report of the relevance of actors other than States in the formation of customary international law, he said that within the framework of international organizations, States did not always act in their capacity as States: they might act simply as members of the organization, in which case, under international law, their conduct was attributed to the organization. The statement in paragraph 71 of the report that, "where appropriate", the practice of States within international organizations was to be attributed to States themselves suggested that the Special Rapporteur viewed such practice as State conduct. Much depended on what the Special Rapporteur meant by the words "where appropriate". The reference in paragraph 72 to "the established practice of the organization" as relating to the "internal operation of the organization" might be too narrow an interpretation. In his view, the relationship between the organization and its members, in particular the competences of the organization *vis-à-vis* its members, was not a matter of general customary international law.

The relevance of actors other than States was bluntly denied in the proposed new paragraph 3, of draft conclusion 4, which read: "Conduct by other non-State actors is not practice for the purposes of formation or identification of customary international law." It should be amended along the lines of draft conclusion 5, paragraphs 1 and 2, of the draft conclusions on the topic of subsequent agreements and subsequent practice in relation to the interpretation of treaties, which read: "Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty." That would allow for the practice of ICRC and certain other non-State actors to be taken into account in identifying customary international law, without, however, putting them on the same level as States.

He had some doubts about the wording of draft conclusion 15, which precluded the possibility that regional custom might exist by requiring that each State must specifically agree with a particular practice. In reality, however, there could be a general expectation among members of a particular region that those who disagreed with a particular development accepted by the majority would have to clearly articulate their disagreement. He therefore proposed the deletion of the words "each of" in paragraph 2 of the draft conclusion.

He agreed with the Special Rapporteur that the concept of the persistent objector had a place in the rules on the formation of customary international law, but contrary to what was stated in paragraph 90 of the report, he did not consider that it was the sole preserve of the mighty. On the contrary, the classic cases concerned less powerful States that stubbornly refused to agree to a certain development. Nor did he consider the recognition of the persistent objector to be in any way contrary to the law; it was an important factor in legitimizing the rules of customary international law and in ensuring transparency in the process of its formation.

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Provisional

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International Law Commission
Sixty-seventh session (first part)**Provisional summary record of the 3246th meeting**

Held at the Palais des Nations, Geneva, on Wednesday, 6 May 2015, at 10 a.m.

Protection of the atmosphere (continued)

(p. 7) Mr. Nolte thanked Mr. Murase for his excellent report, which, as well as being very well researched, took proper account of the debates held in 2014. Although he agreed with Mr. Tladi that the understanding reached in 2013 must be respected, he did not share the doubts expressed by Mr. Park, who thought that the report and draft guidelines exceeded the scope of the understanding. On the contrary, they seemed to him to remain fully within its scope, even without their liberal interpretation. In fact, nothing in the understanding excluded defining basic concepts such as “atmosphere”, “air pollution” or “atmospheric degradation”, if it was done “for the purpose of the draft guidelines”, as proposed, and did not “interfere” with political negotiations. Neither did the understanding exclude defining the scope of application of the guidelines as covering activities that might have significant adverse effects on the atmosphere, as referring to “basic principles relating to the protection of the atmosphere” or as excluding any effect on the legal status of airspace. No more did it exclude addressing the question of whether the protection of the atmosphere was in some legal sense a “common concern of humankind”, or exclude attempting to identify existing principles of international law and the obligations arising from them. Moreover, a simple reminder of the existence of certain basic principles relating to the protection of the atmosphere could not reasonably be interpreted as the Commission interfering in political negotiations, including on climate change, ozone depletion and long-range transboundary air pollution. Similarly, it could not be considered that the report dealt with “specific substances” merely because it occasionally mentioned them as generally recognized relevant factors, without taking a position on how they should be dealt with specifically. The report did not address “outer space” but made clear that the topic did not affect the status of airspace in any way. Finally, it did not seek to “fill” the gaps in treaty regimes, nor to “impose on” treaty regimes rules “not already contained therein”, as it restricted itself to identifying existing rules of customary international law.

He also considered that the report and the draft guidelines it contained were consistent with the object and purpose of the 2013 understanding, which, in his view, were principally intended to ensure that the work of the Commission did not “interfere in relevant political negotiations”. That condition was essential in that it served as a reminder to the Commission that it had only a limited role to play in the important issue of the protection of the atmosphere. Nonetheless, the Commission did have the function of reminding States of existing principles that should be taken into account when addressing questions of the protection of the atmosphere in political negotiations. He therefore welcomed the approach taken by the Special Rapporteur, which consisted of identifying not specific rules but general principles that, by their nature, left States the necessary political room to manoeuvre.

There was no problem with articulating basic principles of international law in the form of “guidelines”, as long as they provided general guidance without imposing a specific result, which was true in the present case because States were being given orientation on which general considerations they should take into account when addressing issues relating to the protection of the atmosphere in relevant forums. In any case, a guideline need not necessarily be devoid of legal content and non-binding. Notwithstanding the foregoing, he reserved his judgement with respect to whether the future workplan proposed by the Special Rapporteur remained within the bounds of the 2013 understanding. He also wondered what would be covered in draft guideline 12 on the precautionary principle, as the 2013 understanding expressly excluded that principle from the Commission’s work on protection of the atmosphere. He also feared that part V (Interrelationship with other relevant fields of international law) and part VI (Compliance and dispute settlement) might stray beyond the bounds of the topic and be overambitious, unless the Rapporteur pursued a general approach. However, the Commission need not decide on such matters immediately.

With regard to the substance of the report, he approved of the proposed definition of the term “atmosphere” contained in draft guideline 1, which had the advantage of not entering into scientific questions but remaining purely functional, and also the proposed definition of “air pollution”, which was inspired by widely ratified treaties that also included the word “energy”. Nevertheless, he had doubts about whether the definition of the term “atmospheric degradation” should be based primarily on domestic legislation and court decisions. Clarification was needed as to whether the phrase “climate change and any other alterations of atmospheric conditions” was limited to alterations caused by “human activities” or whether it comprised any form of climate change, even that which was not caused by human activities. He was inclined to think that any form of climate change that had deleterious effects on human life and health should be recognized as a common concern of humankind giving rise to certain duties for States to cooperate.

With regard to draft guideline 2, he underlined the importance of limiting the scope of the guidelines, in subparagraph (b), to “basic principles relating to the protection of the atmosphere”, which would exclude the creation of detailed rules that could interfere in relevant political negotiations. He had nothing against defining basic principles, provided that it was clear whether they were existing law (*lex lata*) or what the Special Rapporteur referred to as “emerging law” (*lex ferenda*). However, he did not support the formulation “as well as to their interrelationship with other relevant fields of international law”, because he doubted whether principles could have relationships with “fields” and whether, in any event, it would be too ambitious an undertaking to attempt to define such relationships. In that regard, he wished to know whether the Special Rapporteur was contemplating a draft guideline establishing that principles relating to the protection of the atmosphere took precedence over, for instance, the rules and principles of human rights law or the international law of the sea. He agreed with the “without-prejudice” clause with respect to the legal status of airspace contained in subparagraph (c), although he would not have chosen the words “is intended to”. He was not con-

vinced of the relevance of subparagraph (a), inasmuch as it was not really about the scope of the guidelines, but rather about their ultimate purpose. Moreover, the guidelines did not directly “address” human activities, but should rather “concern” them. He therefore suggested that subparagraph (a) could become part of the preamble or of a draft guideline on the object and purpose of the guidelines.

As to draft guideline 3, he recalled that, during previous debates, he had expressed doubts about the wisdom of recognizing a principle of common concern of humankind, as he considered that the implications of such an approach should be established first. Although he was somewhat reassured by the Special Rapporteur’s report, which clearly excluded the expansive interpretations of the concept proposed by certain academics, he was still not convinced that recognizing the protection of the atmosphere as a common concern of humankind should take the form of a principle, as proposed in draft guideline 3. The fact that States had been reluctant to use the phrase “common concern of humankind” was not a reason for the Commission not to use it. However, rather than being recognized as a principle, it could be mentioned in the preamble, as was the case in the United Nations Framework Convention on Climate Change, along with any explanation necessary to avoid the risk of too broad an interpretation.

Draft guideline 4, which formulated an important basic principle, was based on extensive research. One might disagree with the Special Rapporteur as to how far the principle had been established, but the reference in paragraph 50 of the report to the ruling of the International Court of Justice, in which it had taken the view that the “existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment”, was nonetheless particularly relevant, in that the Court had referred not to specific treaties but to the corpus of international environmental law —one might even say customary international law —the point being that the atmosphere was part of the environment. He was not, however, convinced that theoretical developments regarding the nature of obligations *erga omnes* were really helpful and even feared that they went too far. The commentary should instead emphasize that the obligation to protect the atmosphere was one of conduct, not one of result. It would also be important to clarify the relationship between the general obligation to protect the atmosphere and the more specific *sic utere* principle, which the Special Rapporteur intended to address in a separate guideline at a later stage. For the moment, it appeared that he might be engaged in “double counting”.

With regard to draft guideline 5, he proposed the amendment of the first sentence of subparagraph (b) and the deletion of the second sentence, so that the subparagraph would read: “States are encouraged to cooperate in further enhancing and exchanging scientific knowledge relating to the causes and impacts of atmospheric degradation.”

In conclusion, he said that the Special Rapporteur had adapted his approach to take into account previous debates and that the members of the Commission should take a fresh look at his report, rather than assuming entrenched positions. Defining rules and principles of existing law that States must or should take into account, provided that such rules and principles did not contravene current treaty regimes, was not the same as disregarding the 2013 understanding. It seemed that there were two opposing views of international law in play: one viewed international law as a body of established rules agreed by States in treaties and had very little time for customary international law, at least as far as principles were concerned; the other saw international law as a body of rules and principles, which were all interlinked and supplemented the rules expressly agreed by States, ensuring their coherence without holding back their development, and which must be taken into account in any attempt at codification and progressive development. Lastly, he supported the referral of all the draft guidelines to the Drafting Committee and hoped that the Commission, in a spirit of seriousness, enlightenment and generosity, would not allow its discussions to get bogged down.

3245th Meeting, 5 May 2015

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Provisional

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International Law Commission
Sixty-seventh session (first part)

Provisional summary record of the 3245th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 5 May 2015, at 10 a.m.

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

(p. 8) Mr. Nolte, referring to the legal advice sought from the Office of the Legal Counsel on the legality of the use of force in the Syrian Arab Republic and in Yemen, said that he understood that there might well be reasons why the Office's opinions had not been made public. Nonetheless, it would be interesting to know whether they departed from the position of the International Court of Justice in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case and its judgment in the case concerning *Armed Activities in the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* case.

66th Session (2014)**3233rd Meeting, 30 July 2014**

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10 October 2014

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International Law Commission
Sixty-sixth session (second part)**Provisional summary record of the 3233rd meeting**

Held at the Palais des Nations, Geneva, on Wednesday, 30 July 2014, at 3 p.m.

Provisional application of treaties (*continued*)

(p. 6) Mr. Nolte said that, before addressing specific points in the report, he should mention that he had submitted an expert opinion on some aspects on the topic of the provisional application of treaties in an arbitral proceeding under the Energy Charter Treaty. That had given rise to Interim Award on Jurisdiction and Admissibility of November 2009, in the Yukos case before the Permanent Court of Arbitration. The Special Rapporteur might wish to assess the award in his next report. He shared Mr. Forteau's view that the Special Rapporteur should undertake an assessment of the available practice and take a more inductive approach to the topic. The proposition, in paragraph 14 of the report, that the provisional application of a treaty undoubtedly created a legal relationship and therefore had legal effects was not very clear, but its author was the Commission itself, in its commentary to the 1966 draft articles on the law of treaties. There were, however, several differences between the 1966 commentary and the terminology used in the second report on the provisional application of treaties; and those differences made it clear why the Commission should make an effort to formulate a clearer statement.

First, the 1966 commentary said that the clauses providing for the provisional application of a treaty had legal effect, not that provisional application as such had a legal effect. However, in his view, it should be made clear that provisional application had a legal effect only if a pertinent agreement on such application had been established between the signatories. Such an agreement typically derived from a clause providing for provisional application, but it must always be ascertained whether a particular clause was binding on the parties and was meant to create a binding obligation to apply the treaty provisionally.

Secondly, the 1966 commentary and the formulation in the report was that the former stated that clauses providing for provisional application brought the treaty into force on a provisional basis. However, the Vienna Conference had not accepted the Commission's proposal regarding the notion that such clauses brought the treaty into force on a provisional basis. It was thus not clear what the Special Rapporteur meant when he said that provisional application had legal effects.

Thirdly, whereas the 1966 commentary spoke of the bringing into force of the treaty, the second report referred to the creation of a legal relationship. It was not clear whether such a relationship would be treaty-based or based on a unilateral promise or a general principle of law, such as good faith. He shared the doubts expressed by other members as to whether clauses that provided for provisional application should be construed as expressing unilateral promises that would be legally binding under the principles adopted by the Commission in 2006. The Commission should seek clarity in that regard.

Although, understandably, the Special Rapporteur did not wish to use more specific terminology, he should make it clear that the term "provisional application" did not have any inherent legal effects: it was the agreement between the parties to apply a treaty provisionally that created the legal relationship, and, while it might be that some additional legal effects from the agreement by the parties to provisionally apply a treaty might derive from general principles of law or other sources, such effects would indeed be derivative. Moreover, it was not just a matter of words; it went to the heart of the practice of agreeing on clauses providing for provisional application. States agreed on such clauses because they wished to apply the treaty before the internal procedures authorizing the State's consent to be bound had been completed. That wish was understandable; but it was equally understandable that a Government could not undertake a binding commitment that it was not authorized to undertake under its domestic law.

Under article 27 of the Vienna Convention, a State could not invoke provisions of its internal law for its failure to perform a treaty, but the article was not helpful in determining whether an agreement to provisionally apply created a legal obligation other than on the basis of the treaty itself, which had not yet entered into force. Article 25 of the Vienna Convention did not clearly state — and it was the task of the Commission to determine — whether article 27 constituted a rule of interpretation according to which, in case of doubt, the parties to a treaty containing a clause that provided for the provisional application of that treaty were thereby intending to create an obligation to provisionally apply the treaty until notice of termination under article 25, paragraph 2. There was much to be said in favour of such an interpretation of article 25, but its scope was necessarily restricted. The term "provisional application" did not have a fixed meaning or a particular legal character; everything depended on the specific agreement of the parties.

That was clearly so because, in the case of a clause on provisional application, the agreement of the parties concerned the power of a particular State body to bind the State, in a situation in which further domestic procedures were still necessary for the whole treaty to become binding. Governments could not enter into binding commitments, even on a provisional basis, if they indicated that there remained domestic hurdles to be removed or preconditions to be fulfilled in their legal system. That was why certain standard clauses were formulated in such a way as to limit any possible obligation under a clause providing for provisional application, in order to ensure that any such obligation did not go beyond what was permitted under domestic legislation. If Governments could not rely on such an understanding, they would not be prepared to incur the risk of agreeing on the provisional application of a treaty except by way of long and complicated clauses, in which their limitations under domestic law would be spelled out. Such a consequence would not be helpful in practice. Governments should be able to agree that they would apply the treaty as far as they could under their domestic legislation

without having to explain the details of such legislation at the international level. Even if it was not immediately clear to the signatory States to what extent a particular signatory would be able to provisionally apply the treaty, the parties might well accept such lack of clarity in return for the expectation that some parts of the treaty would be implemented in the preliminary phase.

For the reasons stated by Mr. Forteau, Mr. Murphy and others, the statement, in paragraph 82 of the report, that provisional application could not be revoked arbitrarily was questionable. True, the principle of bona fides applied, but a signatory State did not have to give a reason when it notified another signatory State that it was terminating the provisional application of a treaty. Such termination could be due to domestic political processes, for example, and should not be viewed as violating the principle of bona fides. In that connection, he recalled Mr. Forteau's assertion that the recent award in the Matter of the Bay of Bengal maritime boundary arbitration between the People's Republic of Bangladesh and the Republic of India before the Permanent Court of Arbitration had confirmed Mr. Forteau's doubts about the proposition adopted by the Commission in 2013 that a subsequent agreement under article 31, paragraph 3 (a), of the Vienna Convention need not necessarily be binding. Refuting that assertion, he drew attention to the fact that the Arbitral Tribunal had quoted the pertinent part of the Commission's report for 2013 and had simply said that it did not consider the particular exchange of letters in that case to be sufficiently authoritative to constitute a subsequent agreement between the parties. Thus it had not said that a subsequent agreement under article 31, paragraph 3 (a) must be binding: it had not contested the Commission's proposition. Further countering Mr. Forteau's position, he pointed out that an agreement on the provisional application of a treaty was characteristically a formal treaty action, which was not necessarily the case for subsequent agreements or subsequent practice under article 31, paragraph 3, of the Vienna Convention.

The second report had provided an excellent basis for the Commission's debate. The main aspects of the topic that needed to be explored in future reports were the establishment of proper interpretation of clauses providing for the provisional application of treaties, and in particular whether the signatories intended thereby to create a legally binding obligation; the practical elements of treaty making; the importance for Governments of respecting domestic laws and procedures; and the need to circumscribe the provisional application of treaties in such a way that the mechanism remained a useful tool for signatory States, without either deterring or creating false expectations.

3226th Meeting, 17 July 2014

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Provisional

For participants only

19 September 2014

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International Law Commission
Sixty-sixth session (second part)**Provisional summary record of the 3226th meeting**

Held at the Palais des Nations, Geneva, on Thursday, 17 July 2014, at 3 p.m.

Identification of customary international law (*continued*)

(p. 5) Mr. Nolte thanked the Special Rapporteur for his excellent report, which went in the right direction. The report and the debate on it had, however, raised such a quantity of fundamental questions of international law that it would normally take several years to address all of them, in all their complexity. It seemed impossible that the Commission would be able to articulate a reasoned position on all the questions raised in the time that was available.

Concerning draft conclusion 1, he was uncomfortable with the terms “methodology” and “method”, since the topic was about much more than a method: it concerned the secondary rules regarding the formation and determination of customary international law. He therefore suggested that draft conclusion 1 should be reformulated to read:

“The present draft conclusions concern the elements of customary international law and the factors which need to be taken into account for determining the existence and content of such rules.”

It was not sufficient to deal with other sources of international law by means of a “without prejudice” clause. That was true, in particular, of general principles of law, since they might be relevant for determining the content of particular rules of customary international law, and vice versa. For that reason, he suggested the addition of a draft conclusion, or paragraph, based on article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties, to read:

“In identifying rules of customary international law, account is to be taken of general principles of international law.”

With regard to draft conclusion 2, he agreed that customary international law consisted of two elements, but thought it would be wise to add the expression “*opinio juris*” in brackets after the phrase “accepted as law”, to show that the latter term meant a common positive attitude on the part of the stakeholders of the international legal system. He did not think the Commission should attempt to define “international organization” during the current session.

The draft conclusions should be formulated in a way which did not suggest that general practice must come first and then be accepted as law. To make that clear, draft conclusion 3 could be worded to say that it was necessary to ascertain “whether there is a general practice and whether it is accepted as law”. He welcomed the Special Rapporteur’s openness to the idea that the two-element approach could be applied differently in different fields, since types of rules might vary according to dissimilar forms of evidence, the availability of which might differ greatly depending on the nature of the rule.

The reference to the “surrounding circumstances” hardly added anything to draft conclusion 4, which should emphasize that the assessment of the evidence must take account of the factual context and normative considerations.

As for draft conclusion 5, the practice of States contributed primarily, but not exclusively, to the formation of customary international law. The word “formation” captured the process by which customary law came into being better than “creation”.

He doubted whether the implicit reference to the articles on State responsibility in draft conclusion 6 was appropriate, because the primary purpose of those articles was to identify and attribute responsibility for internationally wrongful acts. It was also questionable whether it was necessary to add that the relevant conduct could be “in the exercise of executive, judicial or any other function”. If such an addition were considered useful, he suggested the insertion of the word “public” before “any other function”. In draft conclusion 7, paragraph 1, the word “verbal” should be replaced with “communicative”, because non-verbal communication also played a role in that context. In paragraph 2, a generic reference to internal forms of conduct should be inserted. The forms of practice listed in paragraph 3 had been insufficiently explored, and it would therefore be wise not to include them in the text until the underlying issues were addressed in the Special Rapporteur’s third report.

Turning to draft conclusion 8, he agreed that practice must be unequivocal and consistent, even if that meant that it was sometimes hard to identify the position of democratic States which might speak with many voices. Taken in isolation, draft conclusion 9 might be misread to mean that practice alone could establish a rule of customary international law. Paragraph 1 should therefore begin by saying “The relevant practice, as an element of a rule of customary international law, must be general.” The expression “*opinio juris*” should be added at the end of draft conclusion 10, paragraph 1, to highlight the need for the subjective element of customary international law. It would also be wise to reflect in the draft conclusion the Special Rapporteur’s explanations of the need to cover the subjective element of customary international law.

He generally agreed with draft conclusion 11, although he doubted whether internal memoranda and other internal communications should be recognized as evidence of *opinio juris*. The relevance of inaction should not be addressed without the benefit of the Special Rapporteur’s third report.

In closing, he said that the Drafting Committee should take the necessary time to digest and evaluate the proposed draft conclusions.

3224th Meeting, 16 July 2014

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Sixty-sixth session (second part)

Provisional summary record of the 3224th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 16 July 2014, at 10 a.m.

Cooperation with other bodies (*continued*)

Visit by representatives of the Council of Europe

(p. 6) Mr. Nolte wished to know whether efforts to strengthen the activities of the Council of Europe in the area of the protection of personal data, namely updating the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, had served to intensify the debate on those issues at the global level. He asked whether the admission of Kosovo to the Venice Commission, without prejudice to the issue of its status, might set a precedent for Palestine and whether the case of Palestine had played a part in discussions on how to handle Kosovo. With regard to Ukraine, he wished to know whether the Council of Europe had taken up the issue of the non-recognition of the acquisition of a territory through the illegal use of force and whether the Venice Commission, which had already given its opinion on several occasions on questions of general international law, had been asked to examine that matter.

3220th Meeting, 10 July 2014

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Held at the Palais des Nations, Geneva, on Thursday, 10 July 2014, at 10 a.m.

Immunity of State officials from foreign criminal jurisdiction (*continued*)

(p. 9) Mr. Nolte congratulated the Special Rapporteur on the meticulous research underpinning her third report. He agreed that any consideration of the official acts which would trigger immunity *ratione materiae* and of exceptions thereto should be left to a later stage of the Commission's deliberations. The terminological difficulties in French could be resolved by Mr. Forteau's suggestion to translate the term "official" into French as "*représentants et agents*". He doubted whether it was appropriate to transpose the definition of "agent" contained in draft article 2 of the articles on responsibility of international organizations, which had been developed with the specific needs of international organizations in mind, to the sphere of States. While he also agreed that the Commission should not adopt the term "organ" instead of "official", that term should not be explicitly excluded, as it was in the aforementioned draft article 2. The phrase "other person or entity", also in draft article 2, was problematic, since someone other than an official should not be defined as an official. The Commission should not attempt to deal with the immunity of legal persons from foreign criminal jurisdiction, as that would only add further complications to an already difficult topic.

He concurred with Mr. Forteau and Mr. Tladi that "official" should be defined in such a way as to leave room for the notion of "official act" to serve an independent purpose. It was, however, questionable whether defining "official" more broadly than what was encompassed by "official acts" would serve any practical purpose. The term "*agent*" in the French text had the advantage of signalling that the person concerned did not necessarily have to have the formal status of a State official. He echoed the doubts expressed concerning the distinction drawn between individuals who had a "relationship" with the State and those who acted on its behalf, as the latter necessarily implied the former. He also questioned the inclusion in draft article 2 of the qualification that State officials acted not only "on behalf of" but also "in the name of" the State. Was the implication that all such persons must always announce that they acted for the State? Was the phrase "and represents the State or exercises elements of governmental authority" intended to limit the definition to those who exercised a specific form of

public authority? Did it exclude those who worked for a legally separate public entity or otherwise could not claim to represent the State as such? In his view, references to the nature of the function exercised and the position held in the organization of the State had a place in the commentary but should not be included in the definition itself, as they made it unclear.

In paragraph 147 of her third report, the Special Rapporteur had used professors as examples of persons who had formal connections with the State but were nonetheless not assigned to functions involving the exercise of governmental authority. In Germany, professors were considered to be acting on behalf of the State, and even exercising governmental authority, when they performed tasks such as grading final exam papers, which involved issuing administrative acts that could be challenged in court. It was doubtful whether professors should be entitled to immunity from foreign criminal jurisdiction, however. The example served to demonstrate that the Commission should consider whether there should be a lower threshold for persons who acted on behalf of the State. It was not a question of drawing a distinction between low-level and high-level officials – police officers, for instance, were low-level officials but doubtless enjoyed immunity *ratione materiae*; rather, it was a matter of identifying those officials who, in acting on behalf of the State, did not perform functions that were typical for the State.

The Special Rapporteur had set herself a very ambitious agenda for her next report. The question of what was an “official act” and the issue of possible exceptions to immunity would each require more study and debate than the definition of “State official”

3213th Meeting, 30 May 2014

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Provisional

For participants only

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International Law Commission
Sixty-sixth session (first part)**Provisional summary record of the 3213th meeting**

Held at the Palais des Nations, Geneva, on Friday, 30 May 2014, at 10 a.m.

Protection of the atmosphere (*continued*)

(p. 10) Mr. Nolte said that the scope of the topic of the protection of the atmosphere was circumscribed by the basic understanding underpinning the Commission's decision to include that topic in its programme of work. That understanding had to be taken seriously, regardless of whether or not one approved of its contents. He had always been in favour of including the topic in the Commission's programme of work. He did not think that those members who had had reservations in that respect, but who had demonstrated their readiness to compromise by accepting the understanding, had intended to limit the topic's scope unreasonably by requiring that any study of it should be subject to the conditions established in the understanding.

Everyone agreed that the protection of the atmosphere was extremely important for human-kind. It was equally undeniable that dramatic forms of climate change were taking place. He was deeply convinced that everyone should work together to preserve the vital basis of human existence on earth. The Commission's primary task was not, however, to say what it thought needed to be done to protect the atmosphere, but rather to ask what role it should play in the overall common endeavour to protect the atmosphere and what its proper contribution might be in that connection. When asking that initial question, the Commission members must be honest and modest and they should recognize that the Commission could not save the atmosphere simply by virtue of its legal authority and the collective wisdom of its members. The most important decisions with regard to the protection of the atmosphere must be taken at the political level; the Commission could neither prescribe specific decisions or measures on the matter, nor compensate for the lack thereof. That was the basic reason why the members of the Commission had set some limitations on the study of the topic when the understanding had been formulated. It was also necessary to bear in mind the fact that the Commission would jeopardize its own authority if it overstepped its role in that area. It took a long time to establish authority, but often very little to lose it.

Some members regarded the agreement as a straitjacket which placed the Special Rapporteur in an impossible situation of not being able really to address the important issues raised by the topic. That was not the case, since the understanding left a sufficient margin of manoeuvre to identify the general principles of international environmental law and to say that they applied to the protection of the atmosphere. The identification of existing law could not be seen as exerting pressure on treaty negotiations, or as “filling gaps” between treaty regimes. What existed already between treaty regimes could not be considered to be a form of “filling in”. The identification of general principles of international environmental law, irrespective of whether they were based on customary law or on a general principle of law, was a regular and legitimate function of the Commission and there was nothing in the understanding to prevent that. The Commission might not go very far in that task, but that modest goal was worth pursuing.

The understanding did leave the Commission enough room to set forth some general principles and to establish their applicability to the protection of the atmosphere. He therefore supported draft guideline 2 (b) which said just that. The Special Rapporteur and the Commission should seek to achieve the programme inherent in that draft guideline. In pursuing that goal, it might be wise, for example, to emphasize States’ duty to cooperate in protecting the environment, as Mr. Petrič and other members had suggested.

His views on the other draft guidelines stemmed from the basic position which he had just outlined. He agreed with other members, such as Mr. Forteau, that the Special Rapporteur had put the cart before the horse. More importantly it was premature to propose a draft guideline which already proclaimed that the atmosphere, by virtue of its legal status, was a “common concern” of humankind. Of course, the protection of the atmosphere was a common concern in the colloquial sense of the term, but everyone knew how important it was for the meaning and implications of a term to be reasonably clear once it was supposed to describe something with “legal status”. Perhaps the Special Rapporteur should hold draft guideline 3 in abeyance and, in his next report, begin to elaborate on the above-mentioned general principles of international environmental law. The notion of a “common concern” should not be debated again until those principles, as they applied to the protection of the atmosphere, had been articulated, at which point it might become a suitably sized horse to draw the cart.

He agreed with the members who considered draft guideline 1 (definition of the atmosphere) to be unnecessary and draft guideline 2 (a) to be misleading. As it stood, the draft guideline concerned not only scope, as its title indicated, but also referred to some substantive concepts, such as “deleterious substances” or “significant adverse effects”, which should be considered in connection with substantive obligations. Why should the definition of scope be burdened with such notions, which it would be better to discuss at the same time as the general principles related to their role?

The protection of the atmosphere was a very important topic where the Commission had to play a crucial, albeit limited role, which consisted in reminding States that the protection of the atmosphere was not a field governed solely by the law of a few treaties. He therefore proposed that the Special Rapporteur and the Commission should consider the first report and the first debate in plenary session to be a valuable introduction to the topic, but they should not seek the provisional adoption of any draft guideline at that stage, apart from draft guideline 2 (a). Proceeding in that manner would promote the sustainability and development of the topic. He suggested that as a friend of the topic, in a friendly spirit towards the Special Rapporteur, and as a Commission member who was concerned about the Commission’s role and authority and about the protection of the atmosphere.

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Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*)

(p. 3) Mr. Nolte (Special Rapporteur) said that he had endeavoured to formulate the draft conclusions as normatively as possible, but that the diversity of international jurisprudence and State practice made it difficult to identify very clear rules. However, there were some patterns from which general conclusions could be derived that would help interpreters. Such help might consist of describing the approach adopted by the international courts and tribunals when confronted with subsequent agreements and practice. For example, the way in which the International Court of Justice dealt with the issue provided important guidance for the interpreter. The proposed draft conclusions were thus not purely descriptive. In order to avoid any misunderstandings, the Commission might prefer to call the draft texts guidelines, as proposed by Mr. Niehaus and Mr. Murase.

The proposal to distinguish more clearly the role played by articles 31 and 32 of the Vienna Convention on the Law of Treaties was acceptable, provided that the principle of the unity of the process of interpretation was preserved and that reference was made to article 32 where necessary. It could also be pointed out, as proposed by Sir Michael Wood, that article 32 was applicable not only in a subsidiary fashion but also systematically in order to confirm the meaning resulting from the application of article 31.

With reference to draft conclusion 6, Mr. Murphy had expressed the view, based on considerable research, that application and interpretation were two entirely separate and distinguishable operations. However, many examples could be cited to show that, on the contrary, the two operations overlapped to some extent, and therefore the interpreter's attention was simply drawn to the fact that application of a treaty always involved some degree of interpretation. He supported Mr. Murphy's proposal to emphasize more clearly the content of article 31, paragraph 3 (a), which pushed the interpreter more towards agreements that were happening on the ground, as well as Mr. Forteau's proposal to specify that a subsequent agreement or sub-

sequent practice might serve not only to clarify the terms of the treaty but also other means of interpretation, such as the object and purpose of the treaty. It might also be possible to find a better expression than “other considerations” at the end of the draft conclusion, as suggested by Mr. Niehaus.

Draft conclusion 7 repeated the content of article 31 of the Vienna Convention for the very purpose of explaining it in more detail. The other criteria cited by Mr. Forteau could be mentioned, but it would be difficult to take the further step of concluding, as Mr. Forteau had proposed, that the specificity of a particular practice always had significant value for the purpose of interpretation. Mr. Hmoud’s proposal to indicate that practice should be specific to the treaty seemed to go in the right direction, however. The references to specificity, value and form could also be merged in one draft conclusion. The Drafting Committee should also consider the proposal by Mr. Murphy and Ms. Escobar-Hernández to replace the word “value” with “weight”.

As far as draft conclusion 8 was concerned, he agreed that the formulation “concordant, common and consistent” was perhaps excessively prescriptive. He would propose new wording that would also take account of Mr. Hmoud’s proposal that practice should be sufficiently frequent. The rules on the burden of proof could also be addressed, given that it was closely linked to the value of a subsequent agreement or subsequent practice, as had been noted by Mr. Forteau.

Several members had taken issue with the proposition made in draft conclusion 9 — although it was based on the commentary to draft conclusion 4 that had already been adopted by the Commission — to the effect that a subsequent agreement under article 31, paragraph 3 (a), of the Vienna Convention need not be binding. If subsequent agreements had necessarily to be binding, the Convention would have attributed them stronger legal force. The report of the Appellate Body of the World Trade Organization on the *United States — Measures Affecting the Production and Sale of Clove Cigarettes* case, also mentioned by Mr. Forteau, had not stated that in order to be qualified as a subsequent agreement the Doha Ministerial Decision needed to be binding, but that it clearly expressed a common understanding and was not merely hortatory. Furthermore, there was no indication that the Commission or the States assembled at the Vienna Conference had considered a subsequent agreement under article 31, paragraph 3 (a), of the Vienna Convention to have a different legal effect than an agreement established by virtue of subsequent practice. Of course, the interpreter was bound to “take into account” subsequent agreements or subsequent practice, however, that obligation did not derive from the necessarily binding nature of subsequent conduct but from the Convention itself. Mr. Kamto had rightly noted that, in the *Kasikili/Sedudu Island* case, cited in the report to highlight the need for parties to reach an agreement on the interpretation of a treaty, the International Court of Justice had not confirmed that a subsequent agreement must not be binding. Conversely, it had not expressed the position, in that case or any other, that agreements must be binding. In order to conclude what appeared to be a false debate, perhaps the formulation proposed by Mr. Hmoud could be used, namely that an agreement under article 31, paragraph 3, of the Vienna Convention produced legal effects and to that extent it was binding.

Mr. Park and Mr. Murphy had quite rightly raised the question of whether a distinction should be made between agreements under article 31, paragraph 3 (a), and under article 31, paragraph 3 (b), of the Vienna Convention, but that distinction had already been made in draft conclusion 4 and its accompanying commentary. The purpose of draft conclusion 9 was to identify what the two paragraphs had in common, namely the agreement between the parties regarding the interpretation of the treaty. With regard to silence, it did not seem appropriate to explore the concepts of estoppel, preclusion and prescription, as proposed by Mr. Kamto. The proposal by Mr. Murphy and Sir Michael Wood to move paragraph 3 of draft conclusion 9 to draft conclusion 6 should be examined.

As the general thrust of draft conclusion 10 had been supported, he proposed that the Commission should consider the issue of parties to treaties establishing international organizations, raised by Sir Michael Wood, at a later date. Mr. Murase and Mr. Park had made the point that, as conferences of parties operated under different rules, they could not be treated as a single category. In order to take account of that very diversity, the primacy of the applicable rules of procedure was recognized in subparagraph 2 and a broad definition of the term “Conference of States Parties” was used in subparagraph 1. As proposed by Mr. Murase, it could perhaps be explained that the interpreter had ample room to take into account specific provisions governing the operation of a conference of parties when assessing the effect of a decision it had taken. He questioned the appropriateness of making a distinction, as proposed by Mr. Murphy, between conferences specially charged with assessing implementation of a treaty and those undertaking a review of the treaty itself. A treaty was not necessarily interpreted expressly but could be interpreted implicitly during its implementation. The doubts expressed by Ms. Escobar Hernández with regard to the expression “agreement in substance”, in subparagraph 3, did not seem justified, as the importance of the distinction between the form and the substance was grounded in international case law. The Commission might wish to consider the possible effects of decisions of conferences of parties beyond their contribution to the interpretation of a treaty, as proposed by Mr. Gómez-Robledo, provided that it did not stray from the topic. The fact that some conferences of parties, such as the Conference of the Parties to the United Nations Framework Convention on Climate Change, did not operate under rules of procedure should be highlighted more clearly.

Some members had expressed doubts as to whether draft conclusion 11 fell within the scope of the project, while others believed, on the contrary, that it was necessary to address the question of a possible modification of a treaty by a subsequent agreement or by subsequent practice. He had taken care to formulate the draft conclusion so that it fell within the scope of the topic, namely the interpretation of treaties; however, the distinction between interpretation and modification arose frequently in practice and should thus be brought to the interpreter’s attention. The possible effect of the intention to modify or amend the treaty on the scope and range of possible interpretations should be examined, referring if necessary to the possibility of an evolutive interpretation, as proposed by Mr. Gómez-Robledo. As draft conclusions 11, 7 and 8 were closely connected, the Drafting Committee might consider merging some of their provisions.

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Held at the Palais des Nations, Geneva, on Thursday, 15 May 2014, at 10 a.m.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties

(p. 3) Mr. Nolte (Special Rapporteur) said that the descriptive method used in relation to the current topic was conditioned by one of the core objectives, namely, to provide a repertory of interpretative practice. That objective was based on the nature of the process of interpretation described in articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, which did not prescribe hard and fast rules but instead required the interpreter to take different means of interpretation into account. The draft conclusions were indicative rather than prescriptive and sought to clarify the role of subsequent agreements and subsequent practice as means of interpretation. His second report contained six draft conclusions that followed on from the first five. They ranged from the general to the particular, situated subsequent agreements and subsequent practice within the general framework of the rules on interpretation contained in the 1969 Vienna Convention and, in general, had been favourably received by States.

Draft conclusion 6 (Identification of subsequent agreements and subsequent practice) reminded interpreters that the identification of subsequent agreements and subsequent practice relevant for the purposes of interpretation under articles 31 and 32 — a phrase not to be understood in the normative sense — required careful consideration, since it presented a number of difficulties. The subsequent agreements and subsequent practice that were taken into account must represent the assumption by a State of a position “regarding the interpretation of the treaty”. Subsequent practice followed “in the application of the treaty” (art. 31, para. 3 (b)) or subsequent agreements regarding “the application of its provisions” (art. 31, para. 3 (a)), were specific forms of conduct relating to the interpretation of a treaty. Interpreters thus had to ensure the proper identification of those forms of interpretative conduct by determining, for example, whether a particular practice indeed related to the application of the treaty in question.

Draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation) concerned the possible effects of subsequent agreements and subsequent practice. Given that subsequent agreements and subsequent practice were two means of interpretation among others, and that international courts and tribunals assessed, on a case-by-case basis, the relevance of the various means of interpretation, subsequent agreements and subsequent practice might be used to narrow or widen the range of possible interpretations of a treaty compared to the results of the preliminary interpretation provided for in article 31, paragraph 1. Draft conclusion 7, paragraph 2, drew attention to the fact that the more specific the subsequent practice, the greater the interpretative value that seemed to be accorded to it under international case law. The paragraph was not, however, formulated in mandatory terms.

Draft conclusion 8 (Forms and value of subsequent practice under article 31 (3) (b)), which could perhaps be placed after draft conclusion 9, since it dealt with a more specific aspect of the topic, referred to the forms and the value of subsequent practice under article 31, paragraph 3 (b). The criteria it set forth could be used to identify the interpretative value of subsequent practice, but not all subsequent practice had to meet those criteria in order to qualify as such.

Draft conclusion 9 (Agreement of the parties regarding the interpretation of a treaty) set forth, in paragraph 1, the requirements for the agreement of the parties under article 31, paragraph 3 (a) and (b), of the 1969 Vienna Convention, without prejudice to the definition of the term “treaty” as a written agreement contained in article 2 of the Convention. In order to clarify the meaning of the term “agreement”, which was used in other provisions of the Convention in the sense of a legally binding instrument, paragraph 1 stated that the agreement of the parties need not be binding as such. Draft conclusion 9, paragraph 2, reiterated the position expressed previously by the Commission, and which he had endeavoured to reflect in his report, concerning the value to be attributed to silence on the part of one or more parties in certain circumstances. If necessary, the second sentence of paragraph 2 could become a new paragraph. Lastly, paragraph 3, which was aimed primarily at practitioners at the national level who were unfamiliar with certain usages at the international level, was intended to serve as a reminder that the objective of common subsequent agreements or common subsequent practice was not necessarily the interpretation of a treaty.

Draft conclusion 10 (Decisions adopted within the framework of a Conference of States Parties) concerned the adoption of decisions that could result in a subsequent agreement or give rise to a subsequent practice within the framework of a Conference of States Parties to a treaty. The expression “Conference of States Parties”, which did not appear in the 1969 Vienna Convention or in any other treaty of general application, described a meeting of States parties to a treaty for the purpose of reviewing or implementing that treaty. Its definition was provided in paragraph 1 for the purposes of the draft conclusions. Excluded from that definition were the organs of international organizations; the significance of their decisions under article 31, paragraph 3 (a) and (b), would be considered in his next report. Since there was no requirement that an agreement between the parties under the aforementioned provisions should take a particular form, there was nothing to prevent reaching such an agreement within the framework of a Conference of States Parties, unless the treaty provided otherwise. Paragraph 2 therefore stated that, under articles 31 and 32 of the 1969 Vienna Convention, the legal effect of a decision adopted within the framework of a Conference of States Parties depended on the terms of the treaty and the applicable rules of procedure. Paragraph 3 drew a necessary distinction between the substance (interpretative intention) and the form (unanimity or consensus) of a decision resulting from a Conference of the States Parties. An agreement under article 31 of the 1969 Vienna Convention could result only from a unanimous decision of a Conference taken with the intention of interpreting the treaty, since the mere achievement of consensus could conceal disagreement on the part of some States as to its intended interpreta-

tion. On the other hand, the fact that the rules of procedure of a Conference of States Parties did not provide for its decisions to have binding effect did not, in itself, exclude the possibility for such decisions to constitute an agreement under article 31, paragraph 3, since such agreements did not necessarily have to be legally binding.

Lastly, draft conclusion 11 (Scope for interpretation by subsequent agreements and subsequent practice) was intended to clarify the interpretative scope of subsequent agreements and subsequent practice. International courts and tribunals tended to arrive at rather broad interpretations of treaties, based on subsequent agreements or subsequent practice, while simultaneously considering whether the latter might have modified the treaty, thus inextricably creating a link between the two – interpretation and modification by means of subsequent agreements and subsequent practice. Nevertheless, they were entirely separate things, and the Commission's work remained focused on interpretation. A subsequent agreement between the parties to a treaty could modify the treaty if that agreement met the conditions set forth in article 39 of the 1969 Vienna Convention. However, whether an agreed subsequent practice could have the effect of modifying a treaty — something which States at the 1966 Vienna Conference had rejected, despite the Commission's proposal to that effect — had not yet been expressly and widely recognized in State practice or by international courts and tribunals. Consequently, draft conclusion 11 merely stated, in paragraph 1, that the scope for interpretation by subsequent agreements or subsequent practice might be wide. In paragraph 2, it said that, through a subsequent agreement or subsequent practice, the parties to a treaty were presumed to be intending to interpret the treaty, not to modify it. That solution made it possible to reconcile the reluctance to recognize that the informal practice of the parties could modify a treaty with the reality that the common practice of the parties was a preferred form of treaty application.

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Expulsion of aliens (*continued*)

(p. 7) Mr. Nolte congratulated the Special Rapporteur on his ninth and probably last report on the topic of expulsion of aliens. In that report, the Special Rapporteur examined, with his usual lucidity, the observations and comments made by Governments on the draft articles that had been provisionally adopted and on the commentaries thereto. A significant number of States' observations and comments forcefully challenged the current version of the draft articles. In his view, the numerous specific proposals and observations made by Governments should be debated in the Drafting Committee, not by the Commission in plenary meetings.

The Commission should continue to call the outcome of its work on the topic "draft articles". That in no way prejudiced the status and legal value of the provisions they contained. That status and value depended primarily on what States did with the draft articles after their final adoption by the Commission. States could convene a conference in order to draft a treaty, but they could also turn the draft articles into guidelines, or even conclusions. It was up to them to decide and the Commission should not try to anticipate that decision. The real question was whether and, if so, to what extent the Commission was claiming that the draft articles expressed current customary international law. States' concerns in that respect were legitimate and had to be addressed. For that reason, while he disagreed with the United States' view that the project should not "ultimately take the form of draft articles", he was convinced that they were right in asking the Commission to make it clear which aspects of the draft articles reflected progressive development, so as not to leave "the incorrect impression" that all the other draft articles (not so designated) reflected codification. It would be going too far, however, to follow the United States' recommendation that the commentary should "include a clear statement at the outset" that the draft articles substantially reflected "proposals for progressive development of the law and should not, as a whole, be relied upon as codification of existing law". But it would be honest and prudent to add, in the introductory part of the commentary, a statement to the effect that: "1. In the following commentary, the Commission has strived to

indicate which provisions of the draft articles it considers to be codification of existing law and which provisions it considers to be proposals for progressive development”, and “2. Where the Commission has not given such a specific indication, no presumption applies that the respective provision concerned reflects either codification or progressive development, but its legal status must be derived from the sources which are quoted in support of it in the commentary”.

In his opinion, the most fruitful way for the Commission to proceed would be first to have the Drafting Committee consider the individual draft articles and their respective commentaries in the light of States’ observations, and then to indicate, as far as it was possible and practicable, if they reflected codification or progressive development. Given that proposed general approach, he would comment only very briefly on some specific draft articles and would reserve his further comments for deliberations in the Drafting Committee.

With regard to draft article 1, there was merit in the argument that the distinction between aliens lawfully present in a State and those unlawfully present required clarification. That was, however, no reason to modify the scope of the draft articles. The United States’ recommendation that draft articles 2 and 11 should be harmonized, mainly in order to establish the intentionality requirement, should be heeded. The Special Rapporteur had demonstrated his readiness to work in that direction. It was also necessary to respond to some States’ concerns about the phrase “the non-admission of an alien other than a refugee”. As the United States had commented, draft article 3, as it stood, could give the wrong impression that the Commission considered all the draft articles to be binding rules of international law. The deletion of the word “other” would, however, have the opposite effect. The Drafting Committee should mull over that point. In draft article 5, paragraph 3, as suggested by the United Kingdom, a distinction should be drawn between aliens who were lawfully present in a country and those who were not. Lastly, several substantial concerns voiced by States in respect of draft article 11 should be addressed.

He again thanked the Special Rapporteur for his excellent work and hoped that the Commission would, to quote Christian Tomuschat, allow the draft articles to remain “permeated by a spirit of enlightened modernism which takes the rule of law and human rights seriously, without placing them ahead of any other consideration of public interest”.

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Protection of persons in the event of disasters (*continued*)

(p. 7) Mr. Nolte agreed that the duty to protect relief personnel, equipment and goods was an obligation of conduct and not of result and he therefore wondered whether it was wise that the text of draft article 14 *bis* established a strict obligation on the part of the affected State to “take all necessary measures”. His suggestion was therefore to use the terminology of most universal and regional treaties and to say that the State “shall ensure” that protection, or to speak of “appropriate measures”.

In draft article 17, it might be possible to go further and to state that the draft articles “may, if appropriate, be taken into account in the interpretation of special rules of international law”. He took it that draft article 18 was supposed to allow room for the formulation of customary rules on disaster management and wondered what its relationship was with draft article 17.

In draft article 3 *bis*, the Commission should consider adding the phrase “under whose jurisdiction” to the definition of the affected State, in order to convey the idea that States could be affected by a disaster not only when they exercised their territorial sovereignty, but also when they exercised their jurisdiction over a given territory. In his opinion, the definition of equipment and goods should not be restricted to those which were “necessary” for the provision of disaster relief but, on the contrary, the phrase “and other objects at the disposal of the assisting States or other assisting actors for the purpose of the provision of disaster relief assistance” should be added to the end of the list. In the definition of “relevant non-governmental organization” the phrases “working impartially and with strictly humanitarian motives” and “because of its nature, location and expertise” should be deleted in order to prevent any abuse of the definition, and the commentary should make it clear that an affected State could revoke the right of an NGO to enter its territory, if the organization was not working impartially. With regard to the definition of relief personnel, such persons did not need to be “specialized”. He did not see the point of the phrase “having at their disposal the necessary equipment

and goods”. Lastly, he wondered whether the word “probability” was an apt definition of the risk of disasters.

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International Law Commission
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Provisional application of treaties (*continued*)

(p. 3) Mr. Nolte said that the Commission was faced with a division of opinions over a key issue. While some members held that the provisional application of treaties should not be encouraged, because it entailed the risk that domestic constitutional procedures might be circumvented, others maintained that States were under no obligation to accept the provisional application of treaties and were free to make sure that their constitutional procedures were respected. In his view, both positions expressed important points, and they were not mutually incompatible.

The second position presupposed that it was clear to all what was meant by “provisional application”. The first position reflected doubts as to whether such clarity existed. He himself shared those doubts: to those who were not international legal experts, the term was ambiguous enough to be regarded as not implying a legally binding effect. He also had the impression that the provisional application of treaties might offer governments a means of suggesting to their parliaments that there was some third category of agreement, somewhere between a binding treaty and a less formal undertaking, which did not require treatment according to normal constitutional standards.

If the Commission were to conclude that provisional application always entailed a legally binding treaty obligation, that would mean that most States which required parliamentary approval in order to undertake such an obligation would have to follow normal constitutional procedures in order to obtain approval. In that case, it was unclear what advantage was offered by provisional application. If, on the other hand, the Commission concluded that provisional application did not produce a legally binding commitment, then the goal of bringing the treaty into operation speedily might be achieved, but at the expense of the protection offered

to the parties by the binding character of treaties. By spelling out the meaning and legal effects of provisional application, the Commission could help to ensure that States did not accept what they thought was something less than a binding treaty, only to discover, belatedly, that they were bound by a real treaty.

Such clarification might come with a price, however. Fewer States might be prepared to have recourse to provisional application if it denoted a binding treaty obligation. In that case, it would no longer fulfil its primary function of enabling States parties to embark upon cooperation under a treaty even before its entry into force made it fully binding. That function would have to be fulfilled by means of treaty clauses in which the parties undertook to do their best to apply the treaty within the constraints imposed by their constitutions or domestic legislation.

3183rd Meeting, 19 July 2013

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http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr3183.pdf&lang=EF

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Provisional

For participants only

10 February 2014

English

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International Law Commission
Sixty-fifth session (second part)**Provisional summary record of the 3183rd meeting**

Held at the Palais des Nations, Geneva, on Friday, 19 July 2013, at 10 a.m.

Formation and evidence of customary international law (*continued*)

(p. 5) Mr. Nolte said that, while he acknowledged the arguments of Commission members who wished to restrict the scope of the topic to the evidence of customary international law, some attempt should be made to explain basic aspects of the process of formation. That was all the more true since the argument that there was a trend in a particular area of the law played an important role in court proceedings and in case law, as shown by another topic being dealt with by the Commission. Nevertheless, he could agree to the deletion of the term “formation” from the title. Greater attention must also be paid to the interaction between the rules and the principles of varying degrees of generality that constituted customary international law.

Another important interaction was the one that took place between customary international law and the general principles of law, the latter often being used in conjunction with or in place of the traditional criteria of customary law. It was thus conceivable for a customary rule to be interpreted in the light of a recognized general principle. The role of such principles was closely linked to the formation and evidence of customary international law, but given the need to consider the scope of the topic, a distinction had to be drawn between the two. The Commission must be careful, however, not to exclude the possibility of identifying a general principle as a source of international law, whether as a stand-alone rule or as a complement to other rules from other sources. At all events, it was important, as stated by the Special Rapporteur in paragraph 36 of his report, to at least identify those rules which, by their nature, needed to be grounded in the actual practice of States. But those rules could not be identified exclusively by way of “secondary” rules; they must also be identified on the basis of their substance.

To conclude, he welcomed the fact that the Special Rapporteur had not labelled the two main schools of thought as “positivist” and “critical”. He also welcomed, in paragraph 65 of the report, the inclusion of a reference by the President of the International Court of Justice to the

criterion of the “evidence available”. That point deserved to be analysed further. The recognition of the relevance of availability in that context was not incompatible with the effort to make the identification of customary law more equal among States. Finally, one might wonder whether the comment in footnote 180, which recalled that it was not for a national court to develop international law, might not also apply to international courts, especially if one held to the notion that the accepted approach for identifying the law should be the same for all.

3179th Meeting, 12 July 2013

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Provisional

For participants only

31 October 2013

English

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International Law Commission
Sixty-fifth session (second part)**Provisional summary record of the 3179th meeting**

Held at the Palais des Nations, Geneva, on Friday, 12 July 2013, at 10 a.m.

Protection of persons in the event of disasters (*continued*)

(p. 7) Mr. Nolte congratulated the Special Rapporteur on his impressive, broad-based analysis and said that the two draft articles he had presented were on the right track. However, he shared the scepticism of other members of the Commission with regard to the proposition that international law recognized a general principle of prevention. The title of draft article 16 referred very generally to the “duty to prevent”, but the body of the text was much more specific. It would therefore be preferable, as had already been suggested, to refer to the “duty to take measures for disaster risk reduction”, perhaps with a supplementary reference to mitigation. The title of draft article 16 could then be “Duty to take measures for disaster risk reduction and mitigation”.

He considered that it was not solely the practice of States and organizations with respect to disasters that underpinned the duty to reduce risks but that the human rights dimension of the topic under consideration deserved the importance rightly attached to it by the Special Rapporteur. Unlike some other members of the Commission, he did not believe that the specific duties to prevent risks that were established in human rights law and jurisprudence concerned only foreseeable disasters. As early as 1982, the Human Rights Committee had emphasized, in its general comment No. 6 on the right to life, that the protection of that right required that States adopt positive measures. Today, it was widely recognized that that requirement also applied to other human rights. Of course, the scope and content of that obligation depended to a large extent on the economic possibilities and legitimate policy choices of States. However, the importance of certain rights, such as the right to life, meant that positive protection measures could and must be expected from all States, including measures to reduce the risk of events that were not specifically foreseeable. Drawing a parallel with national legislation on the risks of fire or murder, which covered abstract (not specifically foreseeable) risks, he said that while States had a wide margin of appreciation in terms of specific measures to be taken in those areas, they could not dispense with them entirely. As appeared to have been men-

tioned earlier, the fundamental duty of the State to take measures to protect the lives of persons under its jurisdiction derived not only from the right to life but also from the very purpose of the State.

He also believed that the strongest source for the duty to take risk reduction measures was the “supreme” human right, the right to life, and that source was complemented by the duty to protect that also derived from other fundamental rights. The practice referred to by the Special Rapporteur appeared therefore in fact to constitute a form of implementation of those human rights, thus serving to put into clear perspective the difference between natural and man-made disasters.

On the other hand, he agreed that international environmental law was a secondary source for the general duty to take measures for disaster risk reduction, and that the basic concepts of damage, harm, risk, prevention and precaution should be clearly defined. However, while international environmental law was a secondary aspect of the topic under consideration, which was focused on the protection of persons, it was pertinent as far as disasters with a transboundary dimension were concerned, and by reason of its function of protecting the collective assets of humanity.

Draft article 16 should not focus too narrowly on certain specific means of disaster risk reduction, but rather should present them as examples which “in particular” might be “appropriate measures” to be taken by States.

In conclusion, he agreed with Mr. Forteau that it was necessary to adopt wording which, while establishing a uniform standard, left enough space for States to determine their priorities and the “appropriate” measures they intended to take.

3168th Meeting, 22 May 2013

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Provisional

For participants only

18 June 2013

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International Law Commission
Sixty-fifth session (first part)**Provisional summary record of the 3168th meeting**

Held at the Palais des Nations, Geneva, on Wednesday, 22 May 2013, at 10 a.m.

Immunity of State officials from foreign criminal jurisdiction (*continued*)

(p. 3) Mr. Nolte said that although he agreed with the list in draft article 4 of the narrow circle of officials who enjoyed immunity *ratione personae*, he thought the Special Rapporteur should have undertaken a closer analysis of State practice to establish that result. Such an analysis would have revealed that there was recent State practice suggesting that other Government officials might also enjoy immunity *ratione personae* due to their representative functions, but that such practice was not sufficiently confirmed to draw clear conclusions regarding *lex lata*. That point should be explained in the commentary to the future text.

In addition to the close analysis of State practice that should have been carried out, existing international and national case law should also have been subjected to a critical evaluation. The Special Rapporteur cited the judgement of the Swiss Federal Criminal Court several times, but it was of uncharacteristically poor quality, the decisive argument for denying residual immunity *ratione materiae* having been that it would be contradictory to affirm the need to fight impunity and at the same time admit a wide interpretation of the rules on immunity *ratione materiae*. Just six months earlier, the International Court of Justice had rejected the same simplistic argument, in the case concerning *Jurisdictional Immunities of States (Germany v. Italy: Greece intervening)*. The Swiss Court's failure to address that judgment considerably weakened the value of its own ruling.

A general argument not put forward by the Special Rapporteur but mentioned by several members of the Commission was that while a restriction of the rules on immunity facilitated the fight against impunity, it must not undermine the maintenance of sustainable and peaceful international relations. The likely consequences of such a restriction and whether and how it would support the fight against impunity needed to be assessed. If a general exception to immunity *ratione personae* and immunity *ratione materiae* was permitted in cases where the accused was suspected of having committed international crimes, strong States would probably protect their officials by arranging special missions for them, whereas weak States would

not be in a position to do so. The result would be a two-tier system that would expose the fight against impunity to accusations of double standards. Was that a risk worth taking?

A further consideration was whether it could be assumed that all national jurisdictions were sufficiently independent to prevent a core crimes exception from being abused for political purposes. He fully agreed that the perpetrators of international crimes must not go unpunished, but he was sceptical that that could be achieved by recognizing a general exception to the rules on immunity *ratione personae* and immunity *ratione materiae* in the case of alleged international crimes.

The procedural rules concerning immunity were so important that they could not be developed separately from the substantive delimitation of the different forms of immunity. The previous Special Rapporteur, Mr. Kolodkin, had wisely placed particular emphasis on the need for a State to invoke immunity *ratione materiae*. That position seemed to be supported by the practice of national courts. Although matters of immunity *ratione materiae* and procedural rules were not addressed in the current Special Rapporteur's second report, they exemplified the interdependence of the substantive and the procedural aspects of immunity.

He welcomed the Special Rapporteur's intention to distinguish between the *lex lata* and *lex ferenda* approaches and hoped that meant that when formulating draft articles and the corresponding commentaries, the Commission would clearly indicate whether they were statements of *lex lata* or *lex ferenda*. A distinction between *lex lata* and *lex ferenda* had been advocated by the majority of States in the Sixth Committee the previous year and was also an element of the structured approach favoured by the Special Rapporteur. In his view, that implied that where a particular rule could not be clearly identified, it was necessary either to reaffirm, as *lex lata*, the principle from which the rule was an exception, or to postulate the rule as *lex ferenda*.

He was pleased to note the Special Rapporteur's recognition that a structured approach required due account to be taken of the common features among the different facets of the rules on immunity. The most basic point of departure was that all rules on immunity, whether *ratione personae*, *ratione materiae*, procedural, criminal or civil, ultimately derived from State immunity and had been shaped by State practice. The statement that a person or an official enjoyed immunity should therefore not be taken too literally: it was ultimately the State which possessed immunity and its officials only enjoyed that immunity in a derivative way.

The report provided a good working basis for formulating general rules pertaining to the immunity *ratione personae* of officials from foreign criminal jurisdiction. However, formulating unnecessary definitions might prejudice the work on the topic. That matter and the various specific drafting suggestions made could be taken up in the Drafting Committee.

(p. 7) Mr. Nolte said that while the distinction between *lex lata* and *lex ferenda* might not be so important when elaborating draft conventions, the current project was designed to be taken into account by national courts, which would need to know whether or not the text was to be viewed as customary international law.

3163rd Meeting, 14 May 2013

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Provisional

For participants only

16 July 2013

English

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International Law Commission
Sixty-fifth session (first part)**Provisional summary record of the 3163rd meeting**

Held at the Palais des Nations, Geneva, on Tuesday, 14 May 2013, at 10 a.m.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*)

(p. 4) Mr. Nolte (Special Rapporteur) thanked the members of the Commission for their constructive comments. Mr. Šturma had made the very general point that the draft conclusions could be perceived either as more descriptive, or as more prescriptive. While that was true, that feature was not necessarily unique to the report and draft conclusions, for international law was often predicated on a description of practice that produced a more or less prescriptive effect. That comment had therefore been a helpful reminder that the draft conclusions could be formulated either way.

All the speakers in the debate had agreed that the Commission's work on the topic should cleave as faithfully as possible to the Vienna Convention, although it had to be remembered that the rules of interpretation defined therein had been a compromise between varying schools of thought. Those rules reflected a consensus which had lasted for half a century and there should be no departing from it unless there were good reasons for doing so. As had been suggested, in forthcoming reports and in the commentaries to the draft conclusions he would give greater prominence to the Commission's *travaux préparatoires* leading up to the Convention.

Most members had insisted on the need to visualize the process of treaty interpretation as a "single combined operation" without distinguishing between, or unduly emphasizing, any of the means listed in article 31 of the Vienna Convention. The process of interpretation and its outcome were, however, two quite separate matters. Determining the relevance, in a specific case, of a given means of interpretation alone and then in relation to other means of interpretation, was not the same thing as singling out that means. In fact, subsequent agreements and subsequent practice were only two of several means of interpretation. That did not, however, signify that it was possible to choose freely how to use each means. The reasoning underpinning sound judgments often took as its point of departure the ordinary meaning of the terms of

a treaty read in their context and in the light of the object and purpose, while at the same time taking into account the other means listed in article 31 of the Vienna Convention, supplemented by those mentioned in article 32. Draft conclusion 1 was certainly not meant to facilitate manipulation in that respect, as Mr. Kamto had feared. That balance between the various means of interpretation was fundamental to all the Commission's work on the law of treaties and must therefore be preserved. Some members had criticized the draft conclusions as being too general. He thought that a general approach was necessary at the introductory stage of the work and helped to recall that the interpretative process must remain open. The general nature of the draft conclusions should not, however, endanger legal certainty.

With regard to draft conclusion 1, several members had suggested that article 32, and even article 33, should be placed on the same footing as article 31 of the Vienna Convention. He had no objections to that. He had drawn a distinction, because the Working Group on Treaties over time had insisted on the need to make the "general rule" set forth in article 31 the unquestionable starting point of the interpretative process. On the other hand, members' views had diverged somewhat on the question of whether the means of interpretation mentioned in article 31 should all be "thrown into the crucible". Some members had stressed the importance of the means listed in paragraph 1 of that article, while others had considered that they alone did not comprise the whole essence of the general rule. At all events, nothing in the wording of the article or in the *travaux préparatoires* suggested that "the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" should be given a privileged position. Nor was there any reason to infer that, conversely, the means referred to in paragraph 3 were less important; in fact, in his third report on the law of treaties (1964), the Special Rapporteur, Sir Humphrey Waldock, had gone so far as to say "subsequent practice when it is consistent and embraces all the parties would appear to be decisive of the meaning to be attached to a treaty". The only means which were supplementary in nature were those mentioned in article 32.

All the same, the "ordinary meaning" remained the point of departure for interpretation, as one member had rightly contended. That being so, a provision could be interpreted by giving more weight to some means than to others. As one member had commented, the interaction of the means thrown into the crucible was guided by the evaluation of those means by the interpreter; that evaluation entailed ascertaining the relevance of the various means of interpretation in the particular case and determining their interaction, by placing proper emphasis on them.

That was the reason why the report referred to the case law of a variety of international courts and tribunals. Contrary to the understanding of some members, that case law did not show that, in the abstract, courts and tribunals diverged in the emphasis which they placed on various means of interpretation – which would mean that they disagreed about how to interpret the Vienna Convention. In reality, it seemed that the particular provisions applied by those courts and tribunals usually required the placing of varying degrees of emphasis on certain means of interpretation. The cases cited in the report therefore illustrated "how given instances of subsequent practice and subsequent agreements contributed, or not, to the determination of the ordinary meaning of the terms in their context and in light of the object and purpose of the treaty", as Mr. Tladi had put it. Perhaps, as Mr. Forteau had proposed, it would be better to link the emphasis to be placed on certain means of interpretation to the "nature" of the treaty or treaty provisions which were to be applied; to decide whether, when human rights treaties were interpreted, greater emphasis was to be placed on their object and purpose, whereas the ordinary meaning of terms would be stressed more when interpreting treaties containing specific, reciprocal obligations, such as bilateral commercial agreements. At all events, draft conclusion 1 did not imply that different international courts and tribunals had developed a style of interpretation regardless of the nature or content of the treaties which they applied.

Perhaps it was also necessary to make clear that the purpose of the second paragraph of that draft conclusion was not to change the logical order of reasoning suggested by article 31, but to refer to the practice of courts and tribunals in order to adjust the emphasis placed on the various means of interpretation mentioned in articles 31 and 32 according to the circumstances of the case.

Although Sir Michael had suggested that the expression “means of interpretation”, which might be misleading, should be replaced with “elements of interpretation”, he personally thought that, for various reasons, there should be no deviating from the terminology employed by the Convention and the Commission. The term “means” did not single out the different factors mentioned in articles 31 and 32 of the Vienna Convention, but indicated that, on the contrary, each had a particular function in the overall process of interpretation which was a single, combined operation. Just as a court usually began to construct its reasoning by examining the terms of a treaty, then by analysing them in their context and in the light of the object and purpose of a rule, it was necessary first to ascertain the relevance of the different means of interpretation in a given case before “throwing them into the crucible” in order to arrive at a correct interpretation where each was given its appropriate weight.

He concurred with Mr. Murase that some of the case law of the *ad hoc* tribunals set up under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States might be of limited significance in comparison with that of permanent courts and tribunals. On the other hand, unlike Sir Michael, he considered that paragraph 19 of the report was correct in stating that the Inter-American Court of Human Rights did not generally rely on a primarily textual approach, but tended to resort to other means of interpretation, in particular the object and purpose of the treaty.

With regard to draft conclusion 2, he was not convinced that it was necessary to depart from the wording of the Vienna Convention, as Sir Michael had proposed. Unlike Mr. Murphy, he deemed it essential to make it clear that subsequent agreements and subsequent practice were “authentic” means of interpretation for, although they did not express the original agreement between parties, they were equally relevant as means of interpretation. In order to dispel the doubts expressed by Ms. Escobar Hernández as to the authenticity of *all* subsequent agreements and *all* subsequent practice as means of interpretation, he drew attention to the fact that the first paragraph of draft conclusion 2 referred only to subsequent agreements and subsequent practice “between the parties to a treaty”. As far as the second paragraph of the draft conclusion was concerned, he endorsed the view expressed by several members that subsequent agreements and subsequent practice might guide evolutive interpretation and might also support a contemporaneous interpretation, a point which the Commission should make more explicitly. In that connection, courts and other authorities responsible for applying the law should be reminded that what was sometimes called “evolutive” interpretation was generally intrinsically related to the parties’ practice and should not therefore be taken lightly. That, to reply to Mr. Park, was why evolutive interpretation had to be taken into consideration. The fact that, as Mr. Murphy had said, different authors had given different shades of meaning to that term should perhaps, as Mr. Wisnumurti had suggested, lead the Commission to define it more precisely. A closer look should be taken both at Mr. Forteau’s suggestion that it was necessary to spell out the fact that there was no presumption of contemporaneous interpretation and at the proposal put forward by Mr. Kamto and Mr. Forteau that one conclusion should explicitly state that evolutive interpretation was not a special form of interpretation but resulted from the application of the usual means of interpretation. Lastly, Mr. Murphy was mistaken in believing that the report said that evolutive interpretation necessarily took account of subsequent agreements and subsequent practice; it made the more modest claim that it might be guided by them.

Turning to draft conclusion 3 he said that, unlike Mr. Forteau, he did not think that subsequent agreements within the meaning of article 31, paragraph 3 (a), and the subsequent practice which established the agreement of the parties within the meaning of article 31, paragraph 3 (b), were necessarily binding by virtue of the principle of *pacta sunt servanda*. As for the second paragraph of that draft conclusion, in order to take account of the diverging views of Mr. Huang, Mr. Petrič, Mr. Wisnumurti, Mr. Kamto and Ms. Escobar Hernández, on the one hand, and of Sir Michael, Mr. Forteau, Mr. Hmoud and Mr. Hassouna, on the other, regarding the practice of one or some, but not all, parties to a treaty, it might be wise to study the proposal put forward by Ms. Escobar Hernández to devote a separate draft conclusion to subsequent practice in the broader sense which did not reflect the agreement of all parties, but which might constitute a means of interpretation within the meaning of article 32 of the Vienna Convention. As for the comments made by Sir Michael and Mr. Forteau about the distinction between a subsequent agreement within the meaning of article 31, paragraph 3 (a), and subsequent practice within the meaning of paragraph 3 (b) of that article, the drafting history of the Convention clearly showed that that distinction turned on whether the parties' agreement was express or tacit, something which could be of considerable importance when determining where the burden of proof lay. Contrary to what those terms seemed to suggest, the difference between the two kinds of agreement was not always clear in practice. For that reason, as proposed by Mr. Wisnumurti, it might be advisable, in the English version, to replace the adjective "manifested" with "express".

He readily agreed with Mr. Forteau and Mr. Murphy that it would be desirable to have more precise and detailed wording in draft conclusion 4. One possibility would be to use the formulation contained in paragraph 124 of the report and to specify, as suggested by Mr. Murphy, that the practice in question was that of legislative or judicial organs at a level below that of the central government. The draft conclusion did make the important point that for the purposes of treaty interpretation, practice must be specifically attributed to a State. Nevertheless, as Mr. Murphy had pointed out, the draft conclusion should probably also refer to subsequent agreements. He endorsed the concerns expressed by some members that in the second paragraph of that draft conclusion, the expression "subsequent practice by non-State actors" might mislead the reader into thinking that that practice was deemed to be at the same, or a similar, level to that of States parties to a treaty. That phrase could be replaced, for example, with "the pronouncements or activities of non-State actors", which would also meet Mr. Forteau's concern, since he considered that that paragraph dealt with the question of evidence. However, the issue of non-State actors' activities should not be ignored; the fact that they were mentioned did not interfere with the discretion of the treaty interpreter. Lastly, he took note of the fact that many members were reluctant to recognize "social practice" as a form of subsequent State practice. He had not, however, intended to assert that social practice constituted subsequent State practice but, on the contrary, to emphasize that, in order to be taken into account, any social practice had to acquire the form of State practice.

Finally, with regard to some points which were unrelated to any particular conclusion, he said that a number of aspects of the topic which had not been dealt with in his first report would be broached in later reports. With reference to the limits of interpretation based on subsequent practice, including what Mr. Kittichaisaree and Mr. Park had termed "*de facto* amendments", several members had been reluctant to recognize any possibility of treaty modification through a subsequent agreement which was not a formal amendment. He considered that it was necessary to examine that matter in order to cover the whole of the topic. He assured members that he would display the appropriate sensitivity when doing so.

3161st Meeting, 8 May 2013

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International Law Commission
Sixty-fifth session (first part)**Provisional summary record of the 3161st meeting**

Held at the Palais des Nations, Geneva, on Wednesday, 8 May 2013, at 10 a.m.

Tribute to the memory of Chusei Yamada, former member of the Commission**Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*continued*)**

(p. 3) Mr. Wisnumurti, Mr. Murase, Mr. Comissário Afonso, Mr. Candiotti, Mr. Saboia, Mr. Nolte and Mr. Park also paid a tribute to Mr. Yamada, whose passing was a great loss for the Commission and the international legal community, and expressed their appreciation for his important contribution to the development and codification of international law. At the age of 14, after witnessing first-hand the bombing of Hiroshima on 6 August 1945 and having understood that diplomacy was the only way to put an end to the use of atomic weapons, Mr. Yamada had decided to become a diplomat. As a student at the Faculty of Law at the University of Tokyo, he had studied international law under Professor Kisaburo Yokota, the first Japanese member of the International Law Commission. Finding his approach to be too theoretical to be useful, Mr. Yamada had quickly arrived at a more pragmatic approach, the antithesis of the prevailing trend in academia at the time. He had constantly striven to strengthen the practical utility of international law, which he considered an instrument of peace, and to promote international understanding and harmony through diplomacy and the law. He had been the incarnation of post-war Japanese diplomacy, embodying its strengths and, perhaps, its imperfections.

He had been an exemplary member of the Commission, and his legal and diplomatic skills, his modesty, his spirit of compromise and his tireless commitment had been the keys to his success. Mr. Yamada had always tried to be friendly with all his colleagues, carefully avoiding overly assertive or offensive remarks. He had always been ready to offer compromise solutions, had contributed a great deal to the creation of a friendly and collaborative atmosphere in the Commission and had always respected his colleagues' points of view, even when he disagreed with them. He had been a competent lawyer, a man of integrity and generosity,

hard-working and meticulous. In 1997, while serving as Chairman of the Working Group on International liability for injurious consequences arising out of acts not prohibited by international law, his insightful proposals had enabled the Commission to move forward when the project had reached an impasse.

However, his greatest contribution had been in the development of principles and standards for the protection of natural resources and the environment, and he had proven to be a determined researcher, valuable legal adviser and careful and skilled negotiator, always working to reach a compromise. As Special Rapporteur on the topic of shared natural resources, he had overcome both technical and legal challenges to bring his diplomatic skills, his initiative and his determination to bear in promoting the adoption of the draft articles on the law of trans-boundary aquifers by the Commission and the General Assembly.

Mr. Yamada had also been one of the few members of the Commission to have succeeded in forging constructive links with the representatives of the Sixth Committee. The relationship between the two bodies had continued to be a major concern for him and, at a recent meeting of the Japanese Society of International Law, he had suggested setting up a joint committee to serve as liaison between the two. His passing was a great loss, and it was the duty of the Commission to perpetuate his legacy.

3159th Meeting, 6 May 2013

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Held at the Palais des Nations, Geneva, on Monday, 6 May 2013, at 3 p.m.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties

(p. 5) Mr. Nolte (Special Rapporteur) recalled that the Commission had already addressed important aspects of the topic in the Study Group on Treaties over time. The objective of the present report, which was based on and continued the previous work, was to provide guidance to all those responsible for interpreting or applying treaties. The materials and analyses contained in the present report and those to be contained in future reports, together with the Commission's conclusions, should serve as a point of reference and thereby contribute, as far as possible, to the development of a common approach to the interpretation and application of any treaty.

The report contained four draft conclusions that were based not only on the informal reports previously submitted to the Study Group on Treaties over time, but also on the preliminary conclusions reached following their consideration.

Draft conclusion 1 concerned the general rule of interpretation and the various means of interpretation set out in the 1969 Vienna Convention on the Law of Treaties and applied by the major international courts and tribunals. As mentioned in the report, the latter recognized articles 31 and 32 of the 1969 Vienna Convention as formulating the general rule and the supplementary rules on treaty interpretation, and as having the status of rules of customary international law. In their interpretative practice those courts and tribunals took into account the various means of interpretation, in accordance with articles 31 and 32 of the Vienna Convention, without considering any one of those means as being determinative or higher in rank than the others. However, they could place more or less emphasis on one or the other means of interpretation without that resulting in derogation from the rule embodied in the Vienna Convention. The Convention thus provided for a rather broad framework of interpretation within which the various means of interpretation had to be carefully identified and taken into account in their "interaction". That interaction required giving the appropriate weight to the

respective means of interpretation, meaning that that weight might differ depending on the treaty in question. Thus, the first paragraph of draft conclusion 1 essentially confirmed that article 31 of the Vienna Convention, as treaty obligation and as reflection of customary international law, set forth the general rule on the interpretation of treaties. It seemed worthwhile to enunciate that common point of departure for all those called upon to apply treaties. The second paragraph of draft conclusion 1 stated that the interpretation of a treaty in a specific case might result in a different emphasis on the various means of interpretation contained in articles 31 and 32 of the Vienna Convention, in particular on the text of the treaty or on its object and purpose, depending on the treaty or on the treaty provisions concerned. It seemed important to highlight that point in order to illustrate that placing more or less emphasis on one or the other of those elements was part and parcel of the process of interpretation that was provided for in the Vienna Convention.

The first paragraph of draft conclusion 2 reaffirmed the rule set out in article 31, paragraph 3 (a) and (b), of the Vienna Convention, according to which subsequent agreements and subsequent practice between the parties to a treaty were means of interpretation that were to be taken into account in the interpretation of treaties, as had been recognized in the case law of major international courts and tribunals. It stated that those means of interpretation were “authentic” in order to indicate why they were to be taken into account. The second paragraph of draft conclusion 2 stated that subsequent agreements and subsequent practice could guide an evolutive interpretation of a treaty. In order to illustrate the importance of those means of interpretation, the report cited several examples of how subsequent agreements and subsequent practice could affect the selection and weighing of other means of interpretation, such as the “ordinary meaning” of the terms of a treaty in their context and the object and purpose of the treaty.

Draft conclusion 3 was concerned with the definition of the terms “subsequent agreement” and “subsequent practice” as means of treaty interpretation, which gave rise to two main issues: what distinction should be drawn between subsequent agreement and subsequent practice, and whether subsequent practice had to be agreed between all the parties. It seemed that the main difference between the two categories was that subsequent agreements were more formal in nature; however, since such agreements were not always in writing, it was proposed to include only “manifested” agreements in the draft article. As to a subsequent practice that might be followed by one or more parties without necessarily establishing the agreement of all the parties regarding the interpretation of the treaty, it was recognized that such practice could be used as a supplementary means of interpretation, though not an authentic one, within the meaning of the Vienna Convention, so long as it did not constitute a breach of the treaty, as could also be the case. The proposed text therefore also took that into account.

Draft conclusion 4 defined the possible authors of subsequent practice. It followed from the case law of international courts and tribunals that the rules for the attribution of a practice to a State for the purpose of treaty interpretation were not the same as those for the attribution of conduct to a State for the purpose of establishing its responsibility for wrongful acts; they must therefore be derived from the specific character of the interpretation and application of each treaty by the parties thereto. Subsequent practice could emanate from all government officials who were considered by the international community to be responsible for the application of the treaty, as well as from lower government officials. On the other hand, the courts remained reluctant to take into account the practice of non-State actors or conduct related to social developments, thence the need to specify that point in the second paragraph of the draft conclusion.

The first report on subsequent agreements and subsequent practice in relation to the interpretation of treaties covered general aspects of the topic. He would submit a second report in 2014 that synthesized the other issues dealt with in the three reports of the Study Group on

Treaties over time, followed by a third report, in 2015, that would address the practice of international organizations and the case law of national courts, and would contain new draft conclusions. He envisaged submitting his final report in 2016, with the conclusions and commentaries thereto revised in the light of the debate in the Commission and the discussions in the Sixth Committee.

64th Session (2012)

3152nd Meeting, 30 July 2012

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International Law Commission **Sixty-fourth session (second part)**

Provisional summary record of the 3152nd meeting

Held at the Palais des Nations, Geneva, on Monday, 30 July 2012, at 10 a.m.

Treaties over time (*continued*)

(p. 7) Mr. Nolte (Chairman of the Study Group on Treaties over Time) said that in 2012 the Study Group had held a total of eight meetings, on 9, 10, 15, 16 and 24 May and on 19, 25 and 26 July.

At the Commission's 3135th meeting (A/CN.4/SR.3135) he had presented his first oral report on some aspects of the work undertaken by the Study Group at its five meetings in May. Those aspects had been mostly related to the format and modalities of the Commission's future work on the topic. On that occasion he had explained that the Study Group was recommending a change in the format of the work on the topic and the appointment of a Special Rapporteur.

At its 3136th meeting, the Commission had decided to change the format of its work on the topic as from its sixty-fifth session, as suggested by the Study Group, and to appoint him Special Rapporteur for the topic, which was to be entitled "Subsequent agreements and subsequent practice in relation to the interpretation of treaties".

His report at the current meeting would cover some aspects of the work done during the first part of the session that had not been addressed in his first oral report, as well as the work undertaken by the Study Group during its three meetings during the second part of the session.

At the current session, the Study Group had considered the third report of its Chairman on subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings and had completed its consideration of the Chairman's second report dealing with jurisprudence under certain special regimes as it related to subsequent agreements and subsequent practice.

The third report covered a variety of issues, including: the forms, evidence and interpretation of subsequent agreements and subsequent practice, as well as a number of general aspects concerning, *inter alia*, the possible effects of subsequent agreements and subsequent practice (e.g. how they might clarify the meaning of a treaty provision or confirm the degree of discretion left to the parties by a treaty provision); the extent to which an agreement within the meaning of article 31, paragraphs 3 (a) and 3 (b) of the Vienna Convention on the Law of Treaties must express the legal opinion of States parties regarding the interpretation or application of the treaty; subsequent practice as a possible indication of agreement on the temporary non-application or temporary extension of the treaty's scope, or as indicating a *modus vivendi*; bilateral and regional practice under treaties with a fairly broad membership; the relationship between subsequent practice and agreements on the one hand and technical and scientific developments on the other; the relationship between subsequent practice by the parties to a treaty and the parallel formation of rules of customary international law; the possible role of subsequent agreements and subsequent practice in respect of treaty modification, and the exceptional role that might be played by subsequent practice and subsequent agreements in terminating a treaty. The third report had also addressed other questions such as the influence of specific forms of cooperation on the interpretation of some treaties through subsequent practice, and the potential role played by conferences of the States parties and treaty monitoring bodies in relation to the emergence or consolidation of subsequent agreements or practice. In its analysis of those various issues, the third report provided some examples of subsequent agreements and subsequent practice, assessed those examples and attempted to draw some preliminary conclusions.

The Study Group's debate on the third report had been very rich. During the discussion, several members had touched on the general issue of the level of determinacy of the draft conclusions contained in the third report. While some members had been of the view that many of them were formulated in rather general terms, others had considered that certain conclusions were too determinate in the light of the examples identified in the report. In that regard, some members had observed that the main challenge facing the Commission in its future work on the topic would lie in attempting to elaborate propositions that had sufficient normative content yet preserved the flexibility inherent in the concept of subsequent practice and agreements.

A number of points had been raised in relation to the section of the report dealing with conferences of the parties. They included: the extent to which such forums deserved special treatment in the consideration of the topic; whether a single notion of "conference of the parties" existed or whether that term covered a variety of different bodies whose only common feature was the fact that they were not organs of international organizations; the extent to which the conferral or non-conferral of decision-making or review powers on conferences of the parties had an impact on their possible contribution to the formulation of subsequent agreements or to the formation of subsequent practice in relation to a treaty; and the significance and relevance, in the current context, of consensus and other decisionmaking procedures that might be followed by conferences of the parties.

The Study Group had also considered six additional general conclusions proposed in its Chairman's second report on jurisprudence under special regimes as it related to subsequent agreements and subsequent practice. The discussions had focused on the following issues: whether, in order to serve as a means of interpretation, subsequent practice must reflect the position of one or more parties regarding the interpretation of the treaty; the extent to which subsequent practice would need to be specific; the requisite degree of active participation in a practice and the significance of silence by one or more of the parties to the treaty with respect to the practice of one or more other parties; the possible effects of contradictory subsequent practice; the possibility of treaty modification through subsequent practice; and the relation-

ship between subsequent practice and formal amendment or interpretation procedures. In the light of those discussions in the Study Group, he had reformulated the text of what had become six additional preliminary conclusions by the Chairman. They read:

“1. Subsequent practice as reflecting a position regarding the interpretation of a treaty

In order to serve as a means of interpretation, subsequent practice must reflect the position of one or more parties regarding the interpretation of a treaty. The adjudicatory bodies reviewed, however, do not necessarily require that subsequent practice must expressly reflect a position regarding the interpretation of a treaty, but may view such a position as implicit in the practice.

2. Specificity of subsequent practice

Depending on the regime and the rule in question, the specificity of subsequent practice is a factor that can influence the extent to which it is taken into account by adjudicatory bodies. Subsequent practice thus need not always be specific.

3. The degree of active participation in a practice and silence

Depending on the regime and the rule in question, the number of parties which must actively contribute to relevant subsequent practice may vary. Most adjudicatory bodies that rely on subsequent practice have recognized that silence on the part of one or more parties can, under certain circumstances, contribute to relevant subsequent practice.

4. Effects of contradictory subsequent practice

Contradictory subsequent practice can have different effects depending on the multilateral treaty regime in question. Whereas the World Trade Organization (WTO) Appellate Body discounts practice which is contradicted by the practice of any other party to the treaty, the European Court of Human Rights, faced with nonuniform practice, has sometimes regarded the practice of a ‘vast majority’ or a ‘near consensus’ of the parties to the European Convention to be determinative.

5. Subsequent agreement or practice and formal amendment or interpretation procedures

There have been instances in which adjudicatory bodies have recognized that the existence of formal amendment or interpretation procedures in a treaty regime do not preclude the use of subsequent agreement and subsequent practice as a means of interpretation.

6. Subsequent practice and possible modification of a treaty

In the context of using subsequent practice to interpret a treaty, the WTO Appellate Body has excluded the possibility that the application of a subsequent agreement could have the effect of modifying existing treaty obligations. The European Court of Human Rights and the Iran-United States Claims Tribunal seem to have recognized the possibility that subsequent practice or agreement can lead to modification of the respective treaties.”

The Study Group recommended that the text of those preliminary conclusions by its Chairman, as reformulated in the light of the Group’s discussions, should be reproduced in the chapter of the Commission’s report on the topic “Treaties over time”, as had been done in the case of the first nine preliminary conclusions, which had been reproduced in the previous year’s report. The Commission’s report would indicate that the Study Group had understood those conclusions by its Chairman to be of a preliminary nature, as they would have to be revisited and expanded in the light of future reports of the newly appointed Special Rapporteur, which might include additional aspects of the topic, and of the future discussions within the Commission. In view of the Commission’s decision to change the future format of its

work on the topic, he had not proposed the reformulation of the draft conclusions in his third report in the light of the Study Group's discussions, since he would prefer to take those discussions into account when he prepared his first report as Special Rapporteur. That first report would synthesize the three reports which he had submitted to the Study Group.

3151st Meeting, 27 July 2012

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International Law Commission
Sixty-fourth session (second part)**Provisional summary record of the 3151st meeting**

Held at the Palais des Nations, Geneva, on Friday, 27 July 2012, at 10 a.m.

Formation and evidence of customary international law (*continued*)

(p. 13) Mr. Nolte congratulated Sir Michael on his appointment as Special Rapporteur for the topic of the formation and evidence of customary international law, the most daunting and ambitious topic on the Commission's agenda. In his note, the Special Rapporteur had provided an outline for future work, and although much could be said about possible alternatives on how to approach the topic, it was the Special Rapporteur's prerogative to go forward as he had proposed. Members who had already spoken had made many valuable comments on a number of specific points, which he did not want to repeat or comment upon further at the current stage of the preliminary debate, since his remarks essentially concerned the title of the topic. Mr. Forteau had proposed that the Special Rapporteur should focus on the evidence of customary international law rather than on its formation, and he had argued that the main interest of practitioners would lie in having a better understanding of how to identify customary international law and that the Commission would engage in an academic exercise if it tried to explain the "formation" of customary international law. Thus, Mr. Forteau had addressed a distinction which Mr. Murase had introduced into the debate when he had distinguished between a "snapshot" perspective, which sought to identify the state of customary international law at a given point in time, and a broader perspective which aimed to explain the process by which customary international law came about. Personally, he fully understood that it was most important for States and practitioners to be able to identify customary international law at any given point in time. Thus, he did not disagree with Mr. Forteau insofar as that must be a main element of the Commission's work on the topic. He did not, however, subscribe to the idea that a clarification of the "formation" of customary international law would be less important and would be merely an academic exercise. States and practitioners did not only want to know by which means customary international law could be identified, they also wanted to know how to explain to their national courts and other bodies why and under which circumstances those means led to the conclusion that a particular rule was or was not a rule of customary international law. Of course, in trying to explain the formation of customary interna-

tional law, the Commission ran the risk of becoming involved in a discussion of certain general questions of principle, but that was inevitable in the current exercise. If the Commission did not deal with such issues, it would not meet the expectations of States and the international community at large, and the result of its work might be called into question too easily.

To cite one example, during the current session the Commission had again taken up, under the guidance of a new Special Rapporteur, the topic of immunity of State officials from national criminal jurisdiction. One important aspect of that topic was whether a sufficiently strong trend could be discerned to identify a development in customary international law. Much depended on which factors were taken into account to identify such a trend. Were those factors only, or mainly, specific decisions by courts, Governments and legislatures, or also general values and policy statements, and parallel developments in related areas, such as that of international criminal jurisdiction? In his view, it would be futile to try to tackle the issue by merely seeking to define which of those factors were relevant for the identification of a rule of customary international law at a given point in time. Instead, it was necessary to explain how a possible new rule of customary international law was formed in order to make sense of the diverse factors at work. That required some thinking at a more general level. Otherwise, the Commission would miss the essential characteristic of customary international law, namely the fact that, in contrast to other sources of international law and different forms of national law, customary international law was both the result and the element of a process – a characteristic that must also be taken into account when States and other actors sought to identify a rule of customary international law at a particular moment in time.

Another important aspect was that, as indicated by the Special Rapporteur, one of the main goals, and perhaps the main goal, was to give national courts guidance on how to proceed when they were called upon to apply customary international law. Mr. Petrič and other members had underscored the importance of that aspect. Mr. Petrič had drawn the Commission's attention to the fact that many national constitutions accorded customary international law a special place in their national legal orders, often higher than treaty law.

That suggested that the willingness of national courts to identify and apply a rule of customary international law in accordance with those constitutional rules might depend on how well an authoritative body, such as the International Law Commission, could explain the specific and binding nature of customary international law. If the Commission merely adopted a "snapshot" approach or established a technical list of sources of evidence, it would miss that important dimension of customary international law.

The objective of the Commission's work on the formation and evidence of customary international law must not only be to provide practical guidance for judges and other actors who were not familiar with customary international law, but also to provide a considered opinion for those who were. Debates at academic level in a number of countries reflected a deep concern of a practical nature: today, national jurists and judges asked themselves what the particularities of customary international law were and whether it was legitimate to accord it a special status in the domestic legal system. For example, the ease or, on the contrary, the difficulty with which customary rules evolved had a considerable impact on their legitimacy and authoritative value at both international and national level. The Commission must bear in mind that its work would have implications for the legitimacy and authoritative value of customary international law, both in domestic legal systems and beyond, and it must therefore justify each of its conclusions.

He agreed with Mr. Petrič that it would be useful for the Special Rapporteur to explore sources of law in languages other than English and French, for example the decisions of the German Constitutional Court.

3143rd Meeting, 10 July 2012

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Held at the Palais des Nations, Geneva, on Tuesday, 10 July 2012, at 10 a.m.

Immunity of State officials from foreign criminal jurisdiction

(p. 7) Mr. Nolte said that the Special Rapporteur's report was truly a "transitional" report, as she herself had called it. The Commission must be grateful that she had found the time and the energy to prepare the report in the short time between her appointment as Special Rapporteur and the beginning of the second part of the session. Although the report was not very long, it contained a great many important elements. The report sought, to use the Special Rapporteur's words, to prepare the ground for a "structured debate" and had "methodological and conceptual" "clarification" as its goal. Thus it did not contain any clear proposals regarding substantive questions, except where the Special Rapporteur identified an existing consensus. It was apparently limited to setting out methodological, conceptual and structural questions with a view to outlining a plan for the future work of the Commission. It was indeed necessary to pursue that goal, and the Special Rapporteur deserved praise for her efforts and for the valuable basis that her report offered for the Commission's debate. However, as the topic under consideration was a difficult one in many ways, and because the Commission was at the stage of discussing general orientation, he wished to express a number of caveats. Methodology and conceptual clarifications must remain neutral and should not prejudice substantive issues. He was not saying that the Special Rapporteur had chosen clarifications that were not neutral: he simply wished to ensure from the outset that the choice of methodological approach or conceptual distinctions did not tilt in favour of certain substantive conclusions, for such conclusions would have to be justified independently on the basis of additional sources.

His first caveat concerned the fact that the Special Rapporteur appeared to be suggesting that the Commission should pursue an abstract and systematic method that entailed deducing conclusions from certain conceptual distinctions; that approach reminded him of the traditional civil law approach. The report did not contain many references to specific judgements or legislative acts that might constitute the basis for an analysis of practice, and he was aware that

that was not its purpose. However, a practice-oriented and inductive style of reasoning was necessary to arrive at a solid determination of international law, whether the Commission sought to identify *lex lata* or propose *lex ferenda*. While he valued abstract and systematic reasoning, coming as he did, like the Special Rapporteur, from the civil law tradition, he wished to emphasize that abstract categories had their foundations in empirical developments and must therefore be justified accordingly. He did not doubt that the Special Rapporteur was conscious of that methodological question, but he thought that it would be worthwhile to raise the issue at an early point in the discussion. That question could become relevant in practical terms in dealing with the relationship between the international responsibility of the State and the international responsibility of individuals, which the Special Rapporteur addressed in paragraph 59 of her report, and possibly the distinction between “official acts” and “unlawful acts”, made in paragraph 67.

His second caveat concerned the fact that in paragraph 29 of her report the Special Rapporteur spoke of “a tendency to limit immunities and their scope”. That reference, and others in the report, could be understood to constitute a new version of the “trend argument” that had often been used in the past to limit the immunity of States and their officials. That argument should be used with caution. For example, the International Court of Justice had recently rejected, in the case concerning *Jurisdictional Immunities of the State (Italy v. Germany: Greece intervening)*, the contention of the Italian courts that a trend existed in international law towards a restriction of the immunity of the State in the particular area under consideration, and had shown that, on the contrary, the immunity of the State had been reaffirmed in recent years. There were in fact indications that a similar development may have taken place with regard to the immunity of State officials from foreign criminal jurisdiction. That argument had been developed in an article that was about to be published in the *American Journal of International Law*, which had been based on an extensive analysis of jurisprudence of many countries from the past 15 years. Such a trend towards reaffirmation of immunity before national criminal jurisdictions, if it actually existed, would be compatible with the trend toward the restriction of immunity before international jurisdictions. In that connection, it would be important to take account of the decisions of the International Criminal Court of 12 and 13 December 2011 on the nonexistence of immunity for State officials before international jurisdictions under customary international law, which had given rise to sharp protests from the African Union Commission. More generally, he suggested that the International Law Commission should pay close attention to what it meant when it spoke of a trend.

That brought him to his third caveat: the Special Rapporteur, in her report, often spoke of the “values” of the international community that should be given effect, particularly the value of endeavouring to prevent impunity. The question at hand was not whether to give effect to the values of the international community — that was undeniable — but deciding how to give them effect. The issue of “responsibility to protect” offered an appropriate analogy. That responsibility certainly represented a value of the international community, but for the purposes of international law the decisive question was: who had the competence to give effect to that value? Certainly the State on whose territory international crimes were being committed did — that State even had an obligation to protect — as did the United Nations, but third States did not. That had been the conclusion reached in the 2005 World Summit Outcome. Perhaps the situation with regard to the immunity of State officials from foreign criminal jurisdiction was structurally similar. However, the “value” argument could not be so easily transposed to the rules and principles of international law. Rules of international law, such as the rules on immunity, also represented values. It was not sufficient simply to balance values against each other; such a balancing process must take place within the framework of general rules relating to the formation and evidence of customary international law. Needless to say, the Commis-

sion would also have to discuss in greater depth the more or less legal nature of the values to which the Special Rapporteur was referring.

A fourth caveat concerned the interrelationship of different aspects of the law of immunity and different aspects of international law in general. In her workplan, the Special Rapporteur proposed to break the topic down into different several issues to be taken up in sequence. That, of course, was a useful method that had been successfully employed in other contexts, but the Commission must remember that those issues were interrelated and continue to take that interrelatedness into account. Thus, for example, the distinction between immunity *rationae personae* and immunity *rationae materiae* derived from a common legal source, which was the immunity of the State. Likewise, while the topic under consideration concerned only immunity in criminal matters, that did not mean that developments in the area of immunity in civil matters were irrelevant for the Commission's purposes. Immunity in both criminal and civil matters derived from the same legal basis, and it was sometimes difficult to determine whether a case related to criminal or civil jurisdiction. By looking at the interrelationship of different aspects of the law of immunity, it was possible to identify "grey areas", as the Special Rapporteur called them in her report, that must be acknowledged and addressed.

A fifth caveat had to do with terminology. In paragraphs 34 and 62 of her report, the Special Rapporteur drew a distinction between those who held that immunity was "absolute" and those who maintained that it was "restricted". He did not believe that such a distinction was helpful in the current context, and it could even be misleading. In fact, the question was not at issue, since it was now largely agreed that absolute immunity no longer existed. After all, the previous Special Rapporteur had reminded the Commission of the widely recognized "forum State exception", according to which a State could not claim immunity for acts that one of its officials had committed on the territory of the forum State. The question, then, was not one of an "absolute" versus a "restricted" conception of immunity; rather, what had to be determined was the extent to which immunity should be restricted.

His sixth caveat concerned an interesting remark that the Special Rapporteur made in paragraph 27 in her report, namely that "the statements made by some members of the Commission who spoke on the topic [of the justification for immunity] did not make a sufficient distinction between the application of the two bases (functional and representative) for immunity *rationae personae* and immunity *rationae materiae*". That remark suggested that the Special Rapporteur believed that a functional justification was in some way inherently more limited than a representative justification of immunity. Yet what was meant by "functional" was very much a matter of definition and did not necessarily imply a restrictive interpretation. It was certainly true, as the Special Rapporteur noted in paragraph 57 of her report, that the functional immunity of State officials was "linked to preservation of the principles and values of the international community", but that was a rather general point that did not address a difficult aspect of the question, which was whether the primary function of immunity changed depending on developments in efforts to combat impunity.

A seventh caveat related to the question of possible exceptions to immunity *rationae materiae*. In paragraph 68 of her report, the Special Rapporteur focused on cases "involving the violation of *jus cogens* norms or the commission of international crimes" and stated that "there appears to have been greater support for a potential exception in the case of immunity *rationae materiae* than in that of immunity *rationae personae*". But perhaps *jus cogens* norms should be dealt with differently from international crimes and a distinction made between different types of international crimes where immunity was concerned. Lastly, he wished to recall that the suggestion made at the sixty-third session by Mr. Gaja to the effect that exceptions to immunity might be derived from different kinds of treaties had enjoyed some support among Commission members.

His eighth caveat concerned the procedural aspects of immunity. Unlike the Special Rapporteur, who remarked in her report that the Commission had so far discussed the procedural aspects less than the substantive aspects, he recalled that the Commission had discussed them quite extensively at the previous session. He also believed that substance and procedure were closely related in that area. If, for example, it should be possible to identify procedural rules that would have the effect of pressuring States not to invoke their immunity in certain cases, then the need to recognize certain exceptions might not arise in the same way. He wondered whether it might not in fact be wiser to begin by dealing with the procedural aspects of the topic, thereby enhancing the chances of reaching a consensus on certain substantive issues.

Lastly, in paragraph 48 of her report the Special Rapporteur maintained that the debate in the Sixth Committee had produced “a wide range of views concerning the role to be played a study *de lege lata* or *de lege ferenda*”. It had been his impression, however, that almost all States in the Sixth Committee had expressed the wish to see the Commission produce an analysis of the *lex lata*, which did not preclude the fact that some States might also have thought it advisable for the Commission to formulate considerations *de lege ferenda*. His sense, however, was that States wished to have a clear picture of what distinguished considerations of *lex lata* and *lex ferenda*. That was also his personal preference, as he tended to disagree with the Special Rapporteur when she stated in paragraph 77 of her report that “the topic of the immunity of State officials from foreign criminal jurisdiction cannot be addressed through only one of these approaches”. He did agree that the topic could and should be addressed through both approaches, but he thought that the two approaches should, in the interest of transparency, be used for analytical purposes as separately as possible. That did not preclude the Commission from taking into account “new approaches” and “evolving” aspects of international law, which the Special Rapporteur mentioned in paragraph 48 of her report, but the Commission should have the courage to decide whether those new trends had the character of *lex lata* or *lex ferenda*. Otherwise it would be doing what the Italian courts had done in the cases that had given rise to decisions of the International Court of Justice in the *Jurisdictional Immunities of the State* case, in which the Court had corrected the absence of a distinction between *lex ferenda* and *lex lata*.

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Protection of persons in the event of disasters (*continued*)

(p. 5) Mr. Nolte joined his colleagues in congratulating the Special Rapporteur, who had presented yet another excellent, thoroughly researched report which in his view was heading in the right direction. The report elucidated the complex and tragic dimensions of the topic, of which Mr. Petrič had spoken so movingly. Before addressing the three new draft articles proposed by the Special Rapporteur, he wished to make his position clear on a few general points raised by the Special Rapporteur himself in his description of the debate in the Sixth Committee and by members of the Commission.

Like Mr. McRae and others, he did not wish to reopen past discussion and decisions, but rather to contribute to a reaffirmed consensus that it was not a question of seeking a balance between sovereignty and human rights in the abstract, but of determining the relative importance of the applicable principles and rules in specific situations and with respect to specific questions. Sir Michael Wood had usefully reminded the Commission of that point of departure.

Draft article 10, which concerned the duty of the affected State to seek assistance if the disaster exceeded its national capacity, had been criticized by quite a number of States in the Sixth Committee. Should the Commission discount those statements, as Mr. McRae seemed to believe, and rather emphasize the fact that in practice, States uniformly did seek assistance when a disaster exceeded their national capacity? Or should it follow the view, expressed by Mr. Murphy and others, that practice alone did not demonstrate the existence of the necessary *opinio juris*? The question could not be answered solely by assessing practice and *opinio juris*: the general context of the existing human rights obligations, whether treaty-based or customary, must also be taken into account. The fundamental human rights obligation of States to ensure the right to life, to physical integrity and to food necessarily implied that States must seek assistance if a disaster exceeded their national capacity; that did not mean, of course, that States would have to accept any kind of assistance. Taking those legal considerations into

account, it could be stated that the actual uniform or quasi-uniform State practice seeking assistance in cases when a disaster exceeded national capacities was underpinned by a general *opinio juris*. In that sense, the duty to seek assistance, as articulated in draft article 10, was not a new obligation that the Commission would “impose”, but a well established rule of international law. Draft article 10 thus did not create any additional grounds for State responsibility, and he agreed with Mr. McRae that the Commission could confidently retain the formulation.

Some States and new members of the Commission had criticized the wording of draft article 11, paragraph 2, according to which consent to external assistance by the affected State should not be withheld arbitrarily; that raised the classic question of who was to decide that consent had been “arbitrarily” withheld. It was true that the formulation of a legal standard, even one as broad and imprecise as “arbitrarily”, necessarily implied that its applicability was not determined unilaterally by those States to which the standard applied. However, that also meant that the applicability of the standard could not be determined unilaterally by another State or States in accordance with their preferences. The standard in question, which was relatively flexible, was the minimum that should be respected by States, which had the human rights-based obligation to protect life and physical integrity and provide for the basic nutritional needs of the population. Mr. Tladi believed that draft article 11 would remain meaningless unless the word “arbitrarily” was defined. However, the advantage of that word was that it left much room for discretion, while forcing the parties concerned to justify their position in the light of the overall goal of effective disaster relief.

Some members thought that draft article 12 on the right to offer assistance reflected a narrow focus on rights and duties, whereas the most important practical issue was cooperation. That criticism could, of course, be applied to all the other draft articles that articulated legal rights and duties in an area where so much depended on voluntary cooperation, generosity and openness between States and among other actors. However, any opposition between the articulation of rights and duties and the encouragement of voluntary cooperation was a false opposition. It was true that the Commission should be mindful of the practical usefulness of its work, a point to which he would return later, but it should also exercise its specific competence, which was to articulate and develop legal principles and rules. The right to offer assistance was not a right that could in any way inhibit the voluntary dimension of the provision of assistance.

The same was not true for a possible duty to provide assistance; it was therefore not surprising that States had been virtually unanimous in saying that no such duty existed. Establishing a duty to provide assistance would raise difficult questions of the allocation of responsibility and the determination of the relative capacity of different States. The Commission should therefore not take that route. That being said, it was conceivable that certain situations might arise in which specific States had specific duties to provide assistance. For example, the territory of a State affected by a disaster might be surrounded by that of another State, in which case the neighbouring State could have a duty to permit the delivery of assistance by other States or actors. Such permission would not only be a precondition for the delivery of assistance by third States, but would itself be a form of assistance, which could be conditioned in such a way that it implied no costs for the neighbouring State. More generally, third States could even be said to have a duty to prevent, within the framework of international law and according to their capacities, the commission of the gravest forms of human rights violations in other States. That concept, introduced by the International Court of Justice in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, could be developed and applied in the future to certain extreme disaster situations. The Commission should avoid expressing a view on a possible duty to provide assistance, in order to leave room for developments in that area.

With regard to draft article A on the duty to cooperate, like many other speakers he had observed a disparity between the rich body of material in the report and the rather limited corresponding draft article. He encouraged the Special Rapporteur to be more ambitious and to try to further flesh out that important text. The principle of cooperation was an accepted legal principle and could imply, in certain situations, fairly concrete obligations, depending on the nature and importance of the goal to be achieved. In that context, the distinction between obligations of conduct and obligations of result was not necessarily very helpful. The goal of providing effective and timely assistance was, after all, the paramount consideration. That goal should be stressed; in certain situations it could also imply obligations of result. Again, like other speakers, he was sceptical as to how useful it would be to take article 17, paragraph 4, of the draft articles on the Law of Transboundary Aquifers as a model. That paragraph was formulated as a unilateral obligation, whereas in explicating the duty to cooperate, the Commission should stress the reciprocal nature of the obligation. The fact that “scientific” cooperation was listed in article 17, paragraph 4, as the first possible form of cooperation was perhaps understandable in the specific context of transboundary aquifers, but it would not seem to be a priority matter in most disaster situations.

A number of speakers had noted that draft article 13 relating to conditions that might be placed on assistance, was rather limited in view of the extensive material presented by the Special Rapporteur in his report. Again, the Special Rapporteur and the Commission should try to go further along a number of avenues. It should be made clear that the waiving of rules in disaster situations was not only a question of good will and generosity but that it also raised important questions concerning the rule of law. Laws could not, and should not, be easily set aside, even in a disaster situation, and the Commission should not be seen to encourage a facile disregard of the law in exceptional situations. The real issue was whether there were procedures in certain domestic legal systems that triggered emergency regimes under which certain legislation applicable in normal situations could be suspended. That was a question of preparedness, relating to the pre-disaster phase. In addition, according to paragraph 173 of the report, the principle of sustainable development would support the imposition by the affected State of the condition that assistance must ameliorate, not just restore, previous conditions. As a matter of strict logic, such a condition might be seen as fulfilling the principle of sustainable development, but there was some doubt as to whether it was really helpful in most cases and whether the Commission should be seen to encourage the formulation of conditions that could deter States and actors from providing assistance.

With regard to draft article 14, he shared the view of previous speakers that its current formulation could give rise to the misunderstanding that consultations were a necessary condition for the termination of assistance. However, it was not sufficient to merely articulate the right of the affected State to unilaterally terminate the assistance. Given that it was very difficult to formulate a draft article on termination that would not give rise to contradictory interpretations or misunderstandings, he wondered whether draft article 14 should not simply be dropped, on the assumption that the termination of assistance was covered by the general rules on the requirement of consent, the duty not to arbitrarily withhold consent and the right to impose conditions. Another possibility would be to include in draft article 14 a “without prejudice” clause referring to the general principles set out earlier in the text.

Lastly, Mr. Murase’s proposal that the Commission should draw up a model status-of-forces agreement and attach it to the body of the draft articles was a very interesting and valuable one. Such a model agreement could indeed be a very useful practical instrument. It was perhaps not advisable, however, to limit the Commission’s work to drafting a model status-of-forces agreement, since that might give the misleading impression that disaster relief was typically and primarily a military matter. He also wondered whether it would be possible or advisable for the Commission to draw up a full-fledged model status-of-forces agreement. For

those two reasons, it was perhaps preferable for the Commission to prepare a set of basic rules on foreign personnel involved in disaster relief that could facilitate the elaboration and negotiation of specific agreements between the parties concerned. In any case, he agreed with Mr. Saboia that it was largely up to the Special Rapporteur to decide whether the Commission should draw up a model agreement of any kind. The same was true regarding the extent to which the Commission should address other practical questions. The Special Rapporteur had usefully reminded the Commission that the International Federation of Red Cross and Red Crescent Societies (IFRC) had invited it to be mindful of the respective forms of expertise of each body. Perhaps, as Sir Michael Wood had suggested, the Commission should limit itself to referring to the work of bodies such as IFRC, which had practical expertise that was generally acknowledged.

3140th Meeting, 4 July 2012

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International Law Commission
Sixty-fourth session (second part)

Provisional summary record of the 3140th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 4 July 2012, at 10 a.m.

Cooperation with other bodies

Visit by representatives of the Council of Europe

(p. 9) 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 declared it to be obsolete, its provisions were thus deprived of any legal force. In such cases, then, the designation “inactive” did produce legal effects. He requested clarification of that point.

3135th Meeting, 29 May 2012

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Held at the Palais des Nations, Geneva, on Tuesday, 29 May 2012, at 3 p.m.

Treaties over time

(p. 16) Mr. Nolte (Chairman of the Study Group on Treaties over time) said that during the first part of the current session, the Study Group had begun its consideration of the third report by its Chairman, entitled “Subsequent agreements and subsequent practice of States outside judicial and quasi-judicial proceedings” (document without a symbol, in English only). The Study Group had also addressed the format of future work on the topic and the possible outcome of such work. Some members had noted that although the report was based on a wealth of material and many States had expressed interest in the topic, only a limited number had provided examples of their practice, as the Commission had requested. Members had also noted that the first three reports by the Chairman of the Study Group were interrelated and that the legal analysis and discussion would benefit from their being treated together. Several members had said that in view of the preparatory work which had been accomplished and of the need to focus the work on a specific outcome, the time had come for the Commission to change the format of its work on the topic and to appoint a Special Rapporteur.

He, like some members, considered that States might have commented more substantively on the topic if the reports and summaries of the debates, which had not been published in accordance with the procedure used for study groups, had been available to them. That was why he would welcome a change, at the current stage, in the format for the work on the topic that would allow the Commission to focus on the outcome of such work. It had first been necessary to identify, use, arrange and analyse the main sources of information on the topic, something that had been done in the first three reports and the discussion on them. Those reports could now be merged into a single document that could be made available to States and considered in plenary session.

A change in the format of the work would enable the Commission to more sharply define the scope of the topic. One of the main reasons why the Commission had decided to pursue its consideration of the topic within the format of a study group had been so as to determine

whether the topic should be approached with a broad focus — which would entail an in-depth analysis of the termination and the formal amendment of treaties — or whether the topic should have a narrower focus on specific aspects relating to subsequent agreements and practice. Now that the Study Group had concluded that it would be preferable to limit the topic to the narrower issue of the legal significance of subsequent agreements and practice, one of the main reasons for the Study Group to exist was gone.

Assuming that the format for work on the topic would be changed as he recommended, he proposed that a report bringing together the three first reports should be prepared for the next session. The report should take into account the discussions in the Study Group and should also contain specific conclusions or guidelines. Once the document had been considered by the Commission at the next session, and after the discussion in the Sixth Committee in 2013, one or two further reports should be drafted on the practice of international organizations and the jurisprudence of national courts, as originally envisaged. Those reports would contain additional conclusions or guidelines, together with commentaries, that would supplement or modify, as appropriate, the work done based on the first reports. The Commission would thus be able to complete its work on the topic during the current quinquennium, on the understanding that the topic would remain within the scope of the law of treaties. The main focus would be on the legal significance of subsequent agreements and subsequent practice for the interpretation of treaties (art. 31 of the 1969 Vienna Convention on the Law of Treaties).

The members of the Study Group, who had endorsed his proposals, recommended that the plenary Commission should change the current format for consideration of the topic and appoint a special rapporteur. They had also agreed that the question of the exact title of the topic should be discussed and resolved before the close of the current session, and that in the meantime, the Study Group should continue its work.

63rd Session (2011)

3119th Meeting, 8 August 2011

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Held at the Palais des Nations, Geneva, on Monday, 8 August 2011, at 10 a.m.

Treaties over time

Progress report by the Chairman of the Study Group

(p. 3) Mr. Nolte (Chairman of the Study Group on Treaties over Time) recalled that the Study Group on Treaties over Time had been established by the Commission at its sixtyfirst session and had been reconstituted at its sixty-second and sixty-third sessions. At the current session, it had held five meetings, on 25 May, 13, 21 and 27 July and 2 August 2011.

As had been agreed the previous year, the Study Group had pursued its work on its Chairman's introductory report on the relevant case law of the International Court of Justice and arbitral tribunals of *ad hoc* jurisdiction. Members had accordingly discussed the section on possible modification of a treaty by subsequent agreements and practice and the relationship of subsequent agreements and practice to formal amendment procedures. The Study Group, acting on a proposal from its Chairman, had considered that no conclusion should be drawn, at that stage, on the matters covered in the introductory report.

The Study Group had also had before it a second report by its Chairman and two informal papers presented by Mr. Murase and Mr. Petrič. The Chairman's second report was concerned with case law under certain international economic regimes (the World Trade Organization dispute settlement system, the Iran-United States Claims Tribunal, the tribunals set up by the International Centre for the Settlement of Investment Disputes and the tribunals set up under the North American Free Trade Agreement), international human rights regimes (the European Court of Human Rights, the Inter-American Court of Human Rights and the Human Rights Committee) and other regimes (the International Tribunal for the Law of the Sea, the International Criminal Court, the International Tribunal for the former Yugoslavia, the International

Criminal Tribunal for Rwanda and the Court of Justice of the European Union). The report explained why it had covered those regimes in preference to others.

The Study Group had considered the 20 general conclusions contained in the second report. Discussions had focused on reliance by adjudicatory bodies under special regimes on the general rules of treaty interpretation; the extent to which the special nature of certain treaties, notably human rights treaties and treaties in the field of international criminal law, might affect the approach of the relevant adjudicatory bodies to treaty interpretation; the different emphasis which adjudicatory bodies placed on various means of treaty interpretation (taking, for example, more text-oriented or more purpose-oriented approaches to treaty interpretation rather than more conventional approaches); general recognition of subsequent agreements and practice as a means of treaty interpretation; the significance of the role attached by various adjudicatory bodies to subsequent practice as one of the means of treaty interpretation; the concept of subsequent practice for the purpose of treaty interpretation, including the point in time at which a practice might be regarded as subsequent; possible authors of relevant subsequent practice; and evolutionary interpretation as a form of purposive interpretation in the light of subsequent practice. The Study Group had had time to discuss only 11 of the above-mentioned conclusions. In the light of those discussions, the Chairman had formulated the following nine preliminary conclusions:

1. General rule of treaty interpretation

The provisions contained in article 31 of the Vienna Convention on the Law of Treaties, regarded either as an applicable treaty provision or as a reflection of customary international law, were recognized by the adjudicatory bodies which had been reviewed as the general rule on the interpretation of the treaties which they applied.

2. Approaches to interpretation

Regardless of their recognition of the general rule set forth in article 31 of the Vienna Convention as the basis for the interpretation of treaties, different adjudicatory bodies had put varying amounts of emphasis on different means of interpretation depending on the context. Three broad approaches could be distinguished:

- Conventional: Like the International Court of Justice, most adjudicatory bodies (the Iran-United States Claims Tribunal, the tribunals set up by the International Centre for the Settlement of Investment Disputes, the International Tribunal for the Law of the Sea and international criminal courts and tribunals) typically took into account all the means of interpretation mentioned in article 31 of the Vienna Convention without making more or less use of certain means of interpretation.
- Text-oriented: Panel reports within the framework of the General Agreements on Tariffs and Trade and reports of the Appellate Body of the World Trade Organization (WTO) had in many cases put a certain emphasis on the text of the treaty (the ordinary or special meaning of the terms of the agreement) and had been reluctant to emphasize purposive interpretation. That approach seemed to be dictated, *inter alia*, by a need for certainty and the technical nature of many provisions in WTO-related agreements.
- Purpose-oriented: The regional human rights courts and the Human Rights Committee established under the International Covenant on Civil and Political Rights had frequently emphasized the object and purpose of the text. That approach seemed to stem from the character of substantive provisions of human rights treaties, which dealt with the personal rights of individuals in an evolving society.

The reason why some adjudicatory bodies often put a certain emphasis on the text of a treaty while others looked more at its object and purpose lay not only in the subject matter of the treaty obligations concerned, but also in their drafting and other factors, including possibly the age of the treaty regime and the procedure followed by the adjudicatory body. While it was unnecessary to determine the exact degree to which such factors influenced the interpretative approach of the adjudicatory body in question, it was useful to bear in mind those different broad approaches when assessing the role which subsequent agreements and subsequent practice played for different adjudicatory bodies.

3. Interpretation of treaties concerning human rights and international criminal law

The European Court of Human Rights and the Inter-American Court of Human Rights emphasized the special nature of the human rights treaties which they applied and affirmed that that special nature affected their approach to interpretation. The International Criminal Court, the International Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda applied special rules of interpretation derived from general principles of criminal law and human rights law. However, neither the regional human rights courts nor the international criminal courts and tribunals called into question the applicability of the general rule contained in article 31 of the Vienna Convention as a basis for their treaty interpretation. The other adjudicatory bodies reviewed did not claim that the particular treaty which they applied justified a special approach to its interpretation.

4. Recognition in principle of subsequent agreements and practice as a means of interpretation

All the adjudicatory bodies reviewed recognized that subsequent agreements and subsequent practice in the sense of article 31, paragraphs 3 (a) and 3 (b), of the Vienna Convention were a means of interpretation which they should take into account when they interpreted and applied treaties.

5. Concept of subsequent practice as a means of interpretation

Most adjudicatory bodies reviewed had not defined the concept of subsequent practice. The definition given by the WTO Appellate Body (“a concordant, common and consistent sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreements of the parties [to the treaty] regarding its interpretation”) combined the element of practice (“sequence of acts or pronouncements”) with the requirement of agreement (reflected by the words “concordant, common”) as laid down in article 31, paragraph 3 (a) and 3 (b), of the Vienna Convention (subsequent practice in a narrow sense). Other adjudicatory bodies reviewed had, however, also used the concept of practice as a means of interpretation without referring to and requiring a discernable agreement between the parties (subsequent practice in a broad sense).

6. Identification of the role of a subsequent agreement or practice as a means of interpretation

Like other means of interpretation, subsequent agreements and subsequent practice were usually just one among several means of interpretation used by adjudicatory bodies in reaching a particular decision. It was therefore rare for adjudicatory bodies to state that a particular subsequent practice or subsequent agreement had decisively influenced the final decision. It was, however, often possible to ascertain whether a particular subsequent agreement or subsequent practice had played a major or a minor role in the reasoning underlying a particular decision. Most adjudicatory bodies made use of subsequent practice as a means of interpretation. Subsequent practice was less important for adjudicatory bodies which were either more text-oriented (such as the WTO Appellate Body) or more pur-

poseoriented (such as the Inter-American Court of Human Rights). The European Court of Human Rights placed more emphasis on subsequent practice in that it referred to the common legal standards of Council of Europe member States.

7. Evolutionary interpretation and subsequent practice

Evolutionary interpretation was a form of purpose-oriented interpretation. Evolutionary interpretation could be guided by subsequent practice in both a narrow and a broad sense. The text-oriented WTO Appellate Body had only occasionally expressly engaged in evolutionary interpretation. Among the human rights treaty bodies, the European Court of Human Rights had frequently employed an evolutionary interpretation that had been explicitly guided by subsequent practice, whereas the Inter-American Court of Human Rights and the Human Rights Committee had hardly ever relied on subsequent practice. The reason for that might be that the European Court of Human Rights could rely on a fairly similar level of restrictions on human rights among Council of Europe member States. The International Tribunal for the Law of the Sea seemed to engage in evolutionary interpretation along the lines of some of the jurisprudence of the International Court of Justice.

8. Rare invocation of subsequent agreements

The adjudicatory bodies reviewed had rarely relied on subsequent agreements in the narrow sense of article 31, paragraph 3 (a), of the Vienna Convention. That might be due, in part, to the character of certain treaty obligations, especially those under human rights treaties, substantial parts of which might not lend themselves to subsequent agreements among Governments.

Some decisions which plenary organs or States parties might take in accordance with a treaty, such as the adoption of the Elements of Crimes pursuant to article 9 of the Rome Statute of the International Criminal Court, or the 2001 Notes of Interpretation of Certain Chapter 11 Provisions in the context of the North American Free Trade Agreement, if adopted unanimously might have an effect similar to that of subsequent agreements in the sense of article 31, paragraph 3 (a), of the Vienna Convention.

9. Possible authors of relevant subsequent practice

Relevant subsequent practice could consist of acts of all State organs (executive, legislative or judicial) which could be attributed to a State for the purpose of treaty interpretation. Such practice might, under certain circumstances, even include “social practice” insofar as it was reflected in State practice.

The Study Group recommended that the text of those preliminary conclusions should be reproduced in the chapter of the Commission’s report that related to treaties over time. The Study Group regarded those conclusions as being of a preliminary nature, as they would have to be revisited and expanded in the light of other reports on additional aspects of the topic and the discussions thereon.

The Study Group had also discussed future work on the topic. It expected to complete its discussion of the Chairman’s second report during the Commission’s sixtyfourth session (2012). Thereafter it would analyse the practice of States that was unrelated to judicial and quasi-judicial proceedings on the basis of a report on that subject. The Study Group expected that its work on the topic would be concluded in the next quinquennium, as envisaged, and that it would result in conclusions based on a repertory of practice. The possibility of modifying its working method by having a Special Rapporteur on the topic appointed by the Commission could be considered at the next session by the newly elected members.

At its meeting on 2 August 2011, the Study Group had also examined the possibility of reiterating the request for information from States that had been included in the Chapter III of the Commission's report on the work of its sixty-second session (A/65/10). It had generally been felt that it would be useful to have more information on instances of subsequent practice and agreement that had not been the subject of judicial or quasi-judicial rulings by an international body. The Study Group therefore recommended that the Commission should include a section requesting information on that subject in Chapter III of its report on the work of its sixty-third session.

He hoped that the Commission would be in a position to take note of the report and to approve the two above-mentioned recommendations.

3114th Meeting, 28 July 2011

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Immunity of State officials from foreign criminal jurisdiction (*continued*)

(p. 9) Mr. Nolte said that the Special Rapporteur had once again provided the Commission with a well-researched and thoughtful report which carefully digested the pertinent sources and balanced the relevant arguments. The Special Rapporteur had not relied too much on extrapolations from logic; rather, he had drawn on enough practice to enable the report to serve as an excellent basis for future work. As he was in general agreement with the Special Rapporteur's approach and conclusions, he would limit himself to a few points. However, since some members of the Commission had reopened the debate on issues which had been discussed in the first part of the current session, he would also add a few remarks in that regard.

Mr. Dugard had ended his impassioned intervention with a warning that the Commission might damage its reputation if it did not meet the expectation that it recognize an exception to immunity in cases of core crimes or human rights violations. Mr. Dugard's concern was unjustified for two reasons. First, the Commission always sought to strike a balance between different legitimate considerations and did not let itself be guided disproportionately by one of them. Second, neither the International Court of Justice nor the European Court of Human Rights had compromised their reputation with their rulings in the case concerning *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* or the case concerning *Al-Adsani v. the United Kingdom*. In any event, although there was a trend to restrict immunity in the context of the creation of international jurisdictions, a countervailing trend to recognize immunity before national jurisdictions could also be observed, as shown by the *Arrest Warrant* and *Al-Adsani* cases. The two trends were not contradictory, but complementary from the more general viewpoint of the fight against impunity, which required restricting immunity, although primarily before international jurisdictions, and not in a way that would threaten peaceful international relations; hence the legitimacy, in principle, of immunity be-

fore national jurisdictions. Ultimately, such a balance was the way to combat impunity effectively without running the risk of being discredited or of paying too high a price.

For lack of time, Mr. Pellet had confined himself to forcefully asserting that there was no immunity for core crimes. Both Mr. Pellet and Mr. Murase had argued on a very general and abstract level. The Commission should address the matter in greater detail during the next quinquennium and should examine the possible implications and consequences of such an assertion. He therefore supported Mr. McRae's proposal on how to proceed.

He agreed that the Commission should not reopen the debate on the personal immunity of the minister for foreign affairs and that it should not extend such immunity to other official functions. Today, in the age of globalization, international relations were not necessarily limited to the troika, and the Commission should not rule out the possibility that other State officials, depending on the circumstances, were in a situation sufficiently comparable to that of the members of the troika to benefit from personal immunity.

Turning to the questions addressed by the Special Rapporteur in his third report, including whether a State which exercised jurisdiction was required to consider the issue of immunity *proprio motu*, he said that the Special Rapporteur's careful analysis, in paragraphs 16 to 18, of the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)* should be pursued a bit further. He agreed with the Special Rapporteur's point of departure, which was the statement by the Court according to which "[t]he State which seeks to claim immunity for one of its State organs is expected to notify the authorities of the other State concerned". Given the context in which it had been formulated, it was clear that that statement had not been intended to mean that a State could exercise criminal jurisdiction against one of the three highest officials until their State invoked their personal immunity. The Special Rapporteur rightly noted that the identity of those officials was usually well known or could be immediately verified. As pointed out in paragraph 19, in such a case "the State exercising criminal jurisdiction should itself raise the question of that person's immunity", should "make a determination" and should "ask the official's State merely to waive immunity".

The argument concerning the duty of the forum State to raise the question *proprio motu* could not be limited to cases in which the three highest State officials were implicated. It was equally applicable when it was manifest, in the circumstances, that jurisdiction would be exercised with respect to an official who had acted in his official capacity. In such a case, the State of the official should have the opportunity to invoke immunity — if the preconditions were established — before relevant measures were taken which would violate immunity. He agreed with the Special Rapporteur, however, that if the State concerned, after having been made or having become aware of the situation, did not express its position within a reasonable time, the forum State could assume that the other State did not claim immunity for its official. That was another aspect of the proceduralization of immunity, which the International Court of Justice had recognized in the *Djibouti v. France* case, and it reflected the principle of *bona fides* which must govern international relations.

He acknowledged that the use of the word "manifest" as a criterion in cases of immunity *ratione materiae* might sometimes not prevent a disagreement over whether it was manifest that an official act by a public official was concerned. However, it was not uncommon for procedural preconditions to be determined by the standard of "manifest", which preserved smooth international intercourse and prevented mutual recriminations about whether an initial exercise of jurisdiction had actually been motivated by the wish to make a political point. Therefore, in cases which manifestly involved acts performed by officials in their official capacity, the State which exercised jurisdiction must indicate *proprio motu* to the State of the official concerned that jurisdictional measures were being contemplated and thereby give that State an opportunity to claim immunity for that official before such measures were taken. That condi-

tion did not contradict the requirement of the International Court of Justice that the State concerned must invoke immunity. On the contrary, it was part of the logic of the procedural approach and was in keeping with the rule of mutual consideration and cooperation in international relations. He also agreed with the Special Rapporteur's general line of reasoning in paragraphs 25 and following, according to which the burden on the State of the official to substantiate its invocation of immunity *ratione materiae* did not go very far, in particular where the official capacity of the person concerned and the official nature of the act were manifest. However, he personally would not speak of a presumption that the acts of an official were being performed in an official capacity, as the Special Rapporteur suggested in paragraphs 29 and 30 of his report. The advisory opinion of the International Court of Justice concerning the *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* did not support such a broad interpretation. On the contrary, it confirmed the general proposition that if the official capacity of the person and the official nature of the person's acts were manifest in a specific situation, the burden of proof was significantly alleviated. Indeed, as the Special Rapporteur noted in paragraph 31, "as in the case where the actions of an official are characterized as official acts, the State exercising jurisdiction is not obliged to 'blindly accept any' such claim by the State" which the official represented. That meant, to take the hypothetical example given by Mr. Dugard at the previous meeting, that a State which prosecuted Mr. Mladić must not accept a simple letter from Serbia that he was its official and that the acts in question had been official acts. Rather, Serbia would have to refute what appeared to be public knowledge about Mr. Mladić. On the other hand, if a person clearly was a commander in the armed forces of a country, and the accusation concerned the activities of the armed forces of that country, it should be sufficient for the State of the official to say so. It must be borne in mind that the purpose of any duty to substantiate was merely to determine whether an official had acted in an official capacity, and not to indirectly force a State to defend itself for its actions in a foreign jurisdiction. That also meant that the question of whether the forum State or the State invoking immunity had the prerogative to decide the question of immunity was not very helpful. The forum State must ultimately decide whether it recognized the immunity, but it must do so within narrow and clear limits.

Concerning the question of waiver of immunity, two situations should be more clearly distinguished: waiver of immunity in individual cases and waiver of immunity for certain categories of cases which might be contained in a general treaty rule. He agreed that the standard for identifying such exceptions to immunity was that the waiver must be certain, as stated by the Institute of International Law, and not any particular formal criterion, such as a presumption in one direction or the other. The commonality between the two forms of waiver should not obscure the fact that the determination of when immunity had been excluded was not the same in both cases. When a general waiver of immunity was provided for by a treaty rule, the required certainty related mainly to the interpretation of substantive law, whereas for individual waiver, the question was one of an assessment of a specific procedural act. Basically, his sense was that, to determine whether waiver applied in a particular case, the standard of certainty implied a *bone fides* duty to inquire with the State of the official if there was any doubt. States and their organs might not readily accept that the conduct of another State constituted a waiver of immunity. On the other hand, it followed from the rule of mutual consideration and cooperation in international relations that States also had a duty to express themselves clearly within a reasonable time if they wished to invoke immunity and were confronted with a situation which required their response.

As to the question of "whether a State's non-invocation of the immunity of an official can be considered an implied waiver of immunity", he agreed with the Special Rapporteur that the International Court of Justice had not held "that in not invoking immunity, Djibouti had waived it". He also agreed that it depended on the circumstances of the specific case whether

the non-invocation of immunity constituted a waiver. Therefore, the most important problem was the point in time at which the question of implicit waiver arose. As long as a State did not have certain knowledge of the exercise of jurisdiction against one of its officials or had not yet had sufficient time to respond, the non-invocation of immunity could not be regarded as waiver. However, once the State concerned had been fully informed and given sufficient time for reflection (which must not be too long), noninvocation of immunity was usually considered as constituting an implied waiver or a valid acquiescence in the lapse of the claim in the sense of article 45 of the draft articles on responsibility of States for internationally wrongful acts, on loss of the right to invoke responsibility. The Commission might draw inspiration from paragraph (11) of the commentary to article 45, subparagraph (b), according to which “[i]nternational courts generally engage in a flexible weighing of relevant circumstances in the given case, taking into account such matters as the conduct of the respondent State and the importance of the rights involved. The decisive factor is whether the respondent State has suffered any prejudice as a result of the delay in the sense that the respondent could have reasonably expected that the claim would no longer be pursued. Even if there has been some prejudice, it may be able to be taken into account in determining the form or extent of reparation.”

For reasons of legal and procedural security, a waiver could not be revoked, and therefore he did not share the Special Rapporteur’s view that certain implied waivers did not exclude that a State could invoke immunity at a later stage. That was an unnecessary and misleading proposition which the Special Rapporteur only seemed to need for those cases with respect to which he had accepted that the State which exercised jurisdiction could go forward until the other State invoked immunity. However, such a situation was not one of implied waiver. Rather, it concerned the period during which the question of immunity was still open and during which it must be decided as soon as possible, in a process of mutual cooperation between the two States concerned, whether the preconditions for immunity were present and whether immunity was invoked. If there were serious indications that immunity might be invoked, the State which exercised jurisdiction must act with restraint and give the other State an opportunity to do so. Jurisdictional measures which were taken during that period and which were proportionate would not become invalid if immunity was ultimately and rightfully invoked; however, their validity was not based on an implied waiver, but rather on a limited power to initiate proceedings even in the face of the possibility that immunity might be invoked. The character of a waiver as a unilateral act which determined *in fine* the position of a State with respect to one of its rights should not be called into question.

It was true that the scope of a waiver could be broad or narrow. Thus, what initially might have been a limited waiver which authorized the forum State to take certain preliminary measures did not prevent the State of the official from invoking the remaining immunity later with respect to a regular criminal procedure. He also concurred with the Special Rapporteur’s view on the issue of State responsibility, in particular where he observed in paragraph 60 that “the State which invokes its official’s immunity on the grounds that the act with which that person is charged was of an official nature is acknowledging that this act is an act of the State itself”. He also agreed that, in so doing, that State was not necessarily acknowledging its responsibility for that act as an internationally wrongful act. In closing, he thanked the Special Rapporteur for his excellent report, which had laid the groundwork for the Commission’s consideration of the topic during the next quinquennium.

3112th Meeting, 26 July 2011

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For participants only

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International Law Commission
Sixty-third session (second part)**Provisional summary record of the 3112th meeting**

Held at the Palais des Nations, Geneva, on Tuesday, 26 July 2011, at 10 a.m.

The obligation to extradite or prosecute (*aut dedere aut judicare*)
(continued)

(p. 8) Mr. Nolte, noting that the report dealt with the different possible sources of an obligation or obligations to extradite or prosecute, said he agreed that the main possible sources for such obligations were treaties and customary international law and that the principle of cooperation played an important underlying role in that regard. He had doubts, however, whether the Special Rapporteur had gone far enough: although draft article 3 (Treaty as a source of the obligation to extradite or prosecute) was clearly correct, ultimately it was merely a way of saying that treaties must be complied with, or *pacta sunt servanda*. To make that proposition, it was not necessary to classify the different kinds of treaties which contained obligations to extradite or prosecute. Such a classification would instead be important either for showing that those treaties articulated a general principle or a rule of customary international law, or for suggesting that the obligation to extradite or prosecute was applicable to certain core crimes or that it had certain more specific procedural implications.

Draft article 4 concerned the much more difficult issue of the possible customary nature of the obligation or obligations to extradite or prosecute, and its formulation showed that the Special Rapporteur was undecided on the question. While it was, again, clearly correct that States were obliged to extradite or prosecute an alleged offender if such an obligation was derived from international law, the Special Rapporteur did not go so far as to say that such an obligation existed, even with respect to certain core crimes. Indeed, the material which the Special Rapporteur presented to substantiate a possible customary obligation to extradite or prosecute was limited. The non-binding resolutions and certain propositions advanced by parties in judicial proceedings as such and without further reasoning did not appear to be sufficient to establish a basis in customary international law for an obligation to extradite or prosecute. He did not rule out that other material or considerations could lead to such a conclusion, but the sources contained in the report did not support a stronger formulation than what the Special

Rapporteur proposed in draft article 4, paragraph 2. However, that provision referred back to other norms without specifying them and ultimately left the question open. Bearing in mind that the formulation in paragraph 2 cautiously stated that the obligation to extradite or prosecute “may” derive from customary norms of international law, it was somewhat surprising that the Special Rapporteur proposed in paragraph 3 that an obligation to extradite or prosecute “shall” derive from peremptory norms of international law. As noted by Mr. Dugard, that compulsory language was at variance with the doubts which the Special Rapporteur had himself expressed in paragraph 94 of the report.

With regard to draft article 2 (Duty to cooperate), once again the question was not whether such a general duty existed, but what it meant in the context of international criminal cooperation. There, it would seem to be necessary to assess how far the political goal of the fight against impunity had crystallized into more specific legal obligations, in particular in customary international law. That would require an analysis of possible countervailing considerations, which the Special Rapporteur alluded to in paragraph 74, but did not examine further.

In sum, the fourth report on the obligation to extradite or prosecute was a valuable contribution to the Commission’s consideration of the topic, but the issues which it raised needed to be studied further. It was not yet possible for the aspects of the topic which had been raised in the report to be dealt with as drafting matters. He did not agree with Mr. Murase that the Commission should abandon the topic, which, as Mr. Dugard had observed, was important and had raised expectations. There was a need to reflect on how to proceed further, but owing to lack of time, that would be a proper task for a newly elected Commission. He was not persuaded by Mr. Melescanu’s proposal that the Commission should submit the proposed draft articles to the Sixth Committee for debate. The Commission should not abandon its most important task, that of forming a collective opinion, and thus forego its privilege of submitting a considered view to the General Assembly.

3106th Meeting, 15 July 2011

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For participants only

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Sixty-third session (second part)**Provisional summary record of the 3106th meeting**

Held at the Palais des Nations, Geneva, on Friday, 15 July 2011, at 10 a.m.

Reservations to treaties (*continued*)

(p. 4) Mr. Nolte said that he was no more convinced than Sir Michael by the Special Rapporteur's proposal that the Commission should recommend, as part of the Guide to Practice, the establishment of a mechanism to assist in the area of reservations and objections to reservations. As a general consideration, he was concerned that any dispute settlement mechanism which the Commission might recommend as part of the Guide to Practice might undermine the Guide's authority if the recommendation was not acted upon. That was because users might consider that the Guide to Practice presupposed the existence of such a mechanism, regardless of any protestations to the contrary by the Commission, and States might conclude that if the dispute settlement mechanism was not implemented or did not work as envisaged, then the Guide itself did not have to be taken too seriously. That was why the Commission should not propose a specific mechanism, but should limit itself to making a general recommendation pursuant to which States should consider establishing a mechanism for the assessment of reservations and related declarations, bearing in mind the experience at regional level, such as that of CAHDI. Such a recommendation might trigger a reflection process among States on how to improve the treatment of reservations, a process which should take place after States had had a chance to digest the Guide to Practice as a whole and to assess its significance. It was not until after the significance of the Guide to Practice, and in particular some of its key elements, had become clear that the time might be ripe for elaborating a tailor-made mechanism. Perhaps States would then refer the matter back to the Commission and ask it to make more specific suggestions.

The Special Rapporteur described his proposal for a mechanism as being flexible and he emphasized its quality as an instrument for providing technical assistance to smaller or less developed States, although the proposal was not so limited or technical. Of course, as an international lawyer, he personally supported and welcomed in general the establishment of third-party mechanisms; otherwise, opposing subjective assessments might lead to differences of

opinion in international relations. However, the situation at issue was more complicated. The stated purpose of the mechanism was to resolve the question of whether a reservation was invalid because it was incompatible with the object and purpose of the treaty. Often that was more than a mere technical question and could involve very difficult assessments based on value judgements and political considerations. Who would make such an assessment? The Special Rapporteur suggested that a committee of 10 government experts would do so. That raised a number of difficulties. Would those government experts come from States which had signed the treaty concerned or that were at least entitled to become parties to the treaty? After all, why should a government official of a State which had nothing to do with a treaty be qualified to assess its object and purpose? Should such a body take decisions in the form of recommendations, and if so, on the basis of what procedure? Would it take decisions by a majority vote, and if so, by what majority? Would all 10 members discuss a reservation with the reservation's author? Would the membership of such a body be determined by an election in the General Assembly, or elsewhere? Would membership be *ad personam*, or would membership be held by a particular State? A larger question, above and beyond those of a practical nature, was whether the CAHDI model lent support to the proposal to establish an assistance mechanism at universal level. The comments by Sir Michael, who knew CAHDI well, confirmed his own doubts in that regard. The question of what the CAHDI model meant and whether it was transferable to the universal plane required more discussion, for which the Commission did not have time at the current session. Thus, the Commission should not make specific suggestions, but should merely recommend that States should start an exchange of views on the possible establishment of a mechanism for the assessment of reservations and related declarations, bearing in mind the experience in that respect at regional level. He was open to discuss in the Working Group whether the Commission should formulate a general recommendation along those lines, but he was not in favour of referring the proposed mechanism to the Working Group on the assumption that the Working Group would confine itself to making drafting changes.

Turning to the proposed introduction to the Guide to Practice (para. 105), the text of which had been considered by the Working Group, he noted, in the second sentence of paragraph 1, that the Special Rapporteur was of the view that the commentaries had the same force and authority as the guidelines themselves. While it was true that, as was usually the case, the Commission would adopt every part of the commentary, it had spent infinitely more time on the elaboration of the guidelines themselves than on the formulation of the commentaries, and thus the input of members was much more significant in the former case than in the latter. It was a general understanding that commentaries did not carry the same weight as the provisions themselves; otherwise, there would be no point in differentiating between the two. He therefore suggested inserting a new phrase at the beginning of the second sentence of paragraph 1, which would then read: "Although they do not have the same weight as the guidelines themselves, the commentaries are an integral part of the Guide and an indispensable supplement to the guidelines, which they expand and explain."

With regard to paragraph 9, which stated that "reading the commentaries will be useful only where the answer to a question is not provided in the text of the guidelines", he did not think that the paragraph should be adopted as it stood, because as a lawyer, he had often had the experience that a provision which seemed to be clear at first sight turned out not to be so clear on further reflection or upon consultation of the commentary. As a matter of technique of interpretation, "*acte clair*" theories, which suggested that there was no further need to explain what appeared to be clear at first glance, had also been abandoned. More generally, although he agreed with the substance of the proposed text, except for the two points just made, he found its tone unnecessarily defensive. The same thing could be said in shorter form and more self-confidently, for example in paragraph 1, the third sentence of which did not appear to be

necessary. He hoped that the Commission would have the possibility of revising the provisions of the introduction and would take his comments into account.

3103rd Meeting, 12 July 2011

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International Law Commission
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Held at the Palais des Nations, Geneva, on Tuesday, 12 July 2011, at 10 a.m.

Protection of persons in the event of disasters (*continued*)

(p. 3) Mr. Nolte thanked the Special Rapporteur for his rich and balanced fourth report, which provided an excellent basis for the Commission's deliberations. It recalled the dramatic situations that underlay the abstract term "disaster" and the Commission's responsibility to formulate appropriate and balanced rules to deal with them.

The way Commission members responded to the fourth report depended to some extent on the final formulation to be given to the role of consent, a question that was still before the Drafting Committee in the context of draft article 8, paragraph 2. While he agreed in principle with the requirement of consent by the affected State to the provision of humanitarian assistance by other States or actors, he was not in favour of formulating such a requirement in an absolute way: for example, there might be exceptional situations in which the affected State could not give its consent.

He endorsed the basic approach taken by the Special Rapporteur in draft articles 10 to 12, in particular the premise that an affected State had a duty to seek assistance, a duty arising from its primary responsibility to ensure the protection of all persons in its territory. The reference in paragraph 33 of the report to general comment No. 12 of the Committee on Economic, Social and Cultural Rights on the right to provide adequate food was pertinent in that regard. However, the statement in paragraph 40 that "where the national capacity of a State is exhausted, seeking international assistance may be an element of the fulfilment of an affected State's primary responsibilities" was somewhat weak; where national capacity was exhausted, seeking international assistance was the duty of an affected State. The Special Rapporteur ultimately seemed to recognize that fact, yet in draft article 10 he indicated that the affected State had the duty to seek assistance "as appropriate". The words "as appropriate" should be used only with reference to the mode of implementation of the duty to seek assistance.

The duty to seek assistance embodied in draft article 10 could not and should not be separated from the corollary duty, expressed in draft article 11, not to withhold consent, and the right to offer assistance set out in draft article 12. Where a disaster exceeded the capacity of a State,

that State had the duty to seek assistance from other States and relevant actors, which had the collateral right to offer such assistance; in both cases, the affected State had the duty not to withhold consent arbitrarily. Separating those interrelated and collateral rights and duties could lead to artificial distinctions in practice and to formalistic arguments in emergency situations.

If it was true, as the Special Rapporteur suggested in paragraph 44 of his report, that “a duty to ‘seek’ assistance implies the initiation of a process through which agreement may be reached”, then not withholding agreement arbitrarily must be a duty during that process, and not only upon its completion.

The reference in draft article 12 to the right to offer assistance should be accompanied by encouragement to offer assistance on the basis of the principles of cooperation, international solidarity and human rights. While it would be going too far to recognize a specific legal obligation of third States or organizations to give assistance, recent debates had yielded at least an acceptance of the responsibility of other States and organizations to protect all human beings whose life or basic human rights were immediately threatened. Without wishing to reopen the divisive debate on the responsibility to protect, he felt it was important to emphasize the common ground on that concept that existed within the international community.

Turning to draft article 11, paragraph 2, he suggested that the words “notify all concerned of its decision regarding such an offer” should be replaced by the words “give reasoned responses”. That would better capture the purpose, which was to ensure that the observance of the duty not to withhold consent arbitrarily could be objectively assessed. As currently worded, paragraph 2 seemed not to take account sufficiently of the broader, negotiated approach to the provision of international aid advocated in paragraph 44 of the report. A more process-oriented version of the duty to give reasons for not accepting an offer of assistance would thus be preferable, in his view.

He agreed with Mr. Pellet that the Commission should not consider situations in which a State was unwilling to use its available resources in the context of the duty not to withhold arbitrarily its consent to offers of assistance. The primary duty of every affected State to “ensure the protection of persons and provision of disaster relief and assistance on its territory”, established in draft article 9, implied that such a State must use its available resources to ensure the protection of persons.

For those reasons, he suggested that draft articles 10 to 12 should be merged to form the following new draft article:

“(1) In responding to disasters, States, competent intergovernmental organizations and relevant non-governmental organizations have the right to offer humanitarian assistance to the affected State, and are encouraged to do so in the spirit of the principles of cooperation, international solidarity and human rights.

(2) The affected State has the duty to seek humanitarian assistance from among other states, competent international organizations and relevant nongovernmental organizations, if a disaster exceeds its national response capacity.

(3) The affected State shall not withhold consent to external assistance arbitrarily, and give reasoned responses to offers of assistance.”

His proposal was formulated in the holistic spirit suggested by the Special Rapporteur. It commenced with the general rule whereby the right to offer assistance existed in every disaster situation, irrespective of the ability of the affected State. It continued with the special rule that the duty of the affected State to seek assistance arose in the event that it was unable to provide the necessary assistance. It ended with rules that applied to both the general and the

special rule, articulating the obligations not to withhold consent arbitrarily and to give reasoned responses to offers of assistance.

The rationale behind his proposal was not disagreement with the Special Rapporteur's basic approach and reasoning, but rather a desire to find a formulation that better expressed the Special Rapporteur's intentions. He agreed that draft articles 10 to 12 should be referred to the Drafting Committee.

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Provisional summary record of the 3102nd meeting

Held at the Palais des Nations, Geneva, on Monday, 11 July 2011, at 3 p.m.

Protection of persons in the event of disasters

(p. 13) Mr. Nolte said that Mr. Pellet's attitude seemed contradictory: he had opposed the consideration of the current topic because it was political in nature, linked to the ongoing political debate over the status of the responsibility to protect in international law, but now that the topic was included in the Commission's programme of work, he wished the Commission to treat the responsibility to protect as a guiding principle. He himself thought that the Special Rapporteur had been very wise to avoid mentioning the politically controversial idea of the "responsibility to protect" while including its main elements, which originated elsewhere — the obligation to protect, in the field of human rights, the principles of cooperation and solidarity, in other fields — in order to apply them to the topic at hand. The fact that the Special Rapporteur did not explicitly mention the concept of the responsibility to protect meant, not that he rejected its core elements, but rather that he was applying them intelligently to the topic of the protection of persons in the event of disasters which originated elsewhere — the obligation to protect, in the field of human rights, the principles of cooperation and solidarity, in other fields — in order to apply them to the topic at hand. The fact that the Special Rapporteur did not explicitly mention the concept of the responsibility to protect meant, not that he rejected its core elements, but rather that he was applying them intelligently to the topic of the protection of persons in the event of disasters.

3099th Meeting, 6 July 2011

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For participants only

15 July 2011

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International Law Commission
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Held at the Palais des Nations, Geneva, on Wednesday, 6 July 2011, at 10 a.m.

Reservations to treaties (*continued*)

(p. 5) Mr. Nolte said that he also supported referral of the text in paragraph 68 of the Working Group on Reservations to Treaties. He had been surprised to see that the terms “key players” and “stakeholders” had been used in the report. They had not been employed so far, and it would be advisable to avoid such jargon.

On a more substantive point, he said that the reference in paragraph 15 of the report to “objections to an invalid reservation” suggested clarity as to whether or not an objection was invalid. However, the very purpose of the reservations dialogue was to clarify whether or not a reservation was invalid. He proposed that that phrase should read “objections to reservations which are considered to be invalid”, thereby, in addition, aligning it with draft guideline 4.5.3, paragraph 2.

In paragraph 21, the Special Rapporteur referred to the many objections formulated to a Libyan reservation to the Convention on the Elimination of All Forms of Discrimination against Women on the grounds that the reservation was too imprecise and therefore invalid. Five years later, the Libyan Arab Jamahiriya had modified the reservation, making it more specific. The Special Rapporteur considered that that case was an example of a successful reservations dialogue. But if the reservation had indeed been invalid because it was incompatible with the object and purpose of the Convention, how could the Libyan Arab Jamahiriya modify that reservation five years later? The modification appeared instead to be a late reservation, the formulation of which was impermissible under guideline 2.3. He requested clarification of that point.

That apparent discrepancy raised the wider issue of the wisdom of guidelines 4.5.1, regarding the nullity of an invalid reservation, and 3.3.1, according to which there was no need to distinguish among the consequences of the different grounds for non-permissibility. Although it was too late to change those general principles, the Commission should at least make it clear that States had the opportunity to modify reservations that were deemed by one or more objecting States to be invalid so as to preserve what might be their valid core. The Special Rap-

porteur seemed to acknowledge that possibility when he said in paragraph 33 that “full or partial withdrawal of a reservation that is considered invalid is unquestionably the primary purpose of the reservations dialogue”. That understanding also seemed to underlie the State practice described in paragraph 34. Generally speaking, in paragraph 30 *et seq.* and in the draft recommendation, more emphasis should be placed on dialogue to ascertain whether a particular reservation was valid.

While the examples of the reservations dialogue given in paragraphs 39 to 53 were certainly of great significance, they concerned two specific areas, namely human rights treaty monitoring bodies and coordination among European States. He wondered if there were no pertinent examples of the participation of international organizations, including their secretariats, in such a dialogue. The examples of CAHDI and COJUR were not the best, because they really illustrated the coordination of the views of States within an international organization and not the organization acting as such.

He fully agreed with the Special Rapporteur that the Commission should not try to formulate a legal framework or a “soft law” instrument to regulate the reservations dialogue. Perhaps States could be reminded of the legal principles of *bona fides* and cooperation in treaty law, however.

He had the impression that the draft recommendation in paragraph 68 of the report primarily addressed the reservations dialogue from the viewpoint of the bodies monitoring human rights treaties, focusing on the validity of reservations. But the reservations dialogue went much farther, in that it concerned permissible reservations and the withdrawal of impermissible reservations. The Commission should couch the draft recommendation in language that was suitably general and less oriented towards human rights issues.

3096th Meeting, 1 June 2011

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Held at the Palais des Nations, Geneva, on Wednesday, 1 June 2011, at 10 a.m.

Other business (*continued*)

(p. 5) Mr. Nolte congratulated Sir Michael on his working paper, which provided an excellent basis for the Commission's discussions. He would confine his comments to the topics mentioned in paragraph 20 of the document.

He doubted whether it would be useful to prepare the model dispute settlement clauses mentioned in subparagraphs (a) and (e). States had a wide variety of possible clauses and it was unsure whether the Commission could give appropriate advice as to the best choice from a political or even a technical point of view. States would probably opt for one clause or another depending on the kind of dispute, their interests and the substantive law at stake. As Sir Michael had recalled in paragraph 15 (e) of his working paper, the United Nations had already published in 1992 the *Handbook on the Peaceful Settlement of Disputes between States*, which contained a digest of the different dispute settlement clauses found in State practice and which could be updated.

On the other hand, the suggestion made in paragraph 20, subparagraph (b), of the document was promising. Procedures for the settlement of disputes involving international organizations had been somewhat neglected, even though the issue was important and would probably become more so after the adoption by the Commission of the draft articles on the responsibility of international organizations. The topic as set out in subparagraph (b) could be enlarged to include some aspects of the topic proposed in subparagraph (c). The question of access to and standing before different dispute settling mechanisms, addressed in subparagraph (c), could have particular relevance to disputes involving international organizations and should therefore be given further consideration.

He had a number of concerns regarding the topic mentioned in subparagraph (d), regarding in particular the possible procedural fragmentation of international law. The Commission had decided not to include that topic in its initial study on the fragmentation of international law.

He wondered whether discussion of the issue had moved forward enough for the Commission to propose more than a general frame of reference.

3094th Meeting, 27 May 2011

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Expulsion of aliens (*continued*)

(p. 4) Mr. Nolte said that he generally agreed with draft article D1 (Return to the receiving State of the alien being expelled). It was not clear whether the proposal by Mr. Vasciannie and other members that the expelling State should “take measures to encourage” voluntary compliance with expulsion decisions would have the effect intended, as legitimate means of encouragement such as persuasion could hardly be described as “measures”. It was therefore preferable to retain the Special Rapporteur’s original proposal.

Paragraph 2 should not contain a specific reference to rules relating to air travel. Such rules were clearly covered by the general term “rules of international law”, and it was unclear why they should be mentioned when there was no reference, for example, to the rules relating to sea travel or simply to the rules applicable to the transport of persons. Referring only to air travel might suggest that most forcible expulsions took place through that means of transport and that that form of expulsion was particularly prone to abuse. That was not necessarily the case, however: a specific reference to human rights would be more appropriate.

One of the most important aspects of the topic under consideration was the review of or appeal against an expulsion decision. Like Mr. McRae, he considered that that should be the subject of a separate draft article, to be placed in the part concerning procedural rules. He concurred with the Special Rapporteur’s reasoning that customary international law recognized, not the right to judicial review, but merely the right to an effective remedy. The latter derived from both State practice and human rights guarantees as interpreted by various treaty bodies. Another argument for such a right was that determining whether an expulsion was lawful under a review procedure would make it possible to apply the rules relating to responsibility and diplomatic protection cited in draft articles I1 and J1. He therefore encouraged the Special Rapporteur to provide the Commission with a draft article on the right to an effective remedy against an expulsion decision.

That led to the question of suspensive effect. There, much depended on the question that was posed. If the question was whether all appeals against an expulsion decision must, *de lege lata*, have suspensive effect, then the Special Rapporteur's response — that that was not true — seemed correct. However, if the question was whether an appeal against an expulsion decision should have suspensive effect when the person concerned could plausibly claim that he or she faced the risk of torture or inhuman treatment, then the answer must be in the affirmative. That response was not based solely on a provision such as article 13 of the European Convention on Human Rights, which guaranteed the right to an effective remedy. It could also be drawn based simply on the procedural ramifications of the right not to be subjected to torture or inhuman treatment. That did not mean that there was a general right, under customary international law, to a remedy with suspensive effect in all expulsion proceedings, because in some cases fundamental rights might not be at risk of being infringed. However, the Commission could and should recognize, *de lege lata*, that appeals must have suspensive effect in cases where there was a risk of torture or inhuman treatment, as the European Court of Human Rights had done in its judgments in the *Čonka* and *Jabari* cases. After all, the prohibition of torture was an element of *jus cogens* and States had an obligation to ensure that that prohibition was effective.

While he agreed with the general thrust of draft article E1 (State of destination of expelled aliens), like Mr. McRae, he thought that it should be reformulated by the Drafting Committee. Paragraph 1 was too strict, because it was quite conceivable that a person might be expelled to a State that was not his or her State of nationality even when the State of nationality could be identified. That had implications for paragraph 2, which should be in the form of an indicative list.

Draft article F1 (Protecting the human rights of aliens subject to expulsion in the transit State) should be reworded to make it clear that the transit State was not required to restart the expulsion procedure from the very beginning.

The Special Rapporteur's reasoning behind draft article G1 (Protecting the property of aliens facing expulsion) was noteworthy. He had chosen two examples from German history to make his point, namely the expulsion of Jewish foreign nationals by the Bavarian authorities at the time of the Weimar Republic and the expulsion of millions of Germans and ethnic Germans by other States after the Second World War. The Special Rapporteur could obviously have cited different, terrible examples dating from the interim between those two periods of history. The examples that he had chosen were indeed appalling and worth mentioning, but broad conclusions should not be drawn from them, not only because the expulsions carried out after the Second World War raised very complex questions that the Special Rapporteur only touched on, but also because the main motivation behind the expulsions was arguably not to confiscate property but rather to manifest various forms of hatred or to pursue political goals. That was why Mr. Wisnumurti and Ms. Escobar Hernández were right to say that draft article G1 should emphasize, not the motive for or purpose of confiscation, but rather the protection of the property of expelled persons in general. He therefore went along with Mr. Wisnumurti's proposal to make paragraph 2 the main paragraph of draft article G1 and agreed with Mr. Dugard's idea of moving the current paragraph 1 to the part of the draft articles that dealt specifically with prohibited forms of expulsion, such as mass expulsion. He wished to emphasize again, however, that he considered the inclusion of a draft article on the protection of the property of expelled persons to be very important.

Draft article H1 (Right of return to the expelling State) should be clarified by the Drafting Committee. Firstly, it should speak of the right of re-entry, as the concept of the right of return seemed to be used for cases in which people had been driven from their homeland. The main point, however, was that the current wording of article H1 was too broad. He himself did not interpret the International Convention on the Protection of the Rights of All Migrant

Workers and Members of Their Families or the resolution of the Inter-American Commission on Human Rights as recognition of a general right of return, as did the Special Rapporteur in paragraph 152 of the second addendum to the sixth report. The Convention only indicated that an earlier expulsion decision should not be used to prevent the person expelled from re-entering the State concerned – but that did not preclude other factors that might prevent re-entry. As for the Inter-American Commission on Human Rights, it had simply made a recommendation on a particular case. He accepted the idea that a right of re-entry should be the normal consequence of a final determination that an expulsion decision had violated certain rules. That right flowed from the principles of State responsibility and was recognized in the legislation and practice of certain States. However, it must be made clear that only the violation of certain rules could give rise to a right of reentry. The Special Rapporteur admitted as much when he wrote that an annulment of an expulsion decision founded on a purely procedural error could not confer that right. He himself would like the Commission to go further and state that the right of re-entry could only ensue from the violation of a substantive rule of international law.

He generally agreed with draft articles I1 (The responsibility of States in cases of unlawful expulsion) and J1 (Diplomatic protection) but wished to emphasize that States should be held responsible only for violations of the rules of international law. He therefore suggested that the words “unlawful expulsion” in draft article I1 should be replaced with “internationally wrongful expulsion”.

Draft articles D1 to J1 could be referred to the Drafting Committee.

3088th Meeting, 13 May 2011

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International Law Commission
Sixty-third session (first part)**Provisional summary record of the 3088th meeting**

Held at the Palais des Nations, Geneva, on Friday, 13 May 2011, at 10 a.m.

Immunity of State officials from foreign criminal jurisdiction

(p. 16) Mr. Nolte said that he would begin by addressing a number of fundamental issues raised by Mr. Dugard and other members. Mr. Dugard had been very critical of the report and had attacked its very premise, and he had urged members of the Commission to acknowledge their role as lawmakers and not to hide behind the “fig leaf” of codification.

He came from a country whose officials had in the past committed horrendous international crimes. Germans of his generation saw the Nuremberg trials as a decisive contribution to the development of international law and actively supported the International Criminal Court. He was deeply affected by the international crimes of the day and wanted to help ensure that they did not go unpunished. He was certain that the common goal was to eliminate impunity, and therefore the Commission should avoid framing the debate as taking place between those who were empathetic and future-oriented, on the one hand, and those who were cold-hearted, backward-looking apologists of an outdated concept of State, sovereignty and international law, on the other.

In his view, the real question was how the principle of immunity should be implemented and how it could be made to fit within the international legal system as it stood and was developing. It would be too simple to say that the general trend of international law was to recognize that the most serious crimes should not go unpunished and that the immunity of State officials should therefore be considerably restricted or even, as Mr. Dugard preferred, purely and simply abolished. Mr. Vasciannie had rightly pointed out that undue limitations on immunity could lead to serious friction in international relations. The world was not living in 1999 anymore, a time in which it had been assumed that prosecution of international crimes would be restricted to deposed dictators or overthrown perpetrators of genocide. Today, efforts to prosecute also concerned more ambiguous cases, for example possible war crimes committed by the military forces of developed countries engaged in peacekeeping operations or other unclear situations in a civil war context. He had no objection to subjecting such situations to an international

criminal jurisdiction, but doubted whether the international community had sufficient confidence in national criminal proceedings to accept that they should deal with such cases. If national jurisdictions were not considered to be impartial and reliable, that might lead to tensions, and restricting immunity would become counterproductive. Thus, the Commission must recognize today's realities, which must not be painted over by invoking high moral principles. It must strike a balance between different concerns, which in a sense were already reflected in the law but needed to be reassessed. That would enable the Commission to determine which course to take and to examine the different facets of the topic.

The Special Rapporteur's second report addressed many important issues, and many aspects of its analysis were convincing. If the Commission decided in favour of a codification exercise with the use of the traditional methods which it applied, for example, to the consideration of reservations to treaties, he would agree with the Special Rapporteur's general approach. However, he found merit in the analysis of *lex lata* put forward by Mr. Gaja and which militated against the very broad scope of functional sovereignty which the Special Rapporteur espoused, although personally he had not fully understood how that analysis fit in with the current state of customary international law. That said, he was not persuaded by the assertion by Mr. Dugard and others that the Commission would depart from its own practice if it followed the Special Rapporteur's approach, nor did he see a conflict between the Commission and the International Court of Justice on the subject of immunity of State officials. On the other hand, the Special Rapporteur should have distinguished more clearly between the immunity of the State itself and the immunity of its officials, as well as between substantive rules and rules on jurisdiction, as proposed by Mr. Pellet. It was not sufficient to say that rules of *jus cogens* took precedence over rules of immunity. The real question was how far the rules on immunity went in the first place. One must not be "hyper-westphalian" to find that they went further than what Mr. Pellet postulated. On the other hand, they were not as broad in their scope as the Special Rapporteur proposed.

The Commission was currently in a difficult situation, and three approaches were conceivable. The first was the one espoused by the Special Rapporteur, and which could be called the codification approach. That risked to expose the Commission to the criticism that it was arresting an important development in customary international law. The second approach was the one defended by Mr. Dugard, who openly called for a progressive development approach. Such an approach risked creating a rift between, on the one hand, those States which felt justified in being able to rely on *lex lata* and, on the other, certain domestic courts which took the Commission's position as an encouragement to interpret the rules of immunity ever more strictly. That might result in more domestic prosecutions and a loss of authority of international law as a source of law. The third approach, suggested by Mr. Pellet, might be called the progressive development approach in the guise of *lex lata*, which was astute, but also problematic. Mr. Pellet's *lex lata* was not what the Commission usually referred to as *lex lata*. The Commission usually considered all State and other practice, and it did not postulate a rule as *lex lata* simply on the basis of an abstract principle. However, should the Commission decide to change its position, it would probably be difficult to maintain the consensus, which was the basis of the authority which its work enjoyed.

Whichever approach the Commission decided to adopt, it would be very difficult to achieve a satisfactory result. That should give cause for thought, because at issue was not only the best approach with respect to the subject of immunity of State officials, but also the need to resolve a question that was vital to the Commission and its standing. That key question risked involving the Commission in an unpleasant dispute at a time when it should be trying to analyse the different aspects of the problem and to decide how much room there was for interpretation by a traditional approach. Mr. Gaja had made a proposal to that effect. The Commission should only seek to progressively develop certain aspects of the law on a solid basis of *lex*

lata. The Commission was not a lawmaker in the sense in which Felix Frankfurter or the American realist school had understood the term, because it did not have the unquestioned authority of a national legislature or a national judge. Of course, law and its interpretation involved choices, including of a political nature, but such choices were limited. The law was evolving constantly, but that did not justify taking shortcuts by invoking moral imperatives.

It would be presumptuous at the current stage for the members of the Commission to try to resolve all the preliminary questions and leave the details to the members of the Commission in the next quinquennium. It would be more useful to draw the attention of States to the debate at its current stage so that they could help the Commission take a decision on which approach to adopt: traditional codification, progressive development or progressive development in the guise of *lex lata*. Like Mr. McRae, he did not see any point in establishing a working group at the current stage.

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For participants only

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International Law Commission
Sixty-third session (first part)**Provisional summary record of the 3085th meeting**

Held at the Palais des Nations, Geneva, on Friday, 6 May 2011, at 10 a.m.

Responsibility of international organizations (*continued*)

(p. 3) Mr. Nolte, after welcoming Ms. Escobar Hernández to the Commission, said that he had little to criticize in the second part of the eighth report on responsibility of international organizations. He was in favour of retaining draft article 20 (Self-defence), particularly as the Special Rapporteur had indicated that the resorting by an international organization to self-defence was not a purely hypothetical situation. However, he agreed with other members that the limited likelihood of such an occurrence should be emphasized in the commentary to the draft article.

He expressed support for draft article 21 (Countermeasures), welcoming the suggestion in paragraph 67 of the report that some international organizations did exclude the possibility of countermeasures against their members. He found useful the distinction drawn between three contingencies which existed with regard to countermeasures: the relationship between an international organization and non-members; the relationship between an international organization and its members with respect to the members' rights; and the relationship between an international organization and its members in respect of treaties concluded by member States in a capacity other than as members of the organization. However, the Commission should not draw too great a distinction with regard to the latter category, for if a State was a member of an international organization it assumed additional responsibilities for supporting the organization, and those responsibilities could also affect treaties that it had concluded outside the context of its membership of the international organization.

A case in point was Switzerland, which upon joining the United Nations had agreed to abide by Article 2, paragraph 5, of the Charter of the United Nations, which set out a general obligation to support the Organization. Yet there were surely situations in which that provision could affect the interpretation of treaties concluded by Switzerland or the responsibility of Switzerland as a State, and from that perspective the country could not be viewed merely as a third party.

He was also in favour of draft article 30 (Reparation). With regard to draft article 31 (Irrelevance of the rules of the organization), he welcomed the emphasis placed in paragraph 77 of the report on the fact that international organizations could not be relieved by their rules from complying with their obligations. He supported the Special Rapporteur's balanced proposal in paragraph 84 of the report regarding draft article 39 (Ensuring the effective performance of the obligation of reparation). The Special Rapporteur had recognized the ambiguity that existed in the original version of draft article 39, which could be taken to imply that there was an independent obligation on the part of member States to provide an international organization with financial means to fulfil its obligation of reparation, when such an obligation should in fact arise from the rules of the organization.

Nonetheless, he disagreed with Mr. Pellet that the obligation for member States to provide an international organization with the means to fulfil an obligation of reparation was a logical consequence of having conferred legal personality on the organization; under domestic legislation, for example, the establishment of a limited company did not give rise to responsibility. Similarly, he was not in favour of Sir Michael Wood's suggestion that the wording of the proposed new second paragraph of draft article 39 should be softened by replacing "shall" with "should". The obligations in question were international legal obligations of the international organization itself that had no effect on the obligations of the State.

In conclusion, he commended the Special Rapporteur for his very balanced, subtle and thorough report, and in particular the second part of it.

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International Law Commission
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Held at the Palais des Nations, Geneva, on Wednesday, 27 April 2011, at 10 a.m.

Tribute to the memory of Ms. Paula Escarameia, former member of the Commission (*continued*)**Responsibility of international organizations (*continued*)**

(p. 4) Mr. Nolte said that Ms. Escarameia had combined impressive competence in international law with warmth and generosity – heart with reason, to paraphrase Mr. Pellet’s remarks. In a sense, she had been the Commission’s conscience. With her capacity to be critically constructive and a civilized fighter for her ideals, she had seen the bad but had projected the good.

(p. 8) Mr. Nolte said that as he had commented on Part One of the eighth report on responsibility of international organizations at the previous meeting, he would now focus on Part Two of the report. He endorsed the Special Rapporteur’s approach to draft articles 4 to 9, in particular his remark in paragraph 43 that the application of international law was not entirely excluded even in areas covered by European Union law. He did, however, have some concerns regarding draft articles 13 to 16.

The most important element of Part Two of the report was the suggestion made in paragraph 58 to delete draft article 16, paragraph 2, whereby the responsibility of international organizations would be incurred for recommendations addressed to member States and international organizations to commit an internationally wrongful act. Having always been critical of the idea of such responsibility for recommendations, he was in favour of the suggestion; however, he considered that the Special Rapporteur had not fully explained the implications of that step.

The decision not to accept responsibility for recommendations also affected the responsibility incurred in the provision of aid or assistance in the commission of an internationally wrongful act, which was covered by draft article 13. Care must therefore be taken to ensure that the principle of responsibility for recommendations was not reintroduced indirectly by providing the possibility for considering recommendations as a form of aid and assistance.

His main concern, however, was the commentary to draft article 13. He had no objections to transposing the principle of responsibility for aid or assistance from the law of State responsibility to the law of responsibility of international organizations, and he had no problem with the wording of the draft article. However, the potentially far-reaching and novel form of responsibility for aid or assistance should be carefully limited, similarly to what had been done in the commentaries to the articles on State responsibility. Otherwise important forms of co-operation and innovation in international relations might be unduly inhibited by concerns of potential liability. For instance, it might sometimes be apparent to a United Nations peace-keeping operation that its actions could provide support for the commission of war crimes, and such conduct should not be permissible; however, the World Bank should not be placed under a regime that would require it to verify or ensure that its loans were properly used. He was therefore in favour of the approach adopted by the Commission in its commentary to the parallel draft article 16 on State responsibility with respect to the requirement of intent. The Commission should not only follow the suggestion made by the European Commission, referred to in paragraph 49 of the Special Rapporteur's report, to add to the commentary some limitative language (intent) in line with the commentaries of the draft articles on State responsibility; in his view, it should go a step further and strengthen the subjective requirement by including language calling for some form of intent or, in some case, even conscious misuse.

A reference to the subjective element of intent was not the only addition that should be made to the commentary to draft article 13. The Special Rapporteur recognized that the commentary was very short and needed to be supplemented, but the Commission needed to decide what direction such additions should take. In his view, they should generally be of a limitative nature. He therefore endorsed the idea of establishing a "*de minimis* criterion", mentioned in paragraph 45 of the report, which could be formulated positively as a requirement that the wrongful act had "contributed significantly to that end".

The same general approach should be taken when supplementing the commentaries to draft article 14 on direction and control exercised over the commission of an internationally wrongful act. He therefore endorsed the suggestion made in paragraph 50 that the commentary should indicate that the simple exercise of oversight was not sufficient to generate responsibility.

The Special Rapporteur had acknowledged that draft articles 13 to 16 were closely interrelated and overlapped in part. It was therefore important to explain their interrelationship, primarily by explaining the purpose of the individual articles and by giving appropriate examples. However, it would be helpful to describe the relationship between the articles by inserting the words "subject to articles 13 to 15" at the beginning of draft article 16, as suggested in paragraph 51 of the report. It was not clear whether such an inclusion was meant to imply that draft articles 13 to 15 should have priority and, if so, what that priority would entail. Would it mean that even if draft article 16 did not establish responsibility for recommendations, such responsibility could be derived from draft articles 13 to 15? His sense was that once the reference to responsibility for recommendations was deleted from draft article 16 there would no longer be any need to explain how the provision related to draft articles 13 to 15.

He wished to make a few comments on Mr. McRae's statement, since it went against the general thrust of the statement he himself had made at the previous meeting. When discussing the diversity of international organizations, it was important to focus on when such diversity was really relevant. There were two dimensions to the project under consideration. The first was the relationship of the international organizations to their members. In that relationship diversity played an extremely important role, and there were many references in the draft articles to "the rules of the organization", which was a reaffirmation of the principle of diversity. However, in the relationship between an international organization and a third State subjected to, an internationally wrongful act, such diversity should not be overstated; it was not of para-

mount importance whether the international organization in question was large or small, technical or general in nature.

As far as the "carbon copy" criticism was concerned, his statement at the previous meeting had been misunderstood if it had been interpreted as meaning that the Commission's work on the law of treaties was similar to its work on the responsibility of international organizations. It was in fact more difficult to take a carbon copy approach in the area of the law of treaties because parliaments were required to ratify treaties, whereas international organizations did not have analogous bodies.

Similarly, there were certain norms that he considered as being close to general principles of international law and for which it was not necessary to give numerous examples of practice, even though such practice was assumed to exist. Responsibility was one area in which the notion of a general principle was more inherent than in other areas of international law, such as diplomatic law. The distinction between codification and progressive development in that particular area of the law was not as clear-cut as it was in other areas, and it should not be made so artificially.

As to whether damage ought to be included as an element of an internationally wrongful act, the reasons that it had not been included in the draft articles on State responsibility had nothing to do with the nature of States but related to the nature of certain rules of international law which did not require the payment of damages in the event of their violation. He did not see why the same should not apply to international organizations. Sometimes relying on a general underlying principle was a legitimate approach to follow, and he did not feel it was necessary to seek instructions or further advice from representatives of international organizations on the matter.

Lastly, while he had no objection to the idea of adding an introduction to the draft articles that would outline the concerns raised, he believed it was important to keep things in perspective and not to reopen the debate on a project that was close to fruition.

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Held at the Palais des Nations, Geneva, on Tuesday, 26 April 2011, at 10 a.m.

Responsibility of international organizations

(p. 9) Mr. Nolte said that the topic of responsibility of international organizations was central to the Commission's current agenda. As the Special Rapporteur had been able to complete his work on time, the Commission might be able to finalize its work on the subject 10 years after its adoption of the articles on responsibility of States for internationally wrongful acts. It would be a great achievement for the Commission and for international law in general, if the law of the responsibility of the most important subjects of international law could be articulated authoritatively. The Special Rapporteur's eighth report offered an excellent basis for the remaining work and provided the key to a successful outcome. His own statement would be confined to some general comments on the introduction and first part of the report.

He agreed with most of the Special Rapporteur's analysis and conclusions. The draft articles were all well-crafted and formed a coherent, cohesive whole. It was unnecessary radically to change the approach which had been adopted. All that was needed was some finishing touches.

That meant for example that there was no need to ask whether the "principle of speciality" should be expressed in a manner different to that proposed by the Special Rapporteur, which was modelled on the articles on State responsibility. That principle was clearly set forth in draft article 63. Altering the overall structure of the articles and putting the principle of speciality in the chapter devoted to general principles could give rise to misunderstanding and suggest that the Commission was uncertain about their authoritative force. That could give rise to the practice of "special pleading" which would undermine the whole regime of responsibility of international organizations.

It was unnecessary to revisit the question of whether the draft articles rested on a sufficient amount of State practice. The law of responsibility of international organizations was not self-contained as, for example, the law of diplomatic relations among States, since it was closely

related to the law of State responsibility. That justified the Special Rapporteur's general approach which consisted in asking, with regard to rules resting on little practice, whether there were any good reasons for departing from the approach adopted for the articles on State responsibility. If there were none, the need to preserve the consistency of the law of responsibility and the principle of responsibility itself called for adherence to the rule established for States. The same approach had been followed successfully when the Commission had drafted the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.

At that juncture, it was preferable not to try to solve the question of rules on the invocation of the responsibility of a State by an international organization. While it was regrettable that that issue had not been addressed in either the articles on State responsibility or the draft articles on responsibility of international organizations, since no clear trend had emerged, either in the Commission or among States and international organizations, in favour of deciding the initial question of whether rules on that matter should be included in the draft articles under consideration, it was too late to attempt, for completeness sake, to formulate rules which had not been properly researched. He therefore agreed with the Special Rapporteur's proposal to contemplate a separate study and not to delay the completion of work already under way. Draft article 1 should therefore remain unaltered.

As far as draft article 2 was concerned, he still agreed with the Special Rapporteur that the definition of "international organization" should not be confined to intergovernmental organizations, but he wondered if the commentary could explain that not every association of one or more States with private entities was necessarily an international organization. That status also presupposed that association had a public function and that the participating State(s) had a special position within it.

He concurred with the Special Rapporteur that the Commission should not seek to narrow the definition of the "rules of the organization", because the great variety of rules might not be fully appreciated if some were highlighted and others omitted.

He supported the Special Rapporteur's proposal to include a definition of "organ" in draft article 2, but the term should not be defined in such a way as to exclude the possibility of an "agent" being an "organ" and vice versa. In proceedings before the International Court of Justice, for example, the agent of a government could be an organ of the State. The difference between an "organ" and an "agent" lay primarily in the focus on various aspects of the same phenomenon: the term "organ" referred to the specific legal competence of an entity, including a natural person, to act, whereas the term "agent" referred primarily to the person with specific legal competence to act. The difference between "organ" and "agent" was not that an "agent" operated on the basis of being charged *ad hoc* with a function, while an "organ" exercised a certain function continually. That distinction was often difficult to make in practice and was unnecessary for the purposes of the draft articles under consideration. He therefore proposed that "organ" and "agent" should be defined in the following manner:

"(c) 'Organ of an international organization' means any person or entity which has a legal capacity to act in accordance with the rules of the organization;

(d) 'Agent' means an official or other person or entity through whom the organization acts and who is charged by the organization with carrying out, or helping to carry out, one of its functions."

It was not necessary to define "organ" as any person "who has that status". A reference to "that status" might have been advisable in the context of the law of State responsibility to bring out the fact that it was up to States to define their organs. Technically, however, that reference was not only superfluous; it made the definition circular.

62nd Session (2010)**3071st Meeting, 30 July 2010**

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Sixty-second session (second part)**Provisional summary record of the 3071st meeting**

Held at the Palais des Nations, Geneva, on Friday, 30 July 2010, at 10 a.m.

Treaties over time***Report of the Study Group***

(p. 3) Mr. Nolte (Chairman of the Study Group on Treaties over time) said that the Study Group had held four meetings, on 5 and 26 May and 28 July 2010. It had begun its work on the aspects of the topic relating to subsequent agreement and practice, on the basis of an introductory report prepared by its Chairman on the pertinent jurisprudence of the International Court of Justice and of arbitral tribunals of ad hoc jurisdiction. The report addressed a number of questions, including certain terminological issues; the general significance of subsequent agreement and practice in treaty interpretation; the question of inter-temporal law; the relationship between evolutionary interpretation and subsequent agreement and practice; the beginning and the end of the period within which subsequent agreement and practice could take place; common understanding or agreement by the parties, including the potential role of silence and omissions; attribution of conduct to the State; and subsequent agreement and practice as a possible means of treaty modification. Except for the last item, deferred for lack of time until the next session, all those questions had been the subject of preliminary discussions within the Study Group.

Aspects touched upon included whether, in the interpretation of treaties, different judicial or quasi-judicial bodies had a different understanding of, or had a tendency to give different weight to, subsequent agreement and practice; and whether the relevance and significance of subsequent agreement and practice could vary, depending on factors relating to the treaty such as its age, its subject matter or its past- or future-oriented nature. It had generally been felt that no definitive conclusions could be drawn on those issues at that stage.

During the second meeting, some members of the Study Group had asked for additional information to be provided on relevant aspects of the preparatory work for the 1969 Vienna Convention on the Law of Treaties. At the third meeting, the Chairman had accordingly submitted an addendum to his introductory report, dealing with the preparatory work relating to the rules on interpretation and modification of treaties and on intertemporal law. The addendum described the Commission's drafting work during the first and second readings of those draft articles relating to the interpretation and modification of treaties and the changes made to those texts in the 1969 Vienna Convention on the Law of Treaties. It concluded that the Convention's article 31, paragraphs 3 (a) and (b), on "subsequent agreements" and "subsequent practice", were the remnants of a more ambitious plan to deal with inter-temporal law and the modification of treaties. The plan could not be realized for a number of reasons, in particular the difficulties of formulating in an appropriate way a general rule on inter-temporal law and the reluctance by States at the United Nations Conference on the Law of Treaties to accept an explicit rule on the informal modification of treaties by way of subsequent practice. However, no differences in substance appeared to have caused the initial, more ambitious plan to have been abandoned.

The Study Group had also discussed its future work. During the Commission's next session, it intended first to complete its discussion of the introductory report prepared by its Chairman and then move to the analysis of pronouncements of courts and other independent bodies under special regimes. That would be done on the basis of a report to be prepared by the Chairman. In parallel, contributions were to be made by some members on specific issues, such as subsequent agreement and practice in the field of environmental law and treaties pertaining to specific regions.

At its final meeting, the Study Group had examined the idea that a request for information from Governments might be included in chapter III of the Commission's report on its current session and be brought to the attention of Governments by the Secretariat. It was generally felt that any information provided by Governments would be extremely useful, in particular with respect to the consideration of instances of subsequent practice and agreement that had not been the subject of a judicial or quasi-judicial pronouncement by an international body. The Study Group therefore recommended that chapter III of the Commission's report on its current session should include a request for information on the topic "Treaties over time". The Study Group had been able to agree on a provisional text for the request, subject to any modifications the Commission might introduce when adopting chapter III of its report. The text of the request had been circulated to all members of the Commission.

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Sixty-second session (second part)

Provisional summary record of the 3070th meeting

Held at the Palais des Nations, Geneva, on Thursday, 29 July 2010, at 10 a.m.

Other Business

Settlement of disputes clauses

(p. 12) Mr. Nolte said that the study of the topic fit well in the Commission's work, in particular at a time when the General Assembly was addressing the question of the rule of law at national and international levels. Sir Michael Wood had evoked the current trend towards a wider acceptance of dispute settlement procedures and had come to the conclusion that a presumption should be considered to exist in favour of including dispute settlement clauses in international instruments. He personally would generalize that suggestion by recommending that the Commission should include the question of dispute settlement in all its work, not as a separate matter, but in all topics in which it was relevant. He agreed with Mr. McRae that the Commission should examine more closely why States were at times reluctant to use dispute settlement procedures and what incentives might encourage them to resort more readily to them.

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Held at the Palais des Nations, Geneva, on Friday, 16 July 2010, at 10 a.m.

Reservations to treaties (*continued*)

(p. 14) Mr. Nolte said that he would focus in his comments on the most important question, namely whether there should be a positive or negative presumption with respect to the severability of an impermissible reservation from the consent of the reserving State to be bound by the treaty. Whereas he agreed with most of the Special Rapporteur's research and analysis, he was not fully persuaded by his conclusion of a positive presumption. One reason for his doubts had been articulated by Mr. Gaja and Sir Michael Wood: the lack of an objective institution for most treaties for determining whether a reservation was actually contrary to the object and purpose of a treaty and was therefore impermissible.

He also wondered whether the logic of the human rights treaty bodies could be extended to the general law of treaties. After all, the reason why human rights treaty bodies had arrived at the conclusion that impermissible reservations were void and severable essentially lay in the special nature of human rights treaties. Such treaties had a double characteristic: they usually had a treaty body which was able to a certain extent to make an objective determination, and they constituted an objective order of values or a special kind of community. Both characteristics spoke in favour of a presumption that a State which consented to be bound by them did not wish to make that consent dependent on the permissibility of its reservations.

However, most other treaties did not have that double characteristic of human rights treaties, which defined their nature. That was why he believed that the "nature of the treaty" should be included in any list of criteria for establishing, as the Special Rapporteur suggested in paragraph 481 of addendum 1, whether a treaty was subject to a positive or negative presumption. A mere reference to "the object and purpose" of the treaty was insufficient. After all, a treaty might have different objects and purposes, and whereas the presence of an institution for an independent assessment was not always identified as being an essential part of the object and purpose of a treaty, it was clear that such an institution was an essential element which determined the nature of the treaty. He therefore proposed the inclusion of "the nature of the trea-

ty" in any list which served to establish whether a positive or negative presumption of severability should apply. That would make it possible to carefully extend the positive presumption, as it was now recognized for human rights treaties, to other treaties of a similar nature, namely those treaties which protected other common goods or common values and where the permissibility of a reservation, in particular its compatibility with its object and purpose, could be determined objectively. Thus, referring to the nature of the treaty would have the advantage that neither a positive nor a negative presumption would be too strong, and it would leave some leeway for a differentiated development of practice.

Another important consideration which made him hesitate to accept a broad positive presumption was that it could have an inappropriate retroactive effect. Sir Michael Wood had already hinted at that problem. A positive presumption that went beyond human rights treaties would be a new rule of international law, a progressive development. However, such a new rule should not necessarily be applied retroactively to reserving States, which could not reasonably expect that the rule would be applied to them. Indeed, the Special Rapporteur demonstrated in his report that the human rights treaty bodies had painstakingly explained, for example in the *Belilos* and *Loizidou* cases, why the reserving States had run the risk that their reservations would be considered to be severable from their consent to be bound by the treaty. Thus, if the Commission accepted that there was a positive presumption beyond human rights treaties, it should be made clear that that presumption did not apply retroactively.

A further reason for his doubts concerning a positive presumption had to do with the consequences which such a rule was likely to have in the reality of international relations. For example, if it was assumed that the positive presumption which the Special Rapporteur proposed now had already been adopted by the Commission in 1990, it was likely that the issue would have been raised in the United States of America during the ratification process, completed in 1992, of the International Covenant on Civil and Political Rights. Members of the United States Congress would probably have insisted that the United States make it clear that its reservations were the conditions for its consent to be bound by the treaty. Such a clarification would have made it less likely that other States would have formulated objections to the permissibility of certain reservations made by the United States, as they had done. Thus, the effect of a positive presumption in that case would have been the opposite of what could have been expected, namely a more limited reservations dialogue and more reservations of doubtful permissibility which remained unchallenged because other States wanted the United States to be bound by that human rights treaty. In such a situation, a treaty body would have less *opinio juris* to rely on for a possible conclusion that the reservation was impermissible. He wondered whether such bodies always had enough authority to declare a reservation to be impermissible without the support of other States. In any event, such bodies would probably hesitate to declare a reservation impermissible if the reserving State had made it clear that its consent to be bound by the treaty was dependent on the reservation.

On the other hand, a positive presumption would probably have the opposite effect on such States whose legislature was less determined than the one in the United States and which were more inclined, for various reasons, to accede to certain treaties. Such States would hesitate to expressly formulate the condition that their consent to be bound was dependent on their reservations. A positive presumption might incite other States to formulate objections, thus casting even more doubt on the validity of the reservations concerned. A positive presumption might have the - clearly unintended - effect of privileging powerful States and putting weak States under additional pressure. It would also raise the problem for independent decision makers and third parties of how to apply equal standards with respect to similar reservations, some of which were expressly considered to be conditions for consent to be bound, whereas others were not. A negative presumption had the virtue of not forcing such a question to be answered

immediately and of leaving the situation somewhat ambiguous so that the reservations dialogue had time to resolve differences without an immediate confrontation.

He was aware that some of his arguments were not purely doctrinal, but since the Commission was confronted with the question of whether it should engage in progressive development, or at least in progressive clarification, it should also consider the consequences of a rule which seemed seductive for lawyers, with their inclination to favour legal security, and for international lawyers, who were inclined to promote the progressive development of international law by moving from subjective assessments by individual States to objective determinations by independent third party decision makers. He shared both inclinations, but cautioned against overburdening the consent of States to be bound by a treaty with "objective" considerations. Although he shared the Special Rapporteur's declared intention to find a middle way between the two approaches, he thought that a true middle way would be to refer mainly to the "nature of the treaty" and to leave open the possibility of further development.

He agreed with Mr. Gaja and Sir Michael Wood that draft guideline 4.7.2 went too far in formalizing a binding effect of an interpretative declaration. In his view, draft guideline 4.7.2 was inconsistent with the limited effects which the Special Rapporteur attributed to interpretative declarations compared to reservations.

3064th Meeting, 14 July 2010

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International Law Commission
Sixty-second session (second part)**Provisional summary record of the 3064th meeting**

Held at the Palais des Nations, Geneva, on Wednesday, 14 July 2010, at 10 a.m.

Expulsion of aliens (*continued*)

(p. 6) Mr. Nolte said first of all that he wished to congratulate the Special Rapporteur on Part Two of his excellent sixth report; since procedural rights were essential for noncitizens who were subject to expulsion, the Special Rapporteur was also to be commended for focusing on that issue. As the Special Rapporteur pointed out, the distinction between “legal aliens” and “illegal aliens” was well established and should be taken into account, but always bearing in mind the statement in paragraph 10 of the report that illegal aliens “remain human beings whatever the conditions under which they entered the expelling State”. He agreed with Mr. Gaja that it was neither satisfactory nor appropriate that “illegal aliens” should have no procedural rights. Draft article A1, paragraph 2, merely indicated that a State could apply the rules relating to legal aliens to illegal aliens also. One possible source of inspiration for the formulation of the procedural rights of illegal aliens might be Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in member States for returning illegally staying third-country nationals. The Directive was to be transposed into domestic legislation by member States of the European Union by the end of 2010 so that any discrepancies between the different laws of those States would disappear. In that connection, he wished to say that the description in paragraphs 18 to 21 of the report of German legislation on the procedure for expulsion of illegal aliens was incomplete and might therefore be misleading. In Germany, illegal aliens were in fact entitled to procedural rights relating to the expulsion measures that must be applied when they would not leave the country voluntarily.

Draft article A1, paragraph 2, should not leave the procedural rights of illegal aliens completely open, even though it was not easy to formulate such rights. The European Union Directive he had just mentioned drew certain important distinctions. According to article 2, paragraph 2 (a), of the Directive, member States could decide not to apply the Directive “to third-country nationals who are subject to a refusal of entry in accordance with Article 13 of the Schengen

Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State". The provision clearly showed that the problem of the procedural rights of illegal aliens was not one that could be solved by a simple rule. The Special Rapporteur recognized that when he stated in paragraph 33 of his report that "it is apparent from national laws that a summary or special expulsion procedure may be applied when the alien manifestly has no chance of obtaining entry authorization" and in certain other cases. He therefore questioned whether draft article A1 could simply be referred to the Drafting Committee for a minor technical adjustment. Mr. Gaja had mentioned important considerations of principle, some of which he found convincing, but about which he still had some doubts, in particular the suggested analogy with criminal law. A more thorough discussion on the procedural rights of the category of "illegal aliens", within which a number of distinctions needed to be drawn, seemed necessary.

Turning to the question of the procedural rights of aliens lawfully residing in the expelling State, he said that he agreed with draft article B1 and most of the reasoning underpinning draft article C1, except when the Special Rapporteur based his reasoning on European Union legislation, which applied only to the free movement of citizens of the European Union within its territory (paras. 118–126). He noted with satisfaction, however, that the Special Rapporteur recognized, in principle, that the rules governing the expulsion of European Union citizens applicable among member States of the European Union could be different from the general rules when he stated in paragraph 33 of his report that "a special procedure may also apply when the alien is not a national of a State having a special arrangement or relationship with the expelling State". He himself felt it important to mention that point because of the debate in the Drafting Committee concerning the nondiscrimination provision contained in draft article 10. He endorsed the substance of the rules set forth in draft article C1 with respect to aliens lawfully residing in a given country. He was not sure what exactly was meant by the reference to discrimination in paragraph 1 (d), although he supposed that it was an implicit reference to draft article 10 on non-discrimination. He also wondered whether, rather than to speak of the "right to interpretation and translation into a language he or she understands", it might not be better to refer to "a right to linguistic assistance", since in practice it was sometimes difficult to determine which language a person understood. That concern was probably more justified in the case of "illegal aliens" than with regard to noncitizens residing lawfully in a country, however.

Should the Commission really recognize a right to legal aid? It would not pose a problem for European States, since that right was already recognized in the Directive of 2008, but would other States be prepared to recognize it as well? Perhaps it would be more appropriate to say that aliens had a right to legal aid without discrimination when such a right was granted under national legislation to other persons and in other situations. Lastly, he noted with interest Mr. Gaja's proposal to add a right to the list in draft article C1 under which an expulsion decision would not be enforced until a review decision was handed down. Mr. Gaja based that proposal on an interpretation of article 13 of the International Covenant on Civil and Political Rights, but he himself considered that article 13 had a somewhat wider significance, in that it might provide justification for certain restrictions imposed on grounds of national security. He therefore suggested that a reference to national security should be included somewhere in the list of rights contained in draft article C1, along the lines of article 13 of the Covenant. All in all, he was in favour of referring draft articles B1 and C1 to the Drafting Committee but did not think that the question of the procedural rights of "illegal aliens" could simply be resolved by referring draft article A1 to the Drafting Committee. Like Mr. Gaja, he considered that the draft articles should recognize that "illegal aliens" should have procedural rights, but the Commis-

sion needed to look more closely at how such rights should be formulated: it should not leave it to the Drafting Committee to deal with that complicated issue.

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Held at the Palais des Nations, Geneva, on Wednesday, 7 July 2010, at 10 a.m.

Effects of armed conflicts on treaties (*continued*)

(p. 5) Mr. Nolte said that, at the previous meeting, Mr. Candioti had made a very important point when he had reminded the Commission that it should always remember that the main aim of its current exercise was to affirm the stability of treaty relations, even during an armed conflict. The principal purpose of the draft articles was to make it clear that the old principle that war ended the effects of treaties was no longer valid and had been replaced by a more differentiated set of rules and presumptions which emphasized the preservation, as far as was possible and reasonable, of treaty relations, even in a situation of armed conflict. Nevertheless that exercise was situated within the bounds of general international law. That meant that the Commission must take account of some very important general concepts and rules, especially the concept of “armed conflict”, the right of self-defence and the prohibition of aggression, all of which had been debated and developed in a specific context and with certain policy considerations in mind. When the Commission had debated those concepts and rules in connection with the draft articles, it had sometimes focused too much on determining their relative importance and significance in relation to its general policy and had paid insufficient heed to the effects of the meaning given to the terms “armed conflict”, “self-defence” and “aggression” in the context of the effects of armed conflicts on treaties. He was part of the consensus within the Commission that the term “armed conflict” should refer to both international and non-international armed conflicts and that, in order to define “armed conflict” it was necessary to adopt the same approach as that applied in the *Tadić* judgment. The reason why that approach had been chosen had little to do with the issue of the effects of armed conflicts on treaties, but was to be found more in the general development of the international law of armed conflict. In other words, it had been chosen because of the growing difficulty of distinguishing between international and non-international armed conflicts and because of the changing nature of armed conflicts in the current world. It was the right decision, but it had crucial implications for the draft articles. The possibility of terminating or suspending treaty relations as a result of an armed conflict had hitherto been debated mainly in respect of international armed conflicts.

The primary purpose of the draft articles was, however, to confine belligerent States' capacity to end or suspend treaty relations. By extending the concept of an armed conflict to non-international armed conflicts the Commission was, on the contrary, offering States a possibility of terminating or suspending treaty relations which had not existed previously. By following that general trend in international law, it was undermining the draft articles' principal purpose, namely to ensure the stability of treaty relations. It was therefore quite legitimate for the Special Rapporteur repeatedly to ask the Commission if it really wished to frustrate its chief aim, or whether it would not prefer to follow the suggestion made by one State that it should postulate the sanctity of treaty relations in the context of non-international armed conflicts. If non-international conflicts were limited to situations where the Government of a State dealt by itself with an insurrection in its own territory, there would be no justification for their inclusion in the draft articles, for there was no reason why a classic civil war situation should give a State the possibility of terminating or suspending treaty relations with other States. The general rules of treaty law, especially those relating to impossibility of performance or a change in circumstances, would probably be sufficient to safeguard the legitimate interests of the States concerned. The term "non-international armed conflict" also covered other situations such as those in which third States' forces fought alongside Government troops to combat armed groups and, to some extent, those where States intervened in the territory of another State which was unable to control that part of its territory from which armed groups were launching operations against the intervening State. Those situations could give States legitimate grounds for ending or suspending treaty relations, especially States whose territory was being used for foreign troops' operations with or without the consent of the Government concerned.

If the definition of "armed conflict" was seen from that angle, it was quite logical to try to nuance the rules contained in the draft articles so that they did not unintentionally undermine the stability of treaty relations. But it would be inappropriate simply to exclude non-international armed conflicts from the scope of the draft articles, for it was often hard to tell the difference between them and international armed conflicts between States. He was not persuaded by the solution proposed by the Special Rapporteur, namely to allow States to suspend, but not terminate, treaty relations in the event of non-international armed conflicts. That distinction was misleading, because it wrongly suggested that the suspension of a treaty was a mild measure and it was based on the misconception that non-international armed conflicts involved only one Government and rebels. What should therefore be done? First, the Special Rapporteur could stress in the commentary that the purpose of including non-international armed conflicts and widening the concept of "armed conflict" was not to expand States' possibilities of terminating or suspending treaty relations during classical armed conflicts where a Government was contending on its own with an insurrection in its territory. He should likewise indicate that the draft articles did not address the potential difficulties which a party to the treaty could face in honouring its obligations because of a non-international armed conflict – that was a question of general treaty law; the draft articles had to do with the fact that relations between parties to a treaty altered as a result of an armed conflict. Such a change in relations could arise when a third State was involved in a non-international armed conflict, but obviously not when a State was dealing with an insurrection on its own. Secondly, the Commission could insert into the draft articles an additional paragraph which would read, "The present draft articles apply to noninternational armed conflicts which by their nature or extent are likely to affect the application of treaties between States parties." That sentence, which was borrowed from the previous definition of armed conflicts proposed by Sir Ian Brownlie, referred only to noninternational armed conflicts. Its purpose was to serve as a reminder that non-international armed conflicts must have an additional, inter-State dimension before the principle of *pacta sunt servanda* could be called into question. In that connection it was also necessary to consider the application of the rules of *jus ad bellum*, or to be more exact, of *jus*

contra bellum. Of course, the right of self-defence should not be called into question and, equally plainly, an aggressor should not benefit from aggression. But, when reaffirming the basic rules of *jus contra bellum*, care should be taken not to reintroduce inadvertently possibilities that had been excluded or restricted at the outset. The Commission had agreed that, in the interests of the principle of *pacta sunt servanda*, the outbreak of an armed conflict did not *ipso facto* entail the termination or suspension of treaties. The way in which the Commission reaffirmed the basic rules of *jus contra bellum* should not therefore amount to an invitation to States to terminate or suspend treaty obligations by simply invoking their right of self-defence, or to deny their opponents that opportunity by branding them as aggressors. States would then only have to adjust their terminology in order to achieve undesirable goals.

That concern should, in principle, lead him to support the positions of Mr. Murase and Sir Michael who were in favour of deleting draft articles 13 and 15 and of replacing them with a “without prejudice clause”. But as alluding to a problem was not enough to solve it, it would be preferable to reaffirm the existing rules as clearly as possible and to try to avert the possibility of the abuse to which Mr. Saboia had referred by careful formulation and explanatory commentaries. The fact that a determination of whether a situation constituted self-defence or aggression was infrequently or rarely objective was a general problem of international law which the Commission could not solve within the framework of the current topic.

Turning to draft article 13, he approved of the introductory clause “subject to the provisions of article 5”, since that reference was essential in order to limit abuse of the right of self-defence. Some treaty rules, especially those of international humanitarian law, but also rules concerning borders, could not be terminated or suspended by invoking the right of self-defence. Since article 5 contained only an indicative list, the extent to which the exercise of the right of self-defence could override certain treaty obligations was not strictly limited but open-ended to allow legitimate uses of that right. For that reason, unlike Mr. McRae, he did not think that the reference to draft article 5 would deprive draft article 13 of any effect. On the contrary, if the indicative list were to be discarded, which was apparently what Mr. McRae was suggesting, and if everything became dependent on the specific circumstances of the case in question, powerful States would have ample possibilities of defending their preferences or of accusing others, as the case might be. He concurred with the Special Rapporteur that the right of self-defence must be exercised “in accordance with the Charter” and not, as Sir Michael had suggested, as “recognized in the Charter”. The fact that the Charter did not explicitly mention the principles of necessity and proportionality could not be remedied by replacing the phrase “in accordance with the Charter” with the word “recognized”. The right of self-defence had two, closely linked sources, the Charter and customary international law.

Draft article 13 called for one last comment: it would be wise to make it clear that a State exercising its right of self-defence was not entitled to terminate or suspend a treaty as a whole when all that was needed was the termination or suspension of certain divisible obligations under the treaty. Admittedly that principle had already been set forth in a previous draft article, but it deserved an express mention in the context of self-defence. He therefore proposed that the end of draft article 13 should be reformulated to read, “... a State ... is entitled to suspend in whole or in part the operation of a treaty to which it is a party as far as this treaty is incompatible with the exercise of this right”. As they stood, the words “or in part” did not allay his concerns, since they related only to the entitlement to suspend the treaty’s operation and not to any restriction of that entitlement.

Draft article 15 posed more difficulties than draft article 13. Once again, it was necessary to ensure that the legitimate principle that aggression must not pay could not be misused to undermine the basic aim of the current exercise, which was to uphold the *pacta sunt servanda* rule. As Mr. Dugard had pointed out at the previous meeting, the danger was that the word “aggression” was an evocative and emotive term. But the Commission should not attempt to

ward off one danger by creating another. Acceptance of the alternative solution proposed by the Special Rapporteur and endorsed by Mr. Dugard and Sir Michael, namely a general reference to the prohibition of the use of force, would multiply the uncertainties and possibilities of abuse, as Messrs. Melescanu, Kamto, Saboia, McRae and Wisnumurti had pointed out. Violations of the prohibition of the use of force had been asserted and could arguably be asserted in so many situations, that draft article 15 would almost always be cited, if such a solution were to be adopted. He therefore preferred the solution proposed by the Special Rapporteur, namely that of limiting draft article 15 to situations of aggression. The fact that hitherto the Security Council had rarely characterized a situation as one of aggression was not a vice but a virtue. That practice suggested that such a qualification had to be applied restrictively. In that context he was likewise in favour of a reference to General Assembly resolution 3314 (XXIX). The resolution might not be entirely satisfactory and did not cover all conceivable forms of aggression, especially some of its modern manifestations, but it encompassed a generally accepted basic list which was not restrictive. Although the Kampala conference had concerned only the criminal aspect of aggression, it had undeniably reaffirmed the pertinence of resolution 3314 (XXIX) by adopting a definition of the crime of aggression based on it.

On the other hand, he agreed with Sir Michael that resolution 3314 (XXIX) should not be placed on an equal footing with the Charter. The wording of draft article 15 should indicate that there was room for the development of norms below the level of the Charter. He therefore proposed that the beginning of that provision should be reformulated to read, "A State committing aggression within the meaning of the Charter of the United Nations, in particular according to resolution 3314 ... shall not terminate ...". That wording allowed for the possibility that the Security Council might well qualify certain acts not explicitly mentioned in resolution 3314 (XXIX) as acts of aggression and it indicated that other forms of aggression might exist. Draft article 15 raised an issue of interpretation, insofar as it was not always easy to say when the termination or suspension of a treaty obligation was "of benefit" to the aggressor State. In some instances, the armed conflict caused by aggression might make the operation of certain treaties or the fulfilment of certain treaty obligations pointless. In such cases, it was conceivable that the aggressor could terminate or suspend a treaty which was equally senseless or burdensome for both parties, if such action did not give it a specific benefit that was unavailable to the other party.

In draft article 17 the situation with regard to a general saving clause covering other cases of termination, withdrawal or suspension, was more complex than the wording of that provision suggested. The draft articles did provide an indication of whether a situation had changed so radically that article 62 of the Vienna Convention on the law of treaties could be invoked. In some ways, they clarified, illustrated or fleshed out article 62 of the Vienna Convention. Article 62 and possibly other grounds for termination, withdrawal or suspension were certainly preserved, but in the sense that they had to be interpreted in the light of the draft articles in cases which fell within their scope. That consideration might be too complicated to be expressed in the text of the draft articles, but it could be reflected in the commentaries.

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Effects of armed conflicts on treaties (*continued*)

(p. 12) Mr. Nolte said that draft article 3 appropriately expressed an important general principle which, as the Special Rapporteur noted, was not a presumption. It provided a necessary clarification before draft article 4 set out the most important fundamental rule: the continuation of treaty obligations depended on more specific circumstances than the outbreak of an armed conflict, namely the nature of the specific treaty, its obligations and its relation to the armed conflict. He agreed with those speakers who would like the term *ipso facto* to be replaced by a non-Latin wording.

With regard to draft article 4, he endorsed the remarks of those who were in favour of deleting the reference to the intention of the parties. The Commission had already examined the question and had decided not to include intention, not because it was very often a fiction, but because neither in article 31 nor anywhere else in the Vienna Convention was there any reference to it, and because the omission had been a conscious decision on the part of the drafters of the Vienna Convention, namely the Commission and the State parties.

He agreed with the other explanations provided by the Special Rapporteur on draft article 4, with the exception of his comments in paragraph 48 of the report on why he had not specifically mentioned the subject matter of the treaty as one of the indicia. He did not think that draft article 5, which dealt with certain aspects of subject matter, was a sufficient reason not to include a general reference to it in draft article 4. As the title of draft article 5 indicated, the subject matter served to establish the circumstances in which a treaty continued in operation, but draft article 4 enunciated a more general norm, namely that the subject matter of the treaty, together with other factors, determined whether or not it could be concluded that the treaty continued in operation. Although the Special Rapporteur indicated in paragraph 48 that draft article 4, subparagraph (b), mentioned the subject matter, it should be spelled out more clearly. The Drafting Committee should also replace “*indicia*” by “*factors*” or some other more common word.

He supported the compromise solution proposed by the Special Rapporteur to annex an indicative list of different categories of treaties. To place the list in the commentary would render the draft articles less useful in practice, whereas to incorporate them into the body of the text might soon make the articles seem outdated.

Draft article 5 should include a reference to draft article 10 (Separability of treaty provisions), which embodied a particularly important principle in the current context. It would be preferable to be somewhat more cautious and to include in the indicative list only those categories of treaties for which it could be said with a degree of certainty that practice or their nature and subject matter clearly implied that they continued in operation in the event of an armed conflict. The longer the list, the more important it became to emphasize the separability of the respective treaties. As to the sequence of the various categories of treaties, it should follow, if possible, a visible logic. One possibility would be to arrange the treaties depending on the extent to which they reflected choices of international public policy, such as treaties on international humanitarian law and borders, or the degree to which they protected private interests.

He agreed with the Special Rapporteur that treaties concerning international criminal jurisdiction should be added to the indicative list. However, the Drafting Committee should ensure that only those international criminal jurisdictions were included which actually applied international criminal law. After all, it could not be ruled out that international criminal courts or tribunals would be established in the future whose task would be to apply national criminal law as well.

On draft article 6, he wondered whether the unclear reference to “lawful” agreements could not be replaced by a reference to article 41 of the Vienna Convention. He agreed with the Special Rapporteur concerning the substance to draft article 7 and had no objection to it being moved forward so that it followed draft article 3.

The notification procedure set out in draft article 8 was convincing (apart of course, from the reference to “intention”), and the requirement to raise an objection within six months would constitute an appropriate progressive development of international law, for the reasons given by the Special Rapporteur.

As to draft article 11, he shared the concern of those who thought that, given that it was virtually impossible to foresee how an armed conflict would unfold, and in particular in view of the innumerable possibilities for escalation, it was difficult to accept such a strict rule on the loss of the right (or possibility) to terminate or suspend a treaty. A reference – *mutatis mutandis* – to article 62 of the Vienna Convention would take due account of any fundamental change of circumstances.

He thanked the Special Rapporteur for his clear and balanced report and hoped that the draft articles introduced therein could be referred to the Drafting Committee.

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Held at the Palais des Nations, Geneva, on Friday, 28 May 2010, at 10 a.m.

Effects of armed conflicts on treaties (*continued*)

(p. 10) Mr. Nolte said that the proposals made by the Special Rapporteur were a good mix between conservation of the groundwork that had been built under the able guidance of the regretted Sir Ian Brownlie and modifications resulting from comments by States and the Special Rapporteur's own analysis. His work was a promising basis for successful completion of the project.

With regard to draft article 1, he agreed with the Special Rapporteur and a number of speakers that not only international but also non-international armed conflicts should be included in the scope of application. The practical importance of non-international armed conflicts today, the difficulty in distinguishing between international and non-international armed conflicts in some situations and the Commission's decision to include both in the text adopted on first reading all spoke in favour of that approach, which also seemed to be accepted by a majority of States. It was true, however, that the effects on treaties would differ somewhat, depending on whether an international or a non-international armed conflict was involved.

He shared Mr. Gaja's worries about whether it was appropriate for the scope of the draft to cover a treaty relationship between two States which were on the same side of an international armed conflict. A treaty would be affected by an international armed conflict for different reasons, depending on whether the parties stood on the same or opposing sides. Perhaps draft article 10 on separability of treaty provisions was the only possible answer, and it would be sufficient to include some criteria and references to practice in the commentary to draft articles 1 and 10.

With regard to draft article 2 (b), he supported the Special Rapporteur's proposal to adopt a definition of armed conflict based on the *Tadić* decision of the International Criminal Tribunal for the Former Yugoslavia. That definition had received wide support among States and had been incorporated verbatim in article 8, paragraph 2 (f), of the Rome Statute of the International Criminal Court. The definition that the Commission had adopted on first reading had

been somewhat circular, mixing terminological and substantive elements, and a number of States had expressed reservations. There was thus good reason to take a fresh approach.

The first place to turn in search of a more substantive definition, of course, would be common article 2 of the Geneva Conventions of 1949 and article 1 of Additional Protocol II. As the Special Rapporteur had pointed out, however, the definition in article 2 was not very clear, and the one in article 1 was too restrictive and not quite up to date. The *Tadić* decision was, in his view, the best definition available today.

Draft article 2 (b) added clarity to the Commission's previous definition in that it focused on the actual use of armed force, explicitly mentioned armed groups and differentiated between the use of armed force in international as opposed to non-international armed conflicts, since in the latter, it needed to be "protracted", in other words, to cross a certain threshold of intensity. That requirement was important in that it would prevent the draft articles from being applied to short spasms of internal violence that should not be able to invite the reconsideration of international treaty relations.

The proposed definition also had the advantage of leaving room for interpretations and future developments in that difficult and sometimes contested field of law. He sympathized with Mr. Murase's desire for as much clarity as possible. It would indeed be a remarkable achievement if the Commission could resolve the age-old question of exactly when an armed conflict could be deemed to have broken out, but in the context of the current project, trying to do so might simply lead to fruitless argument. What was important was to give at least some indication of under which circumstances there was actually an armed conflict, regardless of when it started and who started it.

That brought up the question of whether it was appropriate to transpose a definition of armed conflict that had been formulated in the context of international criminal law into the context of treaty law. Such a transposition had been revealed as not always appropriate in the discussion of attribution of acts of non-State actors to States in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* and the *Tadić* case. In the present case, however, it was entirely appropriate to emphasize the unity of international law as the Special Rapporteur had done, although he might wish to explain in the commentary what the previous definition had said, namely that armed conflict did not presuppose a declaration of war or any other declaration. As far as occupation was concerned, he shared the Special Rapporteur's view that it should be mentioned in the commentary, as it was an instance of armed conflict.

The question of international organizations needed to be handled carefully. It would require much research, yet the Commission's goal should remain to complete the project before the end of the current quinquennium. One problem was that some organizations played a role within certain treaties, like the European Union in respect of the United Nations Convention on the Law of the Sea. He agreed with Ms. Jacobsson that it seemed unlikely that the Special Rapporteur had intended to exclude the United Nations Convention on the Law of the Sea from the scope of the draft articles.

3049th Meeting, 21 May 2010

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For participants only

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International Law Commission
Sixty-second session (first part)**Provisional summary record of the 3049th meeting**

Held at the Palais des Nations, Geneva, on Friday, 21 May 2010, at 10 a.m.

Reservations to treaties (*continued*)

(p. 5) Mr. Nolte said that he was largely in agreement with the substance of the draft guidelines proposed in the sixteenth report on reservations to treaties. However, he concurred with Sir Michael Wood that while the fifth part of the Guide to Practice ought to contain a guideline concerning newly independent States, as the Special Rapporteur had suggested, it should not begin with an exception rather than a rule merely because the only article of the Vienna Convention on Succession of States in respect of Treaties that addressed reservations concerned newly independent States.

Furthermore, there were no grounds for creating the misleading impression that the concept of a newly independent State had grown in importance since 1978. As Sir Michael had rightly noted, the opposite was true. The Commission should therefore define the category of newly independent States in such a way as to limit it to States that had achieved their independence through decolonization, in order to preclude any misunderstanding that the draft guideline in question might apply to most of the States that had achieved statehood in recent years. Accordingly, draft guideline 5.1 should come later in the Guide to Practice and should include a definition of the notion of newly independent States.

He also endorsed Sir Michael's view that the guidelines should not be drafted in overly prescriptive terms; rather, their wording should emphasize their residual nature, since State succession was a field in which the legitimate divergence of practice was not a cause for concern.

He wondered whether the rule established in draft guideline 5.3, paragraph 3, was not too rigid. In principle, of course, it was up to the reserving State to withdraw any previous reservations that were incompatible with its most recent reservation; there were, however, cases in which mutual incompatibility was not obvious and where it was simply understood that the latest reservation prevailed.

Perhaps draft guidelines 5.7 and 5.8 could be merged under the heading "Timing". Like previous speakers, he would prefer to see the final phrase "at the time of the succession" deleted

from draft guideline 5.10. He was unsure whether draft guideline 5.13 should be formulated so categorically, because if two States united it was conceivable that the effect of maintaining a predecessor State's reservation might alter its significance and meaning for the other States parties. Was it really always advisable to prevent other States parties from objecting to the extension of the reservation to the entire territory of the successor State?

Perhaps that question showed that the Drafting Committee should try to ensure that the draft guidelines encompassed a broader range of practical considerations. At the same time, he hoped that the Committee would be able to simplify those parts of the text where the wording was still difficult to understand. All in all, he was in favour of referring the draft guidelines to the Drafting Committee.

3046th Meeting, 18 May 2010

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Provisional

For participants only

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English

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International Law Commission
Sixty-second session (first part)**Provisional summary record of the 3046th meeting**

Held at the Palais des Nations, Geneva, on Tuesday, 18 May 2010, at 10 a.m.

Reservations to treaties (*continued*)

(p. 4) Mr. Nolte said he agreed with the Special Rapporteur's decision to draw a distinction between the effects of valid and invalid reservations. He therefore welcomed draft guideline 4.3, which referred to the main effect of objections while indicating that they did not have that effect if the reservation had already been accepted by the objecting State, although the notion of "establishment" did not translate that idea sufficiently clearly. Draft guidelines 4.3.1, 4.3.2, 4.3.3 and 4.3.4 were also satisfactory. It was useful to bring out the basic difference between the effects of an acceptance and those of an objection, as the Special Rapporteur had done in paragraph 334 of his report, and to emphasize that the objective of article 21, paragraph 3, of the Vienna Convention was to safeguard as much as possible the agreement between the parties.

It was also appropriate to point out, as did draft guideline 4.3.5, that the exclusionary effect of an objection could be limited to part of a treaty provision, although the current wording inadvertently suggested that the range of possibilities was extremely limited.

The distinction made in draft guidelines 4.3.6 and 4.3.7 between modifying and excluding reservations certainly helped to give a better understanding of the various possible effects of those reservations, but the distinction was not always clear and might be interpreted by someone who did not read the commentaries carefully as meaning that the two cases were mutually exclusive. In fact, however, certain reservations could have combined effects that must be taken into account. As the Special Rapporteur pointed out, quoting Frank Horn (para. 343), "a reservation does not only affect the provision to which it directly refers but may have repercussions on other provisions. An 'exclusion' of a provision, that is the introduction of an opposite norm, changes the context that is relevant for interpreting other norms". It would be worthwhile to stipulate in one of the two draft guidelines, or in a separate text, that excluding reservations could also have an indirect or direct modifying effect on other parts of a treaty.

Draft guideline 4.3.8 concerning objections with intermediate effect was satisfactory, but greater emphasis should be placed on the exceptional nature of those objections by stressing in the commentary that the underlying objective must be to safeguard the balance between the rights and the obligations flowing from the treaty (what was known as the “package deal”). The Commission must take care not to encourage a practice that was still quite rare but would cause difficulties if it became more widely used.

Due attention should be paid to Mr. Gaja’s suggestion that the reserving State should be allowed to have the last word, in a sense. He had nothing against that idea, since he shared Mr. Gaja’s concerns that, by drawing up a draft guideline on reservations with intermediate effect, the Commission might inadvertently encourage States to adopt such a practice, and that would certainly give rise to difficulties, because the fact that the reserving State had the last word might have a deterrent effect. If the option could be restricted and adequately explained in the commentary, he would be in favour of elaborating a draft guideline, as proposed by the Special Rapporteur.

He agreed with draft guideline 4.3.9 concerning the exclusion of the “supermaximum” effect of an objection to a valid reservation. The question, however, was whether the result would be that it had minimum or maximum effect. If the draft guideline made it clear that such objections would have minimum effect unless it was expressly stated that they had maximum effect, he would be in favour of draft guideline 4.3.9 as proposed by the Special Rapporteur.

As for draft guidelines 4.4.1 and 4.4.2 on the effects of a reservation on extraconventional obligations, he was of the opinion that, as such, a reservation and the combined effect of a reservation and an objection had no effect on the provisions of another treaty or on customary international law. He realized, however, that declarations of States which appeared at first sight to be reservations or objections could, in reality, have two or more facets, seeking also to produce an interpretative or other effect on another treaty or on a rule of customary international law. That would be the case, for example, when a reserving State justified its reservation by reference to what it regarded as a rule of customary international law. It would then not only be formulating a reservation but also expressing *opinio juris* on a rule of customary international law. The phrase “as such” should therefore be added to both draft guidelines. The first part of draft guideline 4.4.2 would then read “a reservation to a treaty provision which reflects a customary norm does not, as such, affect the binding nature of the customary norm”. Draft guideline 4.4.1 could be amended in a similar fashion.

He wondered if draft guideline 4.4.3 on *jus cogens* was really necessary in view of the contents of draft guideline 4.4.2 on customary law. He nonetheless shared Mr. Gaja’s opinion that draft guideline 4.4.3 was not a mere repetition of draft guideline 3.1.9. In conclusion, he was in favour of referring all the draft guidelines to the Drafting Committee.

3044th Meeting, 14 May 2010

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Provisional

For participants only

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English

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International Law Commission
Sixty-second session (first part)**Provisional summary record of the 3044th meeting**

Held at the Palais des Nations, Geneva, on Friday, 14 May 2010, at 10 a.m.

Expulsion of aliens (*continued*)

(p. 3) Mr. Nolte said that, although the Special Rapporteur's sixth report was rich and stimulating, he had doubts about some aspects of it. Generally speaking, the Special Rapporteur's very eclectic approach to the topic took in a wide range of sources, some of which were more than a century old and references to specific situations in many different places. Given the factual and legal complexity of the topic, the adoption of such an approach, albeit desirable from a strictly methodological viewpoint, would make it difficult, or almost impossible, to avoid being taxed with selectivity. For example, in paragraph 215, Germany was the first country to be mentioned under the heading "Examples of detention conditions that violate the rights of aliens who are being expelled". That paragraph did not describe detention conditions in Germany after 1945, but referred to a note from a minister at the end of the nineteenth century which had proposed the setting up of an internment camp for unauthorized immigrants. The Special Rapporteur then associated those "internment ideas" with the Nazi regime and suggested that the legal texts underpinning them had remained in force long after the establishment of the Federal Republic. Although he did not wish to comment in detail on that paragraph, he personally found it selective and emphasized that in national or international discourse it was essential to ensure that any references to past Nazi crimes and their linkage to other periods or countries were appropriate. The Special Rapporteur's references to other, mostly European or African, countries, were often based on sources whose reliability he could not assess. While the treatment of aliens certainly posed serious problems in some places, if the Commission's role was to evaluate evidence of such practices, it would have to conduct a thorough investigation – and if it embarked on such an investigation, it would also have to study the history of immigration, policy grounds and many other issues. Since it would be difficult to cover all the factual, social and political aspects of the subject, the Commission should confine its approach to the safe ground of *lex lata* which, of course, included the human rights of aliens subject to expulsion. It should likewise pay due heed to the opinions expressed by States in the Sixth Committee.

More specifically, he agreed with other speakers that draft article A on the “prohibition of disguised expulsion” should not lead the Commission to consider a new ground of prohibited expulsion, but should prompt it to make an attempt at defining expulsion appropriately in the light of the issue which the Special Rapporteur had addressed in that context. He was sceptical whether the Commission would be able to deal successfully with the question of incentive measures to encourage aliens to leave a country, or to define under what circumstances the offering of such incentives inevitably became a component of illegal forcible expulsion. As far as draft article 8 was concerned, he endorsed the opinions expressed by Mr. Gaja and Sir Michael Wood, who had explained why the issue of extradition should not be dealt with there. Like some other speakers he had serious doubts about draft article 9. Mr. Petrič had rightly emphasized that the distinction between legal and illegal aliens was very important in that context and he had personally not understood the Special Rapporteur’s explanation at the previous meeting of why that distinction would be important only with respect to the expulsion procedure. In his opinion, States might well have valid reasons to expel illegal migrants which had nothing to do with their personal conduct. Perhaps it was worth echoing what some members had already said, namely that the case law of the European Court of Justice relating to the free movement of persons did not offer a suitable basis for identifying universal rules, because it rested on a different premise. While he concurred with the Special Rapporteur that a State’s right to expel must not be exercised in an arbitrary manner, the impression should not be created that grounds for expulsion should preferably be confined to public order and public security. In short, like other speakers, he was not in favour of sending draft article 9, in particular paragraphs 2 and 4 thereof, to the Drafting Committee.

As far as draft article B was concerned, he agreed with the general idea that it was vital to protect human rights, but paragraph 2 (a) should not address, or strictly regulate, the question of the place where an alien was detained pending expulsion. It was necessary to bear in mind the possibilities open to States and the different ways of ensuring that detention did not acquire, or did not seem to acquire a punitive character. For that reason, the Commission should limit itself to the provisions of paragraph 2 (b) and the nature of the place of detention should be dealt with more flexibly in the commentary by giving examples. In conclusion, he suggested that draft article A should be referred to the Drafting Committee on the understanding that the purpose of that draft article was to provide a definition and not to create a new prohibition of expulsion separate from the others. He was not in favour of sending draft articles 8 and 9 to the Drafting Committee. That was particularly true of draft article 9, paragraphs 2 and 4, about which he had serious concerns. He found much of the substance of draft article B acceptable in principle, apart from paragraph 2 (a) but, like Sir Michael, he wondered whether its wording should be as detailed as that proposed by the Special Rapporteur.

3042nd Meeting, 11 May 2010

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Sixty-second session (first part)**Provisional summary record of the 3042nd meeting**

Held at the Palais des Nations, Geneva, on Tuesday, 11 May 2010, at 10 a.m.

Reservations to treaties (*continued*)

(p. 10) Mr. Nolte said that he had a few comments on draft guidelines 4.2.3 to 4.2.7. The Special Rapporteur had evoked the practice of depositaries that deviated from the provisions of article 20, paragraph 4 (c), of the Vienna Conventions, which required the acceptance of a reservation by at least one other State for the State which had formulated the reservation to become a party to the treaty. The Commission should look at the significance and the intention of such practice. His impression was that the motivation behind the practice of the depositaries and its acceptance by States was not to deviate from the Vienna Conventions, but rather to apply them less strictly so as not to pass judgement on the substantive effects of reservations. While that was sound, it perhaps went too far, because waiting for acceptance was not tantamount to making such a judgement. Thus, it could not be concluded that subsequent practice implied an informal modification of the Vienna regime. On the other hand, important practice existed and could not be ignored. Sir Michael Wood had rightly stressed that there could not be two rules, one stemming from international law and the other from the Vienna Conventions, because that would lead to different dates of entry into force for the same treaty. The wisest solution would probably be for the Commission to focus its attention solely on practice and to ask States whether they wished to make it a rule.

Turning to the effects of a reservation on the content of treaty relations (draft guideline 4.2.4), he said that the problem was more one of terminology than of substance. A reservation could not modify the *text* of a provision, as article 21, paragraph 1 (a), suggested, but he wondered whether the best way to make that clear was to say that a reservation modified “the legal effects”. That expression was ambiguous, and it would therefore be preferable to speak of “obligations”, as recommended by Professor Imbert and as the Special Rapporteur had done in draft guideline 2.6.2. Draft guideline 4.2.4 would then read: “A reservation [...] modifies [...] *the obligations* arising out of the provisions of the treaty to which the reservation relates, to the extent of the reservation.”

With regard to excluding reservations and modifying reservations, he wondered whether it was necessary to formulate two separate draft guidelines (4.2.5 and 4.2.6). As pointed out by the Special Rapporteur, the difference between those two categories was not necessarily clear in all cases, and the same reservation could have both an excluding and a modifying effect. The risk was that in practice, by trying to place the reservation in one category or the other, one might overlook complex effects or even use the category of excluding reservations to deny the more indirect modifying effects which reservations had on treaty obligations as a whole. Consequently, if the distinction was maintained, a safeguard clause should be included to remind the parties concerned of the additional modifying effect which excluding reservations might have.

Finally, on draft guideline 4.2.7, the Special Rapporteur had been right to pose as general rule the reciprocal application of the effects of reservations, but the exceptions which he had proposed were perhaps stated too categorically. Of course, a reciprocal application of a reservation might not be possible because of the nature or content of the reservation (subparagraph (a)), but it must always be verified whether a reciprocal application was really impossible. For example, the reservation formulated by Canada to the Convention on Psychotropic Substances in order to allow the consumption of peyote for religious purposes was not specific to Canada. The United States Supreme Court had rendered a similar decision, and members of such groups might wish to continue practicing their religious ceremonies after emigrating to other countries.

The most important exceptions to the principle of reciprocity were those set out in subparagraphs (b) and (c) of draft guideline 4.2.7, namely when the treaty obligation to which the reservation related was not owed individually to the author of the reservation or when the object and purpose of the treaty or the nature of the obligation concerned excluded any reciprocal application of the reservation, as was the case for human rights treaties or treaties protecting common goods. A more flexible formulation might be necessary. It was conceivable that certain treaty obligations were owed both to all the parties to the treaty or to individuals *and* individually to certain other States. In such cases, it was necessary to assess which aspect had priority, not only in the light of the nature of the treaty provision concerned, but also bearing in mind, to quote the Special Rapporteur, the “regulatory and even [...] deterrent role” which the principle of reciprocity played. For example, if a human rights treaty contained procedural guarantees in case of expulsion, and one State formulated a permissible reservation by virtue of which those guarantees did not apply for citizens of certain States, would it really be appropriate to exclude the reciprocal effect of such a reservation by referring to the — undeniable — fact that the procedural guarantees were not owed “individually to the author of the reservation”? In such instances, the “regulatory or even deterrent role” of the principle of reciprocity might be useful and even necessary for the attainment of the collective good pursued by the treaty. It was clear that the applicability of the principle of reciprocity in such cases, and in particular in the human rights context, must be explored very carefully and could only be recognized exceptionally, but it should not be excluded as categorically as had been done in general comment No. 24 of the Human Rights Committee.

In closing, he said that in his opinion, draft guidelines 4.2.3 to 4.2.7 could be referred to the Drafting Committee.

3039th Meeting, 6 May 2010

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International Law Commission
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Held at the Palais des Nations, Geneva, on Thursday, 6 May 2010, at 10 a.m.

Expulsion of aliens (*continued*)

(p. 4) Mr. Nolte said that he would confine his remarks to the draft articles on protection of the human rights of persons who had been or were being expelled, which were contained in document A/CN.4/617. He commended the Special Rapporteur for taking account of members' comments in his preparation of that text.

With regard to draft article 9, on the obligation to respect the dignity of persons who had been or were being expelled, he welcomed the fact that the Special Rapporteur had moved the reference to human dignity into the general part of the draft articles in order to indicate that human dignity was not merely one among several other human rights. However, he was concerned that the formulation of the draft article might be misleading. Human dignity was a general principle from which all human rights flowed; it could not be treated simply as a specific human right. That was a basic notion underpinning international human rights law.

The Preamble of the Charter of the United Nations spoke in general terms of "the dignity and worth of the human person", while the preamble to the Universal Declaration of Human Rights referred to the "inherent dignity ... of all members of the human family". Moreover, the idea that human dignity was more a source of rights than a right itself was spelled out in the International Covenant on Civil and Political Rights, whose preamble recognized that those rights "derive from the inherent dignity of the human person". Human dignity was possessed by every human being, and care should be taken not to create the mistaken impression that it meant honour or reflected individual perceptions of pride or dignity. That was why the drafters of international human rights treaties rarely used the term "human dignity" when defining specific rights, and when they did so, they took care to make it clear that what was meant was inherent human dignity. In fact, the only provision of the Covenant which referred explicitly to human dignity was article 10, which read: "[A]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." That article could be used as a model for reformulating draft article 9, which would then read:

“All persons who have been or are being expelled shall be treated with humanity and with respect for the inherent dignity of the human person.”

His lesser concerns pertained to the subsequent draft articles. For example, he did not fully understand article 10, paragraph 2, and was unsure whether it allowed for the possibility of treating nationals and aliens differently with respect to expulsion, or reflected the fact that there might be legitimate grounds for differentiating between various categories of aliens, such as citizens of States belonging to the European Union and citizens of non-member States. For example, the Convention implementing the Schengen Agreement provided for special procedures for aliens who were defined as “any person other than a national of a member State of the European Communities”. Readmission agreements might provide other legitimate grounds for treating different groups of aliens differently in the context of expulsion.

Turning to draft article 11, he suggested that, in accordance with human rights case law, the text should ensure that the obligation to respect the right to life was not limited to areas where States exercised territorial jurisdiction.

Lastly, the phrase “may be provided for” in draft article 12, paragraph 2, was somewhat misleading – what was probably meant was “as authorized by”. In that connection, he shared Mr. Gaja’s concern that the reference to international law was too vague.

3037th Meeting, 4 May 2010

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For participants only

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Held at the Palais des Nations, Geneva, on Tuesday, 4 May 2010, at 10 a.m.

Reservations to treaties (*continued*)

(p. 6) Mr. Nolte said that the Commission had arrived at a crucial stage in its work on reservations to treaties: the effects of reservations and interpretative declarations were probably the most difficult and controversial aspect of the whole endeavor. It was therefore particularly commendable that the Special Rapporteur had delved back into the *travaux préparatoires* of the Vienna Convention on the Law of Treaties in order to identify the ideas and objectives underlying its reservations regime.

He fully endorsed the Special Rapporteur's suggestion that a clear distinction should be drawn between the effects of permissible and impermissible reservations, as the lack of such a distinction was one of the recognized weaknesses of the Vienna Convention. On the other hand, the usefulness and possible implications of such a distinction depended on how clearly it could be drawn, as had been illustrated by the Commission's discussion of draft guideline 3.3 (Consequences of the non-permissibility of a reservation). It was therefore worrying that the Special Rapporteur had described as "far from clear-cut" and even "enigmatic" the most important criterion for determining the permissibility of a reservation, namely its compatibility with the object and purpose of a treaty. Although he agreed that that criterion was far from clear-cut, he did not believe that its application was any more enigmatic than that of the many other criteria in which the object and purpose of a rule or a treaty came into play. The Commission should accordingly assume that the criterion was applicable, but when spelling out the various effects of permissible and impermissible reservations, it should refrain from attributing greater clarity to the distinction between those effects than was warranted, given the lack of clarity of the criteria on which they were based.

As to the effects of permissible reservations, he admitted feeling somewhat confused by the Special Rapporteur's use of the term "established reservation". While the purpose was to distinguish between permissible reservations that had been accepted by other parties and those to which an objection had been made, that implied that the establishment of a reservation was essentially a relative concept: a reservation was "established" *vis-à-vis* those States that had

accepted it and was not “established” *vis-à-vis* those States that had formulated an objection to it. However, elsewhere in the report, the Special Rapporteur had used language suggesting that the establishment of a reservation was an absolute concept, or a concept with *erga omnes* effect. In paragraph 201, for example, he stated that “a reservation to which an objection has been made is obviously not established within the meaning of article 21, paragraph 1”.

As he understood the Special Rapporteur’s argument, particularly in paragraph 205 of the report, the “establishment” of a reservation was to be seen in relative terms. If that was the case, then he agreed with the Special Rapporteur’s substantive points concerning the effects on the entry into force of the treaty. However, the term “established” reservation was somewhat misleading, since it simply described a reservation that was fully effective *vis-à-vis* those States that had accepted it.

It was also confusing that a reservation that was not established *vis-à-vis* an objecting State could nevertheless have the limited effects on that State described in article 21, paragraph 3, of the Vienna Conventions. In his fifteenth report (A/CN.4/624), the Special Rapporteur used the term “valid” reservations, thereby increasing the confusion: a reservation could be both permissible and valid, while still not being “established”. Perhaps the *erga omnes partes* effect suggested by the term “establishment” could be clarified in the course of the drafting process.

With regard to expressly authorized reservations, described in paragraphs 207 to 222, the question was whether they precluded the formulation of objections. While that might be true in most cases, in some instances the possibility of formulating an objection might depend on the interpretation of the treaty in question. Perhaps the parties, by authorizing specific reservations, were merely emphasizing that such reservations were not contrary to the object and purpose of the treaty, while giving other contracting parties the opportunity to object to those reservations. In contrast to Derek Bowett’s reasoning cited in paragraph 222, he did not consider it a logical necessity that by making the permissibility of a reservation “the object of an express agreement”, the parties renounced any right to object to such a reservation. The arbitral award in the *case concerning the Delimitation of the Continental Shelf of the Mer d’Iroise*, to which the Special Rapporteur referred in paragraph 215 of his report, did not exclude that possibility either.

The parties to a treaty might have a variety of reasons for allowing reservations, as evidenced by the discussion in the report of clauses that permitted the general authorization of reservations, which the Special Rapporteur rightly did not wish to treat as *a priori* acceptance that would exclude objections. The existence of treaty clauses that explicitly permitted reservations but that also allowed objections would require that draft guideline 4.1.1. be reformulated, since an expressly authorized reservation against which an objection could be formulated could not be deemed to be “established” as the Special Rapporteur used the term. The point was not whether the content of the reservation was sufficiently predetermined by the treaty, as suggested by the Special Rapporteur in paragraph 218 of his report, but whether the purpose of the authorization to formulate reservations that had been incorporated in the treaty was to anticipate their acceptance by all the other parties.

He wished to make a similar point with regard to reservations to treaties “with limited participation”. The most conspicuous difference between draft guideline 4.1.2 and article 20, paragraph 2, of the Vienna convention was that the latter’s explicit reference to the “object and purpose of the treaty” had not been included in draft guideline 4.1.2. Although the criterion of object and purpose, like that of number, was far from clear-cut, it should be not downplayed by being subsumed in the general condition of permissibility, but rather highlighted. On the other hand, he had no objection to the reference to “other contracting parties”, contained in draft guideline 4.1.2, whose purpose was to clarify the requirement of unanimous consent.

He was in favour of referring draft guidelines 4.1 to 4.1.2 to the Drafting Committee.

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International Law Commission
Sixty-first session (second part)**Provisional summary record of the 3029th meeting**

Held at the Palais des Nations, Geneva, on Friday, 31 July 2009, at 10 a.m.

Treaties over time***Progress Report by the Chairman of the Study Group***

(p. 16) Mr. Nolte (Chairman of the Study Group on Treaties over time) recalled that the Commission, at its 2997th meeting on 8 August 2008, had decided to include the topic “Treaties over time” in its programme of work. At its 3012th meeting on 29 May 2009 it had established the Study Group on the topic. At its two meetings on 7 and 28 July 2009, the Study Group had based its discussions on two informal papers presented by its Chairman outlining the possible scope of future work on the topic; the proposed approach to the topic set out in Annex A to the Commission’s report on the work of its sixtieth session (A/63/10, pp. 365-384); some background material, including relevant excerpts from the Commission’s articles on the law of treaties and commentaries thereto, from the *Official Records of the United Nations Conference on the Law of Treaties*, and from the conclusions and report of the Study Group on the Fragmentation of international law (A/61/10, para. 251, and A/CN.4/L.682; together with a letter of 17 February 2009 from the Legal Service of the European Commission containing comments and observations on the subject.

The Study Group had chiefly endeavoured to identify the issues to be covered, its working methods and the possible outcome of the Commission’s work on the topic. The main question with regard to the scope of the topic had been whether the Study Group should focus on subsequent agreement and practice, or whether it should also examine the effects of certain acts or circumstances on treaties - such as termination and suspension, other unilateral acts, material breaches and changed circumstances; the effects of other sources of international law - such as subsequent treaties, supervening custom, *desuetudo* and obsolescence; and amendments and *inter se* modifications of treaties.

Several members of the Group had expressed a preference for a narrow approach initially confined to the subject of subsequent agreement and practice, which in itself was wide-ranging, as it took in not only treaty interpretation but also related aspects. Others had contended that the Study Group's approach should be considerably broader. Some members had been of the view that it was inadvisable to restrict the scope of the topic to subsequent agreement and practice from the outset and that work could be conducted in parallel on that subject as well as on some other aspects of the topic.

As far as working methods were concerned, several members had been in favour of a collective effort and had emphasized the need for a proper distribution of tasks among interested members, but if that were done, contributions to the deliberations of the Study Group should be adequately reflected. At the same time, some members had felt that the Chairman should play a strong role in coordinating and guiding the Study Group's work.

As regards the possible outcome of the Commission's consideration of the topic, several members had stressed that the final product should offer practical guidance to States. There had been broad support for the idea of drawing up a repertory of practice accompanied by a number of conclusions. Other members had been of the opinion that the Commission should keep an open mind as to the outcome of its work.

The Study Group had agreed that it should begin its work by considering subsequent agreement and practice on the basis of papers to be prepared by its Chairman, but that the possibility of adopting a broader approach should be explored. In 2010 the Chairman would therefore submit a report on subsequent agreement and practice, which would draw on the case law of the International Court of Justice and other international courts and tribunals with general or *ad hoc* jurisdiction. Other members of the Study Group were encouraged to contribute information on the way in which subsequent agreement and practice was handled at a regional level, under special treaty regimes or in specific areas of international law. Members were likewise invited to contribute papers on other issues falling within the broader scope of the topic.

3021st Meeting, 15 July 2009

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A/CN.4/SR.3021

Provisional

For participants only

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International Law Commission
Sixty-first session (second part)**Provisional summary record of the 3021st meeting**

Held at the Palais des Nations, Geneva, on Wednesday, 15 July 2009, at 10 a.m.

Reservations to treaties (*continued*)

(p. 10) Mr. Nolte said that it appeared from the summary of the discussions in the Commission and in the Sixth Committee on the role of silence as a reaction to interpretative declarations, which appeared in paragraphs 37 and 41 to 43 of the fourteenth report, that States, while accepting the general approach of the Commission, were open to the possibility that silence could constitute approbation or acquiescence in certain circumstances. In his view, the legal consequences of silence in response to an interpretative declaration could not be assessed solely in the light of the general rule stated in article 31, paragraph 3 (a), of the Vienna Convention on the Law of Treaties, since the declarations in question were unilateral in nature and were framed in a specific formalized context in which the expectations of the parties to a multilateral treaty were typically such that, in order to preserve the meaning given to the terms of the treaty, States could not actively insist on a different position. The judgment of the International Court of Justice in the case concerning *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* supported that point of view.

He wished to make two observations concerning the recommendations contained in the latest report of the working group on reservations of the human rights treaty bodies (HRI/MC/2007/5) and reproduced in paragraph 53 of the Special Rapporteur's report. First, in recommendation 3, the working group's recognition of the applicability of the Vienna Convention regime to reservations to human rights treaties was rather limited, since in two different places in the same recommendation it stressed the specificity of the human rights regimes.

Second, in recommendation 7, the working group asserted that a State could not rely on an invalid reservation, and unless its contrary intention had been "incontrovertibly established", it remained a party to the treaty without the benefit of the reservation. The Special Rapporteur had no doubt carefully weighed his words when mildly characterizing that expression as perhaps going a bit too far, but in his own view that remarkable sentence clearly went too far. It

could require human rights treaty bodies to compel a reserving State to remain bound by a human rights treaty in cases where that might not be appropriate. In addressing the question of the consequences of invalid reservations to human rights treaties, it might be helpful to postulate presumptions; however, such presumptions should be more balanced and allow greater margin for the will of the State concerned, the nature of the particular treaty and the related circumstances.

On a point relating to a decision by the Inter-American Court of Human Rights in the case of *Boyce et al. v. Barbados*, described in paragraphs 56 to 60 of the report, he agreed with the Special Rapporteur that the Commission should address the question of the interpretation of reservations. In his view, the decision in the case of *Boyce et al. v. Barbados* suggested that the Commission should remind States, courts, and treaty monitoring bodies that the interpretation of a reservation was not limited to a strictly textual analysis, since reserving States might otherwise feel compelled in the future to formulate longer and more extensive reservations in order to avoid the risk that their intentions were not adequately taken into account.

Turning to the second part of the Special Rapporteur's fourteenth report, he wished to state at the outset that he agreed with nearly all of the proposed draft guidelines, as well as with the Special Rapporteur's conclusions concerning the validity of acceptances, the validity of interpretative declarations and the validity of reactions to interpretative declarations. His main concern had to do with the question of the validity of objections. In that regard, he agreed with the Special Rapporteur's point of departure, which was that the validity of an objection must be assessed independently of that of the validity of a reservation. He also agreed that, as a general rule, objections could be formulated for any reason whatsoever, since the principle of consent in treaty relations held that no State could impose a particular treaty arrangement on another party against its will. That meant that it was indeed difficult to conceive of a situation in which an objection that had the usual effects ascribed to it by the Vienna Conventions - minimum effect or maximum effect - could ever be invalid. He also agreed that the question of whether an objection could have super-maximum effect did not concern the validity of such objections but rather their potential effects.

Like Mr. Gaja, however, he had doubts as to whether the same was true for objections that were intended to have intermediate effect. In paragraph 105 of his report, the Special Rapporteur stated that "[i]t is quite clear that if the effect of an objection is to modify the bilateral treaty relations between its author and the author of the reservation in a manner that proves to be contrary to a peremptory norm of international law (*jus cogens*), this result would be unacceptable. Such an eventuality would, however, seem to be impossible". In the same paragraph the Special Rapporteur noted that "[i]t is extremely difficult - and, in fact, impossible under these circumstances - to imagine an 'objection' that would violate a peremptory norm".

Such statements represented a challenge to lawyers, and in particular to law professors. He would therefore describe a hypothetical situation in an attempt to demonstrate that it was indeed conceivable for an objection with intermediate effect to create treaty relations that could lead to the violation of a peremptory norm of international law. For the sake of argument, one might assume that a group of States had concluded a convention aimed at eliminating terrorism and that the convention was based on three understandings: first, that any State party would extradite a terrorist suspect at the request of another State party that had issued an arrest warrant; second, that States parties would exchange any information they had concerning persons designated as terrorist suspects by another State party; and third, that the convention would contain a clause stipulating that the obligation to extradite did not apply in cases in which there were reasonable grounds for believing that the person to be extradited risked being subjected to torture.

It might further be assumed that State A, upon acceding to the Convention, had formulated a reservation, according to which it would not provide information that it considered might threaten its national security; and that State B had formulated an objection to that reservation, according to which it did not consider itself bound by the provision that limited the duty to extradite in the case where the person to be extradited risked being subjected to torture.

A determination establishing the validity of that objection could lead to the following situation: if State B had subsequently requested the extradition of a person from State A, and it was well known that terrorist suspects were tortured on a regular basis in State B, State A would be obliged under the terms of the treaty to extradite the person, without being able to invoke the torture exception. That was because the provision containing it had been excluded by the objection with intermediate effect formulated by State B. Yet an obligation to cooperate in the commission of torture violated a norm of *jus cogens*. Such an absolute duty to extradite was partially invalid insofar as it applied to cases in which the extradited person risked being subjected to torture.

That hypothetical situation demonstrated several points. First, it was too simplistic to invoke the maxim cited by the Special Rapporteur in paragraph 103: “He who can do more can do less.” While it was true that State B could have formulated its objection in such a way as to exclude all treaty relations, it should not be able to exclude certain provisions of the treaty if doing so would have the effect of enlarging the scope of the treaty obligations and leading to a *jus cogens* violation. Perhaps the Special Rapporteur might object, arguing that objections with intermediate effect could never have the effect of enlarging the scope of treaty obligations, but such a statement would pose difficulties of its own. Treaty obligations were typically an interrelated mix, so that removing one out did not necessarily imply that fewer obligations remained.

Second, the issue was not about the possible effects of an objection. In paragraphs 117 and 118 of his report, the Special Rapporteur assumed that objections could have an intermediate effect if they were aimed at safeguarding the package deal on which the treaty was based or if there was an intrinsic link between the provision that gave rise to the reservation and the provisions whose legal effect was affected by the objection. In his own example, the obligation to extradite could well be considered an element of a package deal between one group of States that typically had an interest in receiving terrorist suspects and another group of States whose interests lay more in receiving information. The link between the two kinds of obligations in his example was admittedly not as close as in the case of an objection to a reservation concerning the dispute settlement procedures of the *jus cogens* regime under the Vienna Convention, to which the Special Rapporteur referred in paragraphs 116 to 118 of his report. But despite the relatively more remote nature of that link, it nevertheless existed and, arguably, was sufficiently strong. Even if the Special Rapporteur could demonstrate that the link was not sufficiently strong, the mere fact that it could exist must be taken seriously, and one could not simply redefine the issue solely in terms of the effects that an objection with intermediate effect could produce.

For those reasons he was not yet convinced that objections with intermediate effect could never be invalid. Consequently, it was necessary to formulate a draft guideline that either specified the grounds for establishing the non-validity of an objection with intermediate effect or excluded objections with intermediate effect.

Irrespective of whether or not it was possible for an objection to a reservation to violate a *jus cogens* norm, he tended to agree with Mr. Gaja that any partial objection that modified the content of a treaty in relation to a reserving State to an extent that exceeded the intended effect of the reservation, in other words, any objection with intermediate effect in the sense understood by the Special Rapporteur, required the acceptance or acquiescence of the reserving

State. That followed from the very same principle that the Special Rapporteur had invoked, namely, the principle of consent, according to which no treaty obligation could be imposed on a State against its will. It was true that exposing States to the risk that they might encounter objections that had the effect of creating a different set of treaty obligations than that contemplated in both the treaty and the reservation might deter a State from formulating a reservation. However, such an advantage did not justify the sacrifice of the principle of consent, on which the Special Rapporteur himself had placed so much emphasis.

Moreover, he was not persuaded that the Commission should attribute to the mere formulation of a reservation the unsatisfactory result whereby an objection was capable of excluding the application of an essential provision of a treaty. It turned the system on its head to use an objection that excluded an essential provision or that led to a violation of *jus cogens* as an inducement for a State to withdraw a reservation.

In his opinion, Mr. Gaja's approach, as described in paragraph 110 and during his intervention at the previous meeting (A/CN.4/SR.3020), did not raise the uncertainties that characterized the regime of late reservations, as stated in paragraph 112. Rather, it was the fact that a reservation had been formulated and that objections with intermediate effect were considered acceptable that required a limited reopening of the possibility for an objecting State to formulate what amounted, in effect, to a reservation.

Apart from that particular point, he subscribed to the Special Rapporteur's suggestion that draft guidelines on the validity of reactions to reservations were unnecessary, except in respect of the question of the validity of objections to reservations. He also subscribed to the proposal that the draft guidelines should be referred to the Drafting Committee, due account being taken of Mr. Gaja's comments.

(p. 16) Mr. Nolte said that he did not deny that the rule of *jus cogens* would exist independently of his hypothetical treaty. If, however, a reservation could be said to violate *jus cogens*, even though *jus cogens* existed independently, he could not see why the same should not be said of an objection that had the effect of producing a treaty regime that violated *jus cogens*. He therefore failed to understand the Special Rapporteur's objection.

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Protection of persons in the event of disasters (*continued*)

(p. 6) Mr. Nolte said that he had one general remark and a few specific comments to make. The general remark concerned the definition of the topic. The Special Rapporteur thought that an explicit reference to the spirit, or philosophy, underlying the whole project should be incorporated in the draft article defining the scope of the topic. Like Mr. Gaja and Mr. McRae, he doubted the advisability of addressing the question of whether the project rested on a rights-based or a needs-based approach in the definition of scope. Admittedly the intention of clearly indicating the spirit informing the project was a good one, but it made the definition of scope less precise and open to conflicting interpretations. He therefore endorsed Mr. Gaja's proposal to limit the definition of scope in draft article 1 to the first part of the sentence, in other words: "The present draft articles apply to the protection of persons in the event of disasters." Like Mr. McRae, he thought that the spirit or purpose of the draft articles should be dealt with elsewhere, either in a preamble or in a separate article.

That proposal was, of course, of a rather technical nature. The main substantive issue was the terms in which the spirit or purpose of the draft articles should be formulated. All the previous speakers had considered that attention should focus on the persons affected by a disaster and that their well-being was the main purpose of the undertaking. Some members seemed to take it for granted that a rights-based approach was the best way of achieving that purpose, but he was among those who urged caution. The Special Rapporteur had explained that he had decided to propose a rights-based approach in the same spirit as that which had prevailed in the 1980s, when a similar approach had emerged with regard to development policy. However, the analogy was not obvious. In the 1980s it might have been necessary to emphasize that the ultimate purpose of development was the realization of the human rights of individuals and not merely the development of the State as an abstract entity. Hence the purpose of a rights-based approach to development had been to focus on the individual as the ultimate beneficiary of development policy. In the field of disaster relief, however, there was no doubt that the

focus of all efforts was the individual. The question was rather that of identifying the best legal technique for achieving that purpose. A rights-based approach indeed strengthened the focus on the individual and had the advantage of setting aside the notion that disaster relief was a matter of charity. But such an approach entailed a serious disadvantage in that it was limited by the extent of the rights themselves and was therefore open to challenges as to the extent of rights protection. Human rights could be severely curtailed in emergencies and human rights obligations essentially bound only the affected State rather than all States. He was not suggesting that human rights were irrelevant in the context. They were important as a means of strengthening the position of individual disaster victims and of identifying their needs, but the project should have a broader basis, namely the needs of the persons concerned. Those needs might go well beyond their rights, and disaster relief should not be hampered by disputes about the extent of rights. Even in disasters which did not acquire an international dimension because the affected State had the means to cope with the situation, one did not generally speak of rights but of needs. For that and other reasons, he proposed that the emphasis of the second part of draft article 1 should be reversed, so that it would then read, either as part of a preamble or as a separate article, “In order for States to provide an adequate and effective response to the needs of persons in a disaster, including to ensure the realization of the rights of persons in such an event”. That wording would not discard human rights as a key element of disaster relief, but it would place them in the wider context of the needs of individuals. Such an approach, based on two pillars but with a stress on meeting needs, would strengthen rather than weaken the spirit or purpose of disaster relief efforts.

Caution was needed when defining the term “disaster”. While it was indisputable and obvious that it was often impossible to distinguish clearly between a natural and a manmade disaster, it was equally true that such a distinction was immaterial from the perspective of individuals and their rights. But that should not lead the Commission to sweeping conclusions. Not every grave crisis was a disaster. As Mr. McRae had said, the current world economic crisis was not a disaster, even though it might produce catastrophic effects in some regions. He was less certain than Mr. Dugard that the situation in Zimbabwe was a disaster in the technical sense that the Commission was trying to define. While he was less familiar than Mr. Dugard with the situation in that country and although he had the impression that the Zimbabwean population was in need of relief, to characterize that situation as a disaster was tantamount to saying that political mismanagement and human rights violations constituted a disaster. He was not persuaded that that would be of any benefit to the victims of certain human rights violations and was therefore in favour of setting a threshold like that proposed by the Special Rapporteur, in other words a “serious disruption” of the functioning of society. Such a threshold was particularly important if it was impossible to exclude disasters by reference to their cause.

Regardless of whether the Commission adopted a rights-based, needs-based or combined approach, it was of course most important to determine the obligations and competences of the affected State. That was a matter which would have to be examined in future reports and at future sessions, although, as Mr. Gaja had proposed, it might already be possible to address possible causes of States’ unwillingness to cooperate and to stress institutional aspects, especially the role of the United Nations and the duty of States to give it “every assistance” (Article 2, paragraph 5, of the Charter of the United Nations). Ms. Escameia was therefore right to postulate a duty on the part of Member States to assist the United Nations. On the other hand, given the very clear statement by the Secretary-General, it might be unwise to rely on the responsibility to protect as a possible source of obligations for Member States. That did not, however, mean that there were no other sources of rights and obligations for third States in the event of a disaster. For example, if a State simply disregarded a famine which led to the death of many people in part of its territory, such disregard might not amount to genocide in the technical sense, but it might well be a violation of a *jus cogens* human rights norm, which

in turn would allow and oblige third States to hold the State concerned responsible, or would at least make it a duty of that State to accept help. He agreed with Ms. Escameia that the Commission should not exclude armed conflicts from the scope of the topic, but that it should formulate a “without prejudice” clause with respect to the rules relating to armed conflict. He supported the Special Rapporteur’s idea of identifying two main axes — although there might be more — namely the relationship between States, on the one hand, and, on the other, the relationship between States and other subjects of international law, in particular persons and nongovernmental organizations, and of clarifying the framework for them in the course of the Commission’s work on the topic. As for the duty to cooperate, he agreed with Mr. Gaja that the principle should be dealt with in conjunction with the other substantive principles with which it was connected. He did not deny the existence of States’ duty to cooperate, but it was just one of their fundamental duties. It was too early to refer draft article 3, but not draft articles 1 and 2, to the Drafting Committee.

(p. 15) Mr. Nolte said that he wished to dispel a misunderstanding with regard to an opinion which Mr. Vasciannie had attributed to him. In one of his statements on the topic at the previous session, he had said that, in principle, he had no problem regarding the right to humanitarian assistance as implicit in international human rights law, and that he regarded it as an individual right that was exercised collectively. That said, that right should be enforceable in the same manner as other human rights, in other words without the unauthorized use of force. Thus conceived, such a right would not challenge the principles of sovereignty and non-intervention. The concept of the responsibility to protect should be understood in the light of that classical interpretation of the law; it remained primarily a political and moral concept that had not altered the law relating to the use of force. It would not be appropriate for the Commission to propose changes in that area.

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Held at the Palais des Nations, Geneva, on Thursday, 14 May 2009, at 10 a.m.

Expulsion of aliens (*continued*)

(p. 15) Mr. Nolte praised the Special Rapporteur's extensive analysis of the jurisprudence of the Human Rights Committee and the European Court of Human Rights. His use of European jurisprudence was of particular relevance to non-derogable human rights, such as the right to life and the right to freedom from torture.

Although there was merit in the Special Rapporteur's assumption that it was necessary to identify a hard core of fundamental human rights which specifically protected persons subject to expulsion, that approach required some qualifications. All human rights applied to persons who were in the process of being expelled. Draft article 8 should therefore be formulated accordingly. For example, the Commission should make it clear that every State must respect its obligations under the human rights treaties to which it had acceded. Those treaties conferred certain rights on all persons, including persons who were being expelled. While some of those rights might be limited for a certain period or to a certain degree, they must be recognized in principle so that the extent and proportionality of the restrictions placed on them could be judicially verified. For that reason, he suggested that draft article 8 should speak of "human rights" and not of "fundamental rights".

In cases where a State had not ratified a particular human rights treaty, the applicable human rights regime was customary international law. At first sight, the Special Rapporteur's approach of concentrating on a few particularly important rights that might appear to be appropriate, but in fact all human rights recognized in customary international law were applicable in expulsion proceedings. They might be subject to more far-reaching limitations than rights arising from treaty obligations, but those more extensive limitations could never affect what the Special Rapporteur termed the "hard core" of human rights, which was derived from the source of all human rights, namely the principle of human dignity.

While he welcomed the fact that the Special Rapporteur stressed the concept of human dignity, he did not concur with the Special Rapporteur's proposal to formulate a draft article - article 10 - enunciating a right to human dignity in the middle of several other draft articles reaf-

firming certain human rights that were particularly relevant in the context of expulsion. Human dignity was not a human right, but a general principle from which all human rights flowed and which was harder to apply than specific human rights. The draft articles should therefore reaffirm that general principle before mentioning all the other specific human rights which flowed from it. That was how the principle of human dignity was conceived in the Charter of the United Nations, in most human rights treaties and in most national constitutions. The Commission should avoid referring to human dignity as a specific human right, since it was a rather vague, broad term. Nevertheless, in certain exceptional cases where specific human rights did not provide an appropriate solution, the principle of human dignity could be invoked. The *Furundzija* case, to which reference was made in paragraph 71 of the report, did not, however, establish the existence of a human right to dignity, since the International Criminal Tribunal for the former Yugoslavia had based its reasoning on a provision of its statute and had not claimed that it was directly applying a human right. He therefore suggested that draft article 10 should be deleted and that a reference to human dignity as a general principle informing all human rights should be inserted in draft article 8.

Like other members, he did not think that it was necessary to identify a “hard core” of human rights, either in general or for the purposes of the draft articles, but if the Commission did decide to take that approach, it should follow the example of some constitutional systems, such as the German system, and endeavour to identify the extent to which certain rights, such as the right to life, gave expression to the principle of human dignity. The decision of the Federal Constitutional Court of Germany cited in paragraph 20 of the report was based on an explicit constitutional provision that could not easily be transposed to the level of international law, where it would be difficult and potentially divisive to try to identify the human-dignity element of every human right. For the Commission’s purposes, then, it would not be helpful to postulate a new subcategory of human rights that were supposedly more fundamental than others. The terminology of the Charter of the United Nations and a number of human rights treaties, which seemed to draw a distinction between “human rights” and “fundamental freedoms”, was not supposed to denote a substantive difference between various categories of rights.

In the light of the Special Rapporteur’s explanation that the main reason for characterizing some categories of rights as more fundamental than others was to emphasize those human rights that were of particular importance for persons who were being expelled, he would not object to the adoption of that approach, provided that in doing so the Commission did not create the impression that it wished to de-emphasize other human rights.

He readily agreed that in the context of expulsion special mention should be made of the right to life, the right to physical integrity and the right to freedom from torture. The same was true in principle of the right to family life and the right not to be subjected to discrimination. However, the right to life and the right to freedom from torture were clearly defined, whereas assessing the exact implications of the right to family life and the right not to be subjected to discrimination was a more complicated process. The Special Rapporteur seemed to accept that distinction, since he added a rather vague limiting clause to his formulation of the right to family life in draft article 13 but did not add any such clause in the provision on the right to life, although the latter could be restricted in certain circumstances according to the main human rights treaties. The Commission should be consistent in that respect; it should include clauses limiting any human rights it mentioned if they were generally subject to such a restriction. The draft articles should also mention the right to due process, since it was pertinent in the context of expulsion and the exact implications of that right in that context could be spelled out in a separate chapter.

As to whether the draft articles should be sent to the Drafting Committee, or whether the various objections raised indicated that the Special Rapporteur’s approach should be modified and

that the Commission should content itself with a general provision along the lines of draft article 8, stipulating merely that all human rights must be protected when aliens were expelled, he observed that there were inherent pros and cons in either approach and it would be premature to decide on the matter at the present juncture. He therefore suggested that the Commission should follow the course of action it had adopted the previous year when it had been unsure whether to include a chapter on countermeasures in the draft articles on the responsibility of international organizations: in other words, it should establish a working group to ascertain whether agreement could be reached on a list of human rights deserving specific mention as particularly relevant in the context of expulsion. If no agreement could be reached, the Commission should follow Sir Michael Wood's suggestion and formulate a general provision on human rights along the lines of draft article 8.

Draft article 12, paragraph 2, should be recast to reflect more clearly the fact that children's special need for protection sometimes required that children should not be detained in the same conditions as adults, while at other times it required that they should be kept with adults. Otherwise the draft article could lead to the conclusion that the prolonged separation of children from their parents might be justified. It should be recalled in that connection that article 37, subparagraph (c), of the Convention on the Rights of the Child stipulated that "every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so". A number of States had formulated reservations to the Convention with a view to permitting juveniles to be detained with and in the same conditions as adults, but those reservations were not necessarily of decisive importance for the Commission's consideration of the topic of expulsion.

He endorsed the view expressed by other members of the Commission that sexual orientation should be included among the other prohibited grounds of discrimination listed in draft article 14. He agreed with Mr. Gaja that the report appeared to suggest that there was a possibility of discriminating between nationals and aliens with respect to expulsion; moreover, there might be legitimate grounds for discriminating between different categories of aliens when it came to expulsion, for example between citizens of States belonging to the European Union and citizens of non-member States. The Convention implementing the Schengen Agreement envisaged special expulsion procedures for aliens, who were defined therein as "any person other than a national of a Member State of the European Communities". Readmission agreements might likewise constitute legitimate grounds for treating different groups of aliens differently with respect to expulsion.

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International Law Commission
Sixty-first session (first part)**Provisional summary record of the 2999th meeting**

Held at the Palais des Nations, Geneva, on Tuesday, 5 May 2009, at 10 a.m.

Responsibility of International Organizations (*continued*)**Organization of the work of the session (*continued*)**

(p. 11) Mr. Nolte commended the Special Rapporteur on his comprehensive, thorough and subtle report. By and large, he agreed with its content and had relatively few comments on it.

He wished to refer first to the Special Rapporteur's somewhat unusual approach of revisiting the draft articles before the formal second reading. Like Mr. Pellet, he believed that the distinction between a first and a second reading served an important purpose and should, as a general rule, be maintained. However, the special nature of a law of responsibility of international organizations warranted an exception from that rule, as it concerned an area which so far was based on very little practice and yet had begun to develop rapidly during the course of its consideration by the Commission, as the judgement in the *Behrami and Saramati* cases showed.

Turning to the second issue raised by Mr. Pellet at the previous meeting, he said that it would be unfortunate if the Commission, after completing its work on the responsibility of international organizations, should leave a lacuna in the law of international responsibility where the responsibility of States *vis-à-vis* international organizations was concerned. At the same time, he also understood the Special Rapporteur's concern for keeping the responsibility of States outside the scope of draft article 1. If Mr. Pellet's proposal was adopted, it would be tantamount to adding a paragraph to a law on apples stating that the law also applied to oranges. Such an additional paragraph would then also require that the "law on apples" should be renamed the "law on apples and oranges". He wondered whether a different compromise could not be struck between the Special Rapporteur's and Mr. Pellet's positions. Perhaps a working group could find a way to meet Mr. Pellet's legitimate concern not to leave a lacuna in the law of international responsibility and the formal concern of the Special Rapporteur to avoid a misleading title of the draft articles. One way might be for the Commission to draft a separate related statement on issues of State responsibility with respect to international organizations.

He had several comments to make on individual draft articles. He endorsed the Special Rapporteur's proposal in paragraph 10 of the report to move the definition of the "rules of the organization" from draft article 4, paragraph 4, to draft article 2 and to make it more general.

As to the definition of the term "international organization" in draft article 2, he believed that the commentary to article 2 should make it clear that, while such international organizations must not necessarily be exclusively composed of States, they should at least be predominantly composed of or influenced by States and/or predominantly serve State functions.

With regard to the words "established practice", discussed in paragraphs 14 to 16, he said that while the draft articles should clearly contain a reference to the "practice" of the organization, the word "established" implied a usage over a longer time, which was not necessarily required. On the other hand, the expression "generally recognized practice", which had been suggested by the European Commission (report, footnote 19), implied that specific acts of recognition must have occurred, which was not necessarily the case either. In his view, the Commission should consider using the words "relevant practice" in order to accommodate the diversity of international organizations; the matter could probably be dealt with in the Drafting Committee.

Paragraph 13 of the report considered the question of whether an international organization could be held responsible only by a State that had recognized its separate legal personality, and he wondered whether that raised a real issue. The fact that a State invoked the responsibility of an international organization typically implied that the State recognized that organization's separate legal personality - except, of course, if the contrary had been made clear and the invoking State did not adopt a contradictory position.

It followed from all the remarks he had made that he agreed with all the changes proposed by the Special Rapporteur in paragraph 21 of the report.

Turning to the question of attribution of conduct, he agreed with the Special Rapporteur's proposal to rephrase draft article 4, paragraph 2, in order to specify as the decisive factor that a person or entity had been charged by an organ of the international organization with carrying out, or helping to carry out, one of the functions of that organization (report, para. 23).

The most important issue concerned draft article 5 (Conduct of organs or agents placed at the disposal of an international organization by a State or another international organization) and the interpretation given to it by the European Court of Human Rights in *Behrami and Saramati*. The Special Rapporteur criticized the reasoning of the Court on legal and policy grounds and thus defended what he regarded as the original approach taken by the Commission, finding confirmation of his position in a number of statements by States and academics as well as by the Secretary-General of the United Nations. While the Special Rapporteur's point of departure was correct, he could not follow him in all his conclusions.

He shared the Special Rapporteur's view that the criterion of "effective control" stipulated in draft article 5 was the correct one in cases where a State or an international organization put an organ at the disposal of another international organization. He also agreed that the European Court of Human Rights had incorrectly or too broadly interpreted article 5 in the joined cases of *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway* when it had attributed the conduct of a State to the United Nations in a case in which the Organization had not in fact exercised the degree of control required under draft article 5. In his view, however, the Court's determination did not warrant the conclusion that the Court had taken the wrong decision from either a legal or policy standpoint. After all, the Special Rapporteur had himself agreed that the United Nations Security Council could modify the general rules for the attribution of conduct, and he had acknowledged as much in paragraphs 120 to 124 of his report, where he had proposed a new draft article on *lex specialis*. From his own

perspective, the question was whether the Security Council, in its resolution 1244 (1999) had implicitly modified the rules of attribution. If it had, the European Court of Human Rights should have indicated as much. The fact that the Secretary-General had rejected the Organization's responsibility in cases like *Behrami and Saramati* was not a convincing argument to the contrary, since the Secretary-General might well have had in mind different United Nations interests than did the Security Council and its members.

If there was general agreement that the European Court of Human Rights had misinterpreted article 5 but might nevertheless have ultimately taken the correct decision, the Commission should perhaps limit itself to reaffirming, as a general rule, the wording and the strict interpretation of draft article 5. It should also make clear, as the Special Rapporteur had suggested in paragraph 30 of his report, that the overly broad interpretation of the criterion of "effective control" in the *Behrami and Saramati* decision could not be "applied as a potentially universal rule". The Commission should not, however, criticize the policy aspect of the Court's decision and should leave open the possibility that the decision might be justified on the basis of the *lex specialis* exception - without, however, taking a definite stand on the matter.

The *lex specialis* provision was also helpful in determining whether the implementation of a binding act of an international organization by a State, acting *de facto* as an organ of that organization, warranted a different rule of attribution. If the Commission accepted that it did, then the suggestion of the European Commission and the position of the World Trade Organization (WTO) panel, on the one hand, and the judgements of the European Court of Human Rights in the *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* case and the European Court of Justice in the *Kadi, Al Barakaat International Foundation v. Council and Commission* case on the other, were not necessarily contradictory. It was entirely possible that the implementation by a State of a binding act of an international organization had to be attributed to the State where its human rights aspects were concerned but to the international organization where its trade aspects were concerned. It should also be recalled that the European Courts derived their positions on attribution chiefly from the primary norms at issue.

With regard to draft article 6, he supported Ms. Escameia's suggestion to include the term "clearly", which better conveyed what the Special Rapporteur himself had intended. As to the issue of the breach of an international obligation, he agreed with the Special Rapporteur's suggestion that article 8, paragraph 2, should be reworded to indicate more clearly that the rules of organizations were, in principle, part of international law, a situation that left room for certain exceptions. However, he questioned whether the proposed wording expressed that idea clearly enough.

He wished to make two comments with regard to chapter V of the report (Responsibility of an international organization in connection with the act of a State or another international organization). Firstly, while he agreed with the rule contained in draft article 12, he would welcome a statement in the commentary to the effect that responsibility for merely making a recommendation could be established only if the conditions of the special rule contained in draft article 15 were met. Without such a provision, responsibility for aiding and assisting was too broad. Secondly, he supported the Special Rapporteur's view, expressed in paragraph 51 of his report, that draft article 15, paragraph 2, should emphasize the role played by the authorization or the recommendation in causing the member to cooperate with the act committed by the international organization. He wondered, however, whether the proposed wording had successfully done so; he would prefer to retain the original text.

On the question of circumstances precluding wrongfulness, he said that he could not support the Special Rapporteur's suggestion to delete draft article 18 on self-defence, given the risk that States and other interpreters of the articles might conclude that the Commission did not recognize a right of self-defence for international organizations at all, despite subtle indica-

tions to the contrary in the commentary. He suggested that reference should be made in draft article 18 to the special situation of international organizations with regard to the right of self-defence by inserting the word “appropriately” before “constitutes”. That would address the concerns expressed by States and international organizations while preserving the right of self-defence, which was a general principle of law and which international organizations might in certain circumstances - such as administering Territories, for example - legitimately have to invoke.

On the issue of countermeasures as circumstances precluding wrongfulness, he fully agreed with the Special Rapporteur’s statement in paragraph 65 of his report that the principle of cooperation that restricted recourse to countermeasures in relations between an international organization and its members appeared to be relevant not only in the case of countermeasures taken by an international organization against its members (the situation covered in draft article 19), but also in the case of countermeasures taken by a member State against an international organization (the situation covered in draft article 55).

Nevertheless, it seemed to him that the restriction necessitated by the principle of cooperation was not conveyed strongly enough in draft article 19, paragraph 2, and draft article 55, according to which countermeasures were not allowed if, under the rules of the organization, reasonable means were available for ensuring compliance with the obligations of the responsible State or international organization concerning cessation of the breach and reparation. While international organizations had procedures through which pressure could be exerted on recalcitrant member States, most did not possess the “means” to “ensure” that their members complied with their obligations. The proposed wording therefore had the effect of a residual rule: if the rules of the organization did not provide otherwise, and in the event of doubt, countermeasures could be applied in relations between an international organization and its member States.

As he had indicated at the previous session, the main reason there should not be a residual rule allowing a member State to take countermeasures against an international organization, or vice versa, was that international organizations were typically governed by special regimes and had renounced, at least implicitly, taking the law into their own hands. In setting up international organizations, States had created the mutual expectation that the application of the rules of the organization would ultimately lead to the settlement of any dispute that might arise. Yet even if they did not, the existence and operation of the organization should not be jeopardized by unilateral countermeasures. That was true not only for organizations such as the European Community, which had a system of judicial remedies, but also for the United Nations and its specialized agencies. The Charter of the United Nations had, after all, established the organized international community of States and had created a legal framework and procedures that risked being undermined if secondary rules which, while making sense in the context of the responsibility of reciprocally sovereign States, were formally imposed on relations between an international organization and its members. Accordingly, he proposed replacing the word “means” with “procedures” and replacing the word “ensuring” with “seeking” in both draft article 19, paragraph 2, and draft article 55.

Turning to chapter VII of the report (Responsibility of a State in connection with the act of an international organization), he endorsed the Special Rapporteur’s attempt to restrict the responsibility of the States members of an international organization under draft article 28 if they used an international organization to circumvent their own obligations. He was not satisfied, however, that that restriction was adequately conveyed by the wording proposed by the Special Rapporteur in paragraph 83 of his report. The expressions “purports to avoid compliance” and “by availing itself of the fact” were too abstract and left open the possibility that, contrary to the Special Rapporteur’s intentions, draft article 28 might be interpreted more

broadly. In his own opinion, the original term “circumvention” better conveyed the stated objective of the draft article.

Lastly, he wished to note his agreement with the Special Rapporteur’s reasoning regarding the issue of the content of international responsibility, as well as with the suggested new general provisions contained in draft articles 61 to 64.

60th Session (2008)

2986th Meeting, 29 July 2008

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http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr2986.pdf&lang=EFS

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Summary record of the 2986th meeting

Extract from the Yearbook of the International Law Commission: 2008, vol. I

2986th Meeting

Tuesday, 29 July 2008, at 10.05 a.m.

Immunity of State officials from foreign criminal jurisdiction (*continued*)

(p. 221)

58. Mr. Nolte said that the Special Rapporteur's preliminary report combined a mastery of detail with a methodical approach, providing clear definitions and raising pertinent questions, thereby already indicating the direction the Commission's work should take. Together with the Secretariat's very thorough memorandum, it constituted an excellent basis for the Commission's discussions.

59. Beginning with a few general observations, he said that a number of speakers had launched what he was tempted to term a preemptive strike, by calling the judgment of the ICJ in the Arrest Warrant case "a disaster", or by suggesting ways in which the Special Rapporteur should take into account modern trends in human rights law and the goal of combating impunity. Some speakers had asserted that the Special Rapporteur was playing Hamlet without the Prince, and had called for a more open attitude to the "really important issues". However, he himself considered that it was not fruitful to preface the discussion with such statements, because they tended to narrow the debate prematurely and to oversimplify it. In consideration of the topic, due heed would have to be paid to some of the most important principles of international law and contemporary interna-

tional policy. He assumed that it was because of the importance of the topic that the Special Rapporteur had started with an analysis of the legal basis for immunity and had not yet tackled the issue of possible exceptions. In view of its great significance, members must be prepared to consider all the relevant aspects of the topic. Such an open-minded approach called, first, for an analysis and description of the primary purposes of immunity, since that offered the sole basis for assessing countervailing trends and balancing competing goals in order to determine the degree and scope of possible exceptions.

60. The discussion thus far had not concentrated sufficiently on the basic reasons for granting State officials immunity from foreign criminal jurisdiction in the first place. Those reasons were often stated in rather abstract terms and they sounded either somewhat old-fashioned: sovereign equality, *par in parem non habet imperium*, representation of the State, stability and predictability of inter-State relations; or else rather technocratic, for example, the necessity of immunity for the performance of State functions. When formulated in those terms, those reasons might sound rather weak, especially when set against reasons embodying such substantive values as human rights and the need to combat impunity. At the current stage it was, however, vital to clarify the substantive values underlying the abstract and apparently technocratic terms by which immunity was usually justified. Mr. Vasici-

annie had taken a few steps in that direction, and Mr. Brownlie had reminded the Commission that sovereign equality was designed to ensure that strong States did not treat weak ones unfairly. He would add that the stability of inter-State relations was not just important in securing technical cooperation between Governments, but was also essential for securing the human rights of individuals and, in some situations, for ensuring that force was not used within and between States. The rules on immunity therefore protected not only the “egoistical” sovereign interest of a particular State, but also the very community values that were safeguarded by human rights and by the principle that there should be no impunity for international crimes. The Special Rapporteur had alluded to those interests, in paragraph 96 of his report, but they deserved more emphasis as collective goods.

61. Turning to the distinction between national and international criminal jurisdiction, he agreed with the stress placed on that distinction in paragraph 44 of the report. Since the jurisdiction of international criminal tribunals derived from agreements between the States concerned, there could be no justification for immunity from that jurisdiction. That also meant, however, that developments in the field of international jurisdiction could not be used as an argument in support of restricting immunity before national courts. For example, the judgment of the International Tribunal for the Former Yugoslavia in the *Prosecutor v. Blaškić* case could not be regarded as a precedent for purely national criminal jurisdiction. If any conclusions were to be drawn from the existence of international criminal jurisdiction, they should go in the direction of confirming the immunity of State officials from another State’s criminal jurisdiction, the reason being that the growth and entrenchment of international criminal jurisdiction would make it unnecessary for third States to assume criminal jurisdiction over State officials in order to combat impunity.

62. His last general point was that modern developments must be taken into account in

a comprehensive rather than a selective manner. He had therefore been rather concerned at the assertions of some members that the judgment of the ICJ in the *Arrest Warrant* case had “interrupted” a trend towards the recognition of a new exception to immunity in cases involving international crimes or grave human rights violations. He had the impression that this assertion owed more to a particular interpretation of the significance of the decisions in the *Pinochet* case than to what they actually stood for if analysed critically. Even if they constituted a new trend, history did not always go in a straight line, but took twists and turns. Why should the judgment of the ICJ not be the expression of another equally legitimate and even more recent countervailing trend, stemming from the experience of different jurisdictions since the *Pinochet* case? Perhaps those jurisdictions had weighed the pros and cons of according such an exception and had concluded, explicitly or implicitly, that the time was not ripe for allowing a new exception, or that countervailing reasons prevailed. The general trend of national and international case law since the *Pinochet* case should not be played down, but rather it should be taken seriously, for it might be based on valid considerations. Excessive importance should not be attached to exceptions to that general trend, or to certain individual dissenting voices, merely because they happened to coincide with a widespread moral and political perception.

63. Turning to more specific points, he agreed with the view expressed by the Special Rapporteur in paragraph 83 of the report that, while it might be appropriate to distinguish between immunity *ratione personae* and immunity *ratione materiae* for analytical purposes, it was questionable whether that distinction was necessary for the legal regulation of the subject of immunity. He took that comment to mean that, as practising lawyers, the members of the Commission should not lose sight of the common purpose underlying those two seemingly different forms of immunity. That common purpose was the protection of State officials’ functions, irrespective of whether they were

limited or whether they extended to the representation of the State at the international plane—in other words what the Special Rapporteur called the “mixed functional/representative rationale” of immunity *ratione materiae*. But, naturally, a State alone could not define which of its officials had a wide representative role; such a definition must depend on a shared understanding on the part of the international community, an understanding that was not frozen in time but would evolve in parallel with changes in the external and representative functions of certain officials. He therefore saw no contradiction in the fact that there might be a tendency simultaneously to expand both the immunity of certain State officials and exceptions thereto, since the two tendencies were not mutually exclusive. In theory, in the *Arrest Warrant* case, the ICJ could have found that Ministers for Foreign Affairs in principle enjoyed immunity *ratione personae*, except in cases of prosecution for genocide. The reason why the Court had not followed that line of reasoning might have had to do with the inherent persuasiveness of the analogy of Head of State with Minister for Foreign Affairs in terms of their representative function, as compared to the much more difficult task of establishing an exception for international crimes. That, however, was a question that the Commission should examine at subsequent sessions.

64. He concurred with the Special Rapporteur that, in principle, all State officials should be considered within the context of the topic, but that must not be taken to imply that all persons regarded as officials by a particular State must be recognized as State officials for purposes of enjoying immunity from criminal jurisdiction. There were two ways of narrowing down the definition of the category in question. The first would be to consider only those persons who exercised powers intrinsic to the State, thereby excluding the vast majority of State officials whose work could be performed equally well by the private sector, or who did not have the instruments of State power at their disposal. That category would include most officials working in the sectors of education,

health, inland transport, telecommunications, water, gas and electricity. Since the Court of Justice of the European Communities had developed a similarly narrow concept of “public service” in the admittedly different context of the right to freedom of movement within the European Union, in considering what the term “State official” essentially meant, the Special Rapporteur could perhaps draw some inspiration from that case law, as it reflected the functional approach which formed the basis of the law of immunity. That would make it possible to narrow down somewhat the wider notion of “State official”, which the Special Rapporteur had drawn from article 4, paragraph 2, of the draft articles on responsibility of States for internationally wrongful acts,²⁷¹ without detriment to the basic principle of the protection of the function.

65. A second way of narrowing down the concept of State officials entitled in principle to immunity could be to identify certain groups of officials who would form an exception because in State practice they were not generally considered to benefit from immunity. For example, soldiers who were prisoners of war did not usually benefit from immunity if they were charged with war crimes. Perhaps, however, that exception was limited to certain crimes and did not affect the principle whereby soldiers, as public officials, normally enjoyed immunity, in which case it should be dealt with in the context of possible substantive exceptions to immunity.

66. As for the group of persons enjoying immunity *ratione personae* because they were considered to represent the State as such, he agreed with the Special Rapporteur that it should comprise the trio of Head of State, Head of Government and Minister for Foreign Affairs, whose immunity was recognized in customary international law. The Commission should not address the question of whether other State officials, such as ministers of defence, enjoyed the same immunity. However, while the Commission should not encourage an extension of that category, neither should it exclude possible develop-

ments, or insights derived from specific cases. In his opinion, in the *Arrest Warrant* case the ICJ had plausibly recognized that the rationale for immunity *ratione personae* applied equally well to Ministers for Foreign Affairs. That principle had not been explicitly recognized hitherto, nor, however, had it been explicitly challenged. On the other hand, it would be going too far to interpret paragraph 51 of the judgment in that case as recognizing that immunity *ratione personae* covered more than the trio. The decisions in the *General Shaul Mofaz* and *Bo Xilai* cases, concerning the Israeli Defence Minister and the Minister of Commerce of the People's Republic of China respectively, might quite legitimately have had a different outcome in other national jurisdictions. In any case, the deciding factor must be, not the importance that the State ascribed to the post of the official concerned, but rather the international community's recognition of, and mutual assumptions regarding, the importance of a particular post for the exercise of public functions and in particular for the representation of the State as a whole.

67. He concurred with the Special Rapporteur that the issue of recognition was part of the wider topic of the effects of recognition in general, and should be alluded to only by way of a "without prejudice" clause. In his opinion, however, it would seem to follow from the general principles of *bona fides* and legitimate expectations that if a State recognized an entity as a State and that entity met the usual criteria for statehood, the recognizing State must accord immunity to the officials of that entity.

68. He had no firm preferences on how to deal with the issue of family members of persons enjoying immunity *ratione personae*. He suspected that the matter was inextricably bound up with the topic under consideration and unconnected with any other topic, in which case the Commission should try to tackle it. The Special Rapporteur had

already mapped out a good approach in that regard in paragraphs 125 to 129 of his report.

69. He agreed with the conclusions to chapters I to III of the report as summarized in paragraph 102 and with the conclusions to chapter IV as summarized in paragraph 130. His only suggestion would be to delete the word "primarily" in paragraph 130 (d) in order to avoid any suggestion that the Commission held that more officials than the trio already enjoyed immunity *ratione personae*.

(p. 224)

78. Mr. Nolte, responding to Mr. Brownlie's and Mr. Hmoud's remarks, said he suspected there was less of a difference of opinion than might appear to be the case. His earlier statement had been about the competence of international criminal jurisdiction in relation to national criminal jurisdiction. The *Pinochet* decision dated back nearly 10 years; when it had been adopted, the International Criminal Court had only just been negotiated. More consideration now had to be given to coordination between the nascent global international criminal jurisdiction and national jurisdiction. He fully agreed with Ms. Jacobsson on the need for open-mindedness. No one had advocated unquestioning reverence for the *Arrest Warrant* decision, but some had adduced reasons why the decision could be seen as correct. It was true that the *Pinochet* decisions were not the only relevant ones; recent decisions by the House of Lords, for example, went in a direction that was diametrically opposed to that of *Pinochet*. The Commission needed to identify what was the dominant trend, and for what reasons, and what—perhaps for better reasons—was the minority trend. Lastly, he was thrilled to hear that for Mr. Pellet, the *Arrest Warrant* decision was no longer disastrous: it was now merely unfortunate.

2980th Meeting, 17 July 2008

Available at:

http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr2980.pdf&lang=EF5

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Summary record of the 2980th meeting

Extract from the Yearbook of the International Law Commission: 2008, vol. I

2980th Meeting

Thursday, 17 July 2008, at 10.05 a.m.

Protection of persons in the event of disasters (*continued*)**(p. 146)**

11. Mr. Nolte said that the Special Rapporteur's thoroughly researched and thought-provoking report provided an excellent introduction to the subject. The discussion held at the previous meeting on whether to adopt a rights-based or a problem-based approach to the subject had been very valuable and should be continued. He concurred with the Special Rapporteur's view that the two approaches were not contradictory but instead complemented each other, and that it was essentially a matter of emphasis. The question of emphasis therefore merited further and ongoing discussion.

12. In accordance with its mandate, the International Law Commission should, in principle, adopt a law-based approach. Its members were not well-versed in the operational aspects of disaster relief and had to rely on consultations with experts, as they had done in the work on shared groundwaters. Although disaster relief was perhaps not as far removed from its area of expertise as was hydrology, the Commission should nevertheless be mindful of its limitations. That did not mean that he disagreed with Mr. Brownlie; on the contrary, if the Commission's work was to be useful to those in urgent need of protection, it must be aware of realities on the ground and capable of ascertaining where the problems lay in practice.

13. A law-based approach was not necessarily a human rights-based approach. Although human rights should play an important part in the current exercise, it would not be advisable to make them the sole basis for the Commission's work, as many other legal and non-legal principles also came into play. For example, a large proportion of disaster relief resources was provided out of a sense of solidarity and of moral rather than legal obligation. Although, taking a rights-based approach, one might say that victims were entitled to disaster relief, any attempt to place the international solidarity on which many disaster relief efforts relied on a purely legal basis might run the risk of cutting off a most valuable source of such relief. He was not advocating a charity-based approach, but simply saying that human rights should be only one component of an overall law-based approach to the issue. If, for the purposes of the current exercise, the Commission nevertheless wished to emphasize the role of human rights, it might wish to consider using the concept of a "human rights-oriented approach", which left more room for other important legal principles and for focusing on specific problems on the ground.

14. With regard to the scope of the topic *ratione materiae*, he was not in favour of using the definition of the term "hazard" found in the Hyogo Framework for Action 2005–2015,¹⁹⁹ which was much too broad. He preferred the one found in the 1998 Tampere Convention on the Provision of Telecommunication Resources for Disaster Mitigation and Relief Operations, which more clearly highlighted the emergency na-

ture of the issues being addressed by the Commission.

15. In paragraph 47 of the report, assisting actors were referred to as “agents of humanity”. While that might be the way those actors saw themselves, it was perhaps too presumptuous a designation; “agents *for* humanity” might be a better rendering, in that it underscored that their perception of their role must always be measured against their success in accomplishing it.

16. On the question whether the topic should be limited to natural disasters or should cover all disaster situations, including man-made disasters, he agreed that there was a considerable overlap between natural and man-made disasters (of which the situation in Darfur provided a good example); nevertheless, he was not convinced that this justified adopting a holistic approach. Even when natural disasters resulted from human activity, they clearly had a non-political dimension that made it easier for States to accept special assistance. He would therefore tend to place the emphasis on natural disasters, and include only those man-made disasters that had acquired the characteristics of natural disasters.

17. A similar approach could be taken with regard to the question of whether the protection of property and the environment should be included in the scope of the topic. His suggestion would be that if the disaster affected or threatened persons’ lives, bodily integrity or basic needs, then the concept of disaster relief should be extended to include those related issues. If, on the other hand, only their degree of affluence, or the environment in general, was affected, such protection should not fall within the scope of the study.

18. Paragraph 54 raised the question whether a right to humanitarian assistance should be recognized. While it was certainly too early to discuss the matter in detail, he had no problem, in principle, with regarding such a right as implicit in international human rights law, and his instinct would be to regard it as an individual right that was typi-

cally exercised collectively. At the same time, a right to humanitarian assistance must be enforceable in the same manner as other human rights; in particular, there was no right or obligation to enforce it through the unauthorized use of force. Thus conceived, such a right would not challenge the principles of sovereignty and non-intervention. The concept of the responsibility to protect should be understood in the light of that classical interpretation of the law; it remained primarily a political and moral concept that had not altered the law relating to the use of force. It would not be appropriate for the Commission to propose changes in that area.

19. As for the scope of the topic *ratione personae*, paragraph 56 of the report raised the question whether—and if so, how—the practice of non-State actors should be assessed and what weight should be accorded to it. That question came close to touching on the very nature of international law. While not wishing to deal with the matter at length, he would venture the opinion that although the practice of non-State actors might be relevant for the purposes of identifying best practices, it could not, as such, constitute practice relevant for the development of customary international law or the interpretation of treaty law. It was States, not non-State actors, that were competent to make and change the rules at the international level. Thus, while States might delegate or recognize the rule-making or practice of other actors (which they were doing increasingly often, perhaps particularly in the area of disaster relief), the fact remained that they themselves had the last word and the legal authority to recognize a certain practice by a non-State actor as legally relevant.

20. Clearly there were other dimensions to the legal status of non-State actors. A human rights-oriented approach raised the question of the obligations of non-State actors. In that connection, he could recommend Andrew Clapham’s book entitled *Human Rights Obligations of Non-State Actors*.²⁰⁰ He cautioned against according

quasi-official status to non-State actors: while they might have a so-called “right of initiative”, why should that right not simply derive from the universal freedom of expression? Non-State actors might have an obligation to protect, but only on the basis of and within the limits of general human rights law, and certainly not in the same way as States had obligations to protect. To a certain extent, persons in need of protection had a right in relation to non-State actors, but account had to be taken of the fact that many disaster relief efforts were fuelled by a sense of solidarity and charity, not out of a sense of legal obligation. As far as commercial subcontractors were concerned, his initial instinct was that there should be no distinction in law, in principle, between commercial and non-commercial non-State actors, since good intentions alone did not justify privileges.

21. Lastly, on the question of what form the Commission’s work on the topic should take, the answer depended on whether the emphasis was to be placed on codification and strictly operational pointers, or on progressive development. A convention would make sense only if those States that typically hesitated to allow a free flow of disaster relief would be likely to ratify it. Such States would ratify a convention only if it was a credible effort to codify existing law and ensure good practice. If, on the other hand, the emphasis was placed on progressive development, the approach that the Special Rapporteur seemed to favour, then guidelines would be more appropriate. Personally, he would be inclined towards a more cautious approach, in the interest of providing effective relief to disaster-stricken persons, and he would therefore be open to a framework convention.

2973rd Meeting, 6 June 2008

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http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr2973.pdf&lang=EFS

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Summary record of the 2973rd meeting

Extract from the Yearbook of the International Law Commission: 2008, vol. I

2973rd Meeting

Friday, 6 June 2008, at 10 a.m.

Expulsion of aliens (*continued*)**(p. 99)**

1. Mr. Nolte thanked the Special Rapporteur for his stimulating report. He agreed with certain parts of his analysis and, in particular, the concerns expressed in paragraphs 20 and 33 on the expulsion of persons to countries where their lives would be in danger.

2. The question whether a dual or multiple national was an alien in cases of dual or multiple nationality, as posed in chapter I, section A of the Special Rapporteur's fourth report (paras. 7–13), would take the Commission in a problematic direction. Nationals were not aliens, and that was not merely empty formalism. One purpose of establishing a clear distinction was to prevent States from creating different classes of nationals or citizens, as Mr. Petrič had pointed out. If States sometimes treated some of their nationals, for certain purposes, as if they were aliens, they either had a special justification or they were violating international law. Such exceptions could be justified only exceptionally, for example, if they were for the benefit of a class of persons, as when an individual was given the possibility of consular protection by the State of his or her dominant nationality against the State of his or her less dominant nationality. States could also limit the right of certain dual nationals to be elected to certain positions. There was, however, no State practice that could legitimize the treatment of dual nationals as aliens for the purpose of expulsion. The distinction between a dominant and a non-dominant

nationality had its place in the law of diplomatic protection where it did not serve to determine the legal relationship between the individual and his or her State, but only the consequences of that legal relationship between two States which apparently had the same entitlement as protector.

3. The award of 17 December 2004 in the *Ethiopia/ Eritrea* arbitration was not an example to the contrary. In that case, Ethiopia had applied a law according to which an Ethiopian national lost his or her Ethiopian nationality if he or she voluntarily acquired the nationality of another State. That rule existed in many countries and was legitimate under international law: a person could automatically lose his or her nationality and become an alien and thus be subject to expulsion. Admittedly, the example of the *Ethiopia/Eritrea* arbitration was somewhat misleading as the Ethiopian law in question had apparently not had the effect of *ipso jure* terminating the citizenship of the persons who had acquired Eritrean citizenship by registering to vote in the referendum. It had therefore been necessary to publish an implementing act, which had then had to be monitored to determine whether it was arbitrary. Moreover, as some members of the Commission had stressed, that case was exceptional in nature.

4. In any event, the mere fact that dual nationals had been expelled without first having been denationalized by the expelling State, as indicated in paragraph 10 of the report, did not prove that such a practice was legal. Its legality could not be established by the fact that the expellees might possibly return more easily to the country from which they had been expelled if they had not been

stripped of their nationality. That rather hypothetical advantage was contrary to the very real protection offered by the requirement that a State must not arbitrarily deprive a person of his or her nationality before expelling him or her.

5. He could not agree with the two conclusions the Special Rapporteur had reached in paragraph 12 of his report because they were too broad, even if the Special Rapporteur's interpretation of the material he had collected was correct. Taken at face value, principle (a), according to which "[t]he principle of the non-expulsion of nationals does not apply to persons with dual or multiple nationality unless the expulsion can lead to statelessness", would mean that States could freely expel their nationals who just happened to be dual nationals. Dual nationals would thus be second-class citizens who would be more liable to expulsion. Principle (b), according to which "[t]he practice of some States and the interests of expelled persons themselves do not support the enactment of a rule prescribing denationalization of a person with dual or multiple nationality prior to expulsion", was not based on a sufficiently comprehensive assessment of the legitimacy of the practice of States and the interests of the persons concerned.

6. He was also not persuaded by chapter I, section B of the report (paras. 14–24) for the simple reason that it was based on the reasoning and conclusions of section A. Even if he were persuaded by section A, however, he would have doubts about section B because he could not accept the statement in paragraph 18 of the report that dual or multiple nationals could be more freely expelled by or between the States of their nationalities, regardless of the nature of their attachment to each of those States.

7. Chapter II of the report dealt with the circumstances under which a person lost or was deprived of his or her nationality and then became an alien. That question must be considered on the basis of the fundamental right

provided for in article 15 of the Universal Declaration of Human Rights,¹⁴¹ which stated that no one could be arbitrarily deprived of his or her nationality and which had been applied by the Ethiopia–Eritrea Claims Commission. Contrary to what was suggested in paragraph 30 of the report, that Commission had not considered "expulsion on the ground of dual nationality" permissible, but had, rather, assumed that such expulsion would have been admissible if the expelled persons had lost their nationality in a non-arbitrary way. It had never considered the expulsion of nationals to be permissible, even in the case of dual or multiple nationality.

8. It was perhaps worthwhile to recall the context in which the right to a nationality and the right not to be deprived of a nationality had been recognized in article 15 of the Universal Declaration of Human Rights. The recognition of those guarantees at the international level had been much influenced by the fact that Nazi Germany had stripped its Jewish citizens of their nationality. In his view, that experience did not show only that persons should not be deprived of their nationality if that made them stateless. It would have been equally powerful if the German Jews had all had another nationality because it also showed that the deprivation of nationality could take place only in generally recognized or clearly reasonable exceptional circumstances. The Commission's work should not suggest otherwise.

9. Despite those reservations, he agreed with the Special Rapporteur's conclusion that there was no need for an additional draft article because the general prohibition of the expulsion of nationals would be enough. That prohibition applied equally to dual and multiple nationals. In order to avoid any misunderstanding, however, nothing would prevent the Commission from including a provision expressly indicating that denationalization could not take place for the purpose of expulsion.

2962nd Meeting, 14 May 2008

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Summary record of the 2962nd meeting

Extract from the Yearbook of the International Law Commission: 2008, vol. I

2962nd Meeting

Wednesday, 14 May 2008, at 10.05 a.m.

Responsibility of international organizations (*continued*)**(p. 36)**

32. Mr. Nolte, clarifying the statement he had made at the previous meeting, said that he had commented not on draft article 46, but solely on draft article 52, paragraphs 4 and 5, and the possible entitlement of member States of an international organization to take countermeasures against that organization. The principle of speciality had to be borne in mind in that context and he therefore proposed that draft article 52 should make it clear that it did not create a presumption in favour of countermeasures being taken against the allegedly responsible international organization.

33. Turning to draft article 51, paragraph 3, and the question of whether an international organization was entitled to invoke the responsibility of another international organization for the breach of an obligation owed to the international community as a whole, he noted that, in support of the argument that it could, paragraph 36 of the sixth report had quoted the contention of the Commission of the European Communities that “it is hardly conceivable that a technical transport organization should be allowed to sanction a military alliance for a breach of a fundamental guarantee of international humanitarian law that may be owed to the international community as a whole” .

34. In his own view, however, certain considerations militated in favour of the possibility that a technical transport organization

might, under certain circumstances, be allowed to take countermeasures against a military alliance. The first was that the member States of that organization might have transferred the exclusive power to take certain decisions concerning transport to the organization. If those member States had thereby deprived themselves of the right to take unilateral measures, then why should the fact that they had delegated their power to a technical organization result in neither the member States nor the organization being able to take countermeasures in the area of transport? Paragraph 60 of the report discussed that point in the context of draft article 57, but limited the possibility of taking countermeasures in an area over which competence had been transferred to an international organization to regional economic integration organizations. An air traffic control organization, for example, might not be linked to a regional economic integration organization but might still have certain exclusive powers which would have to be used in order to implement certain countermeasures.

35. There was, however, a more general issue involved and, for that reason, the answer that a technical transport organization had not been empowered to apply countermeasures was too simplistic. Of course, if the organization had not been given such powers, it could not take countermeasures against a military alliance. But the real question was what considerations determined whether the technical transport organization had been empowered to take countermeasures for violations of peremptory norms by other organizations. The answer seemed not to depend primarily on the technical scope

of the organization's activity, but rather on whether its members had conceived it as an instrument for many purposes, including the adoption of countermeasures for violations of peremptory norms, or whether they had intended to neutralize, or depoliticize, the management of a technical area by entrusting it to a specific organization. It was unlikely that the reply could be found simply by referring to the organization's rules—since they usually said nothing on the issue—or to the organization's technical nature. Once again, the draft articles should leave room for an interpretation of an international organization's character.

36. He was unsure whether the draft articles dealt adequately with the complexities of the eventuality of one international organization invoking the responsibility of another international organization. The mere fact that the injured organization was not a member of the responsible organization did not seem to be a sufficiently determinative factor. The European Community was not a member of the Southern Common Market (MERCOSUR) and NATO was not a Member of the United Nations, yet the position with respect to invoking responsibility seemed to be different in the two cases. The fact that all members of NATO were Members of the United Nations suggested that, for the purposes of invoking responsibility, NATO should be treated more like a Member of the United Nations, whereas the European Community must clearly be treated as a non-member of MERCOSUR.

37. Secondly, although it was hard to disagree with the Special Rapporteur's cautious statement in paragraph 46 of his report that “should an organization fail to apply its own rules when taking countermeasures, the legal consequence is not necessarily that countermeasures would have to be regarded as unlawful”, it might nonetheless give the wrong impression, especially if it was read in the light of the Special Rapporteur's comments on draft article 46 in paragraph 11 of the report, which suggested that the rules of an international organization were comparable to the internal law of States. The internal law of States was normally disregarded, for good reasons, when assessing the international legality of a State's action, whereas the rules of international organizations tended to be of greater consequence when evaluating the legality under international law of the activities of the organizations concerned. That was because those rules also determined the scope of an international organization's competence, *inter alia*, so as to enable third parties to rely on them, and were more directed towards the international public, including non-members. Hence it was necessary to distinguish between various types of rules.

38. Lastly, he endorsed previous speakers' views concerning the exhaustion of local remedies and questions of admissibility, and said he would welcome more explicit treatment of those issues in the draft articles.

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Summary record of the 2961st meeting

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2961st Meeting

Tuesday, 13 May 2008, at 10.10 a.m.

Responsibility of international organizations (*continued*)**(p. 30)**

24. Mr. Nolte said that the warning quoted in the footnote to paragraph 41—namely that the work of the Commission would become “a train wreck” if the provision that it was to elaborate concerning countermeasures directed at an internationally wrongful act of an international organization were to provide new justifications for those who had long been inclined to “sanction” the United Nations—expressed an entirely legitimate concern. For that reason, he disagreed with draft article 52, paragraphs 4 and 5, pursuant to which an injured member of a responsible international organization could, as a general rule, take countermeasures against the organization—countermeasures being excluded “only if this is not inconsistent with the rules of the ... organization”. In his view, that presumption should be reversed.

25. He therefore proposed that draft article 52, paragraph 4, should read: “A member of an international organization which claims that it has suffered an injury for which the organization is responsible may not take countermeasures against the organization except if this is consistent with the character, the law and the rules of that same organization.”

26. International organizations constituted special regimes, specific communities whose members had renounced, usually implicitly, the possibility of taking the law into their own hands, in the conviction that the rules of

the organization would enable disputes to be resolved, should they arise. Even if they did not, the existence and operation of international organizations should not be jeopardized by the application of unilateral countermeasures. The Charter of the United Nations, for example, had created a legal framework and procedures that might be fatally undermined if the secondary rules, which made sense in the context of responsibility of States that recognized each other’s sovereignty, were transposed into the context of relations between the United Nations and its Member States. It was not a question of ruling out the possibility that the United Nations could act illegally and that Member States could respond to such acts, but of determining whether Member States could react by taking countermeasures.

27. How was it possible to determine whether the law of an organization excluded resort to countermeasures by its members? The problem was that the constituent treaty of most organizations contained no explicit rules on that issue, and that a presumption in favour of the possibility of members taking countermeasures, as suggested by the Special Rapporteur, thus risked serving as a blanket authorization. However, that would be inappropriate if it was the character of an international organization, or the nature of the community that had created it, that determined whether countermeasures were or were not permissible. In such a case, merely to state that the “rules of the organization” determined the issue was somewhat misleading. It was not any specific rule, nor a group of specific rules, but the rules of the organization as a whole, including their purpose, that constituted the character of the

organization and determined whether countermeasures were permissible. It was therefore important that reference should be made not only to the “rules” of the organization, but also, more generally, to the “character” and “law” of the organization.

28. Nor should the question whether the members of an international organization could resort to countermeasures be answered by way of formal analogies. It was a question of interpreting existing practice and identifying the policy choices contained in the constituent treaties of the international organizations. As far as past practice was concerned, the lack of precedents spoke in favour of an *opinio juris* of States that countermeasures, as a general rule, were not permissible. In his opinion, the onus was on the Special Rapporteur to show that there should be a presumption in favour of member States taking countermeasures—a requirement that the report had not met. As for the policy choice expressed in a constituent

treaty, the Charter of the United Nations, in particular, was designed as a special regime in which States targeted by binding decisions of the Security Council and recommendations of the General Assembly were not supposed to challenge them other than through recourse to United Nations bodies or by claiming that the decisions in question had been taken *ultra vires*. Admittedly, those possibilities of recourse were perhaps unsatisfactory in certain respects, but that did not justify an invitation by the Commission to targeted States to use the law of responsibility of international organizations to legitimize challenging the outcome of common deliberations by applying unilateral measures.

29. Lastly, he affirmed his conviction that the general approach to the question of countermeasures was extremely important, and supported the suggestion by Ms. Escameia that the issue should be discussed in a working group.

2958th Meeting, 7 May 2008

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http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr2958.pdf&lang=EF5

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Summary record of the 2958th meeting

Extract from the Yearbook of the International Law Commission: 2008, vol. I

2958th Meeting

Wednesday, 7 May 2008, at 10 a.m.

Shared natural resources (*continued*)**(p. 16)**

78. Mr. Nolte, commending the Special Rapporteur's exemplary work, said that the draft articles set out in the fifth report left little room for criticism, carefully balancing the values and interests at stake. He supported the Special Rapporteur's strategy of separating the work on transboundary aquifers from the issues of oil and natural gas and endorsed his careful approach with regard to the final form of the draft articles, for the reasons set out in the report. He also agreed on the need to limit their scope so as to avoid possible complications and overlap. He endorsed the reference in draft article 1 (*b*) to "other activities", a reference that had been criticized by a number of members. He understood that formulation to have the function of a catch-all clause; it would be asking too much to enumerate all possible activities which might affect aquifers, in particular in view of the difficulty of predicting future developments.

79. The balance that must be struck between the interests of aquifer States and the need for the conservation of aquifers had been well formulated in draft article 3. The use of the word "sovereignty" was legitimate in the context. He wondered, however, whether the exercise of sovereignty should be described as having only to be "in accordance with the present draft articles", as draft article 3 provided. He rather thought, like Ms. Escameia and Mr. Brownlie, that there should also be a reference to general interna-

tional law. As far as he could see, the draft articles did not expressly refer to general international law or customary international law. It should be specified that the draft articles were without prejudice to such rules of customary international law as might provide greater protection to transboundary aquifers or aquifer systems. It could be argued that in certain areas, general principles of customary international environmental law provided more protection to transboundary aquifers or aquifer systems than did the draft articles. It should be made clear that the purpose of the draft articles was not to reduce the existing protection of aquifers under general or customary law or to freeze the development of those rules of law; indeed, in a time of fragmentation of international law, there should be an explicit reference to them.

80. He agreed with the Special Rapporteur that there was no need for an additional subparagraph in draft article 4 prohibiting the assignation, lease or sale of an aquifer to another State. Either the draft articles would become a non-binding declaration, in which case they were equally applicable to all States regardless of any assignation, or they would become a binding treaty, in which case a treaty State would not be able to shed its obligations by transferring parts of its rights over the aquifer to another State or entity.

81. He agreed with the obligation formulated in draft article 6 not to cause significant harm. Like Ms. Escameia and Mr. Pellet, he was not fully persuaded that the obligation should be limited to aquifer States. It was true that draft article 10 covered non-aquifer States, but only those in whose

territory a recharge or discharge zone was located. Like Mr. Pellet, he wondered whether it was not conceivable, for example, that pollution emitted by a third State might affect a recharge or discharge zone or whether, in the present period of climate change and technological development, it would not become possible for some States that were neither aquifer States nor non-aquifer States in which a recharge or discharge zone was found to use climate-modification techniques that might affect aquifers. In his view, the draft articles should cover such eventualities.

82. With regard to draft article 20, on the relation to other conventions and international agreements, he agreed with its basic idea, assuming that the draft articles were to become a convention, although like Mr. Pellet, he was not certain that article 311 of the

United Nations Convention on the Law of the Sea was the right model. The instruments on biological and cultural diversity could serve as more recent and convincing models. He did not understand, however, whether the Special Rapporteur intended to include draft article 20 in the event that the draft articles remained a non-binding document or one reflecting customary international law. He endorsed Ms. Xue's point that it should be made clear in the draft articles themselves that draft article 20 applied only if the draft articles took the form of a convention. In either case, they should contain a clause specifying that they left customary law unaffected to the extent that it afforded greater protection to aquifers or aquifer systems.

83. He agreed with previous speakers who recommended that the draft articles should be referred to the Drafting Committee.

59th Session (2007)

2942nd Meeting, 25 July 2007

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http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr2942.pdf&lang=EF5

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Summary record of the 2942nd meeting

Extract from the Yearbook of the International Law Commission: 2007, vol. I

2942nd Meeting

Wednesday, 25 July 2007, at 10.05 a.m.

Expulsion of aliens (*continued*)

(p. 184)

69. Mr. Nolte said that he agreed with most of the Special Rapporteur's views and suggestions and would therefore speak only on the points on which his own views differed. Like several other members of the Commission, he had some reservations about the methodological approach adopted by the Special Rapporteur and, while he fully endorsed the basic premise stated in draft article 3 that the right of a State to expel aliens was not absolute, he would explain the limitations applicable to the exercise of that right in a slightly different way. The main limitations were human rights as derived from treaties and customary international law, including rules of *jus cogens*. He would thus not emphasize, as the Special Rapporteur did, the "limits inherent in the international legal order" because they basically involved inter-State relations, not international law relations between a State and an individual. In his opinion, the second sentence of draft article 3, paragraph 2, should be amended to read: "In particular, the State must respect its obligations arising from human rights." As Mr. Gaja had suggested, moreover, paragraphs 1 and 2 should be combined in order to make the principle a more unitary one. Apart from the question of the basis and limits of the right of expulsion, he agreed with Ms. Escameia that the distinction

between the internal and external limits of the right of expulsion did not serve much purpose, and with Mr. Pellet and Mr. McRae that the distinction Herbert Hart had drawn between "primary rules" and "secondary rules"²⁹² did not really fit in the present study.

70. With regard to draft article 4, he agreed with the principle stated in paragraph 1 that a State could not expel its own national, but, like several other members of the Commission, he was not sure whether the exception stated in such vague terms in paragraph 2 ("for exceptional reasons") was well founded. After all, the cases cited by the Special Rapporteur to justify it related mainly to extradition, not to expulsion. He was also not sure whether the Special Rapporteur was reintroducing his initial interpretation of the concept of "*ressortissant*" in paragraph 43 of his report in order to extend the concept of "national", which had apparently been agreed on as being the opposite of that of "alien". The Special Rapporteur used that usual interpretation of the concept in paragraph 28 of his report, but the reference to the decision of the Human Rights Committee in the *Stewart v. Canada* case (para. 43 of the report) was not sufficient. While agreeing that the questions raised by Mr. Gaja about the term "national" were worth asking, he did not think that they belonged in a draft article relating to "*ressortissants*".

71. Referring to draft articles 5 and 6 relating to refugees and stateless persons, respec-

tively, he supported the view expressed by Mr. Pellet and other members such as Mr. McRae and Mr. Petrić that the Commission should not use language different from that of the 1951 and 1954 Conventions. He did, however, fully agree with the principle stated in draft article 7 and wished to refer in that regard to certain experiences that had not been mentioned in the report. Under the Nazi regime, Germany had carried out terrible, inexplicable mass expulsions as a prelude to the Holocaust and as part of the aggressions it had perpetrated during the Second World War. It must also not be forgotten that, after the war and as a reaction to the German aggression, over 10 million Germans had been expelled from their homeland. It was of course not a matter of relativizing German guilt, but it was conceivable that the collective expulsions of Germans after 1945 would not be justified today. As to the text of the draft article, he agreed with the Special Rapporteur's view, as further explained by Mr. Pellet, that the words "reasonable and objective examination" in paragraph 1 were better than the word "fair", as suggested by Ms. Escameia. The word "reasonable" was probably more helpful for the victims of collective expulsions than the

word "fair" because it left more room for considerations other than legal process. Referring to draft article 7, paragraph 3, he shared Ms. Escameia's doubts about the words "taken together as a group, they have demonstrated hostility towards the receiving State", which were too vague and general and thus gave a State engaged in armed conflict too easy an excuse for carrying out an unjustified collective expulsion. It would be better to apply the principle of the distinction drawn in international humanitarian law between civilians and combatants, with the result that only the members of the group who had actually behaved in a clearly hostile manner would be liable to expulsion in time of war.

72. On the basis of those comments, he agreed that draft articles 3, 4 and 7 should be referred to the Drafting Committee. He nevertheless shared Mr. Pellet's view that the Commission as a whole should decide whether the draft articles should contain rules relating to refugees and stateless persons and, if so, whether such rules should deviate from the relevant conventions. He personally did not endorse either of those two options.

2938th Meeting, 18 July 2007

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http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr2938.pdf&lang=EFS

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Summary record of the 2938th meeting

Extract from the Yearbook of the International Law Commission: 2007, vol. I

2938th Meeting

Wednesday, 18 July 2007, at 10 a.m.

Responsibility of international organizations (continued)**(p. 159)**

48. Mr. Nolte said that in his first statement on the Special Rapporteur's fifth report he had already explained briefly why he had not been persuaded by Mr. Pellet's criticism that the Special Rapporteur should have included a duty on the part of the States members of an international organization to provide it with the means to honour its obligations arising out of its internationally wrongful acts. Mr. Pellet, having introduced a proposal on the subject, felt compelled to give his reasons more fully.

49. To start with, he was not convinced by the reasons given by Mr. Pellet in support of his proposal. Mr. Pellet's first point consisted in an analogy with national constitutional law. It was not true, however, that national parliaments were required under constitutional law to vote the funds which States needed to meet their international obligations. The State as such had that duty under international law, and under its constitutional law it might also even be bound to fulfil its international obligations. He was not aware that the constitutional law of Germany, the United Kingdom or the United States required the parliaments of those countries to provide funds to honour the State's international obligations. The absence of such an obligation stemmed from the basic freedom of parliamentarians to vote in accordance with their own conscience. That freedom was the reason that conclusions applicable to the problem at hand could not be drawn

from national constitutional law. The only question that could arise was whether the opposite, *a contrario* conclusion should not be drawn: if the absence of an obligation on the part of national parliaments to provide funds was based on the freedom of parliamentarians, it might be otherwise in cases such as the one before the Commission, in which that freedom was not involved.

50. Secondly, in his argument Mr. Pellet had cited the 1954 advisory opinion rendered by the ICJ (*Effect of awards of compensation made by the United Nations Administrative Tribunal*) on the obligation of the General Assembly to approve the necessary funds to honour a judgement of the United Nations Administrative Tribunal. However, that precedent was much more limited than Mr. Pellet suggested. It did not concern general international law, but only the treaty constituting the Charter of the United Nations. Moreover, the judgment did not postulate an obligation on the part of the Member States of the United Nations, but only on the part of the General Assembly. Lastly, it had to do with the special case of the effects of a final judgment within a constitutional system. It might sometimes be possible in national constitutional law for courts to require parliaments to provide or set aside funds in order to implement final judgments, but that possibility was much narrower than Mr. Pellet's interpretation of it. It did not include a general requirement to provide the necessary funds to meet such obligations.

51. Thirdly, in his most general point, Mr. Pellet argued that it would be absurd and pointless to enunciate rules on the responsibility of international organizations if member States were not under an obligation to

provide such organizations with the funds needed to answer for their internationally wrongful acts. Personally, he did not think that the absence of such an obligation would be absurd. It made perfect sense to leave it to the international organization and to its internal or external political process to find the necessary funds. In that respect, international organizations were in the same position as States. Often, the political pressure to honour their commitments was such that member States felt compelled to make the necessary funds available.

52. In other cases, such as the agreement to which Mr. Singh had referred concerning the International Tin Council, the international organization might be conceived in a way that suggested that the liability of member States was limited to their contributions as determined by the constituent instrument. In yet other cases, the international credibility of the organization and its member States would suffer, just as would that of a State that did not honour its commitments. That political effect was the consequence of the separate legal personality of the international organization, the very feature which Mr.

Pellet had so emphasized. It would be unbalanced if the international organization had only the advantages of a legal personality but not its potential disadvantages.

53. He did not mean to say that it was not desirable for States to provide the funds needed for an international organization to fulfil its obligations. However, once it was accepted that an international organization had a separate legal personality with respect to some of its activities, the issue could not be addressed under general international law, but only on the basis of the treaty law in question. The ICJ had taken that approach in its advisory opinion on *Certain Expenses of the United Nations*. It might be possible in some cases to interpret the constituent instrument of an international organization as enunciating a duty on the part of its member States to pay their contributions in accordance with the needs and international obligations of the organization, but it went too far, and would unnecessarily limit the options States had when creating an international organization, to postulate that such a duty existed under general international law for all organizations.

2937th Meeting, 17 July 2007

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Summary record of the 2937th meeting

Extract from the Yearbook of the International Law Commission: 2007, vol. I

2937th Meeting

Tuesday, 17 July 2007, at 10.05 a.m.

Reservations to treaties (*continued*)**(p. 151)**

14. Mr. Nolte said that the twelfth report on reservations to treaties was thorough, systematic and pragmatic. Nevertheless, he wished to make two points regarding the acceptance of reservations to the constituent instrument of an international organization.

15. His first point concerned draft guideline 2.8.7. Paragraph 77 [257] of the report suggested that it was debatable whether a distinction should be made between the strictly constitutional provisions of constituent instruments and their material or substantive provisions. In the Special Rapporteur's view, there was no value in introducing a guideline that attempted to define the concept of "constituent instrument" and it would make more sense to set out the difficulties of defining the concept in the commentary. While he agreed with the Special Rapporteur that it would be difficult to provide an exact definition of the concept of a "constituent treaty" or to delimit "strictly constitutional" and "substantive" provisions, he thought it would be possible and advisable to address the problem in draft guideline 2.8.7, rather than in the commentary, by simply replacing the first word "when" with the phrase "as far as". The draft guideline would then read: "As far as a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization." That formulation would alert the reader to the existence of an important distinction without attempting to

delineate the boundary between strictly constitutional and substantive provisions, whereas a reference to that distinction in the commentary could easily be overlooked.

16. His second point concerned draft guideline 2.8.10. He was somewhat uncomfortable with the Special Rapporteur's suggestion that a reservation formulated before the entry into force of a constituent instrument of an international organization "requires the acceptance of all the States and international organizations concerned" only, and not that of the organs of the international organization concerned. As he understood it, that provision would mean that a State which acceded to a treaty at a very early stage might have its reservation accepted much more easily than if it were to accede later. In that case, States that acceded at a later stage and the organs of the international organization might be faced with a precedent which they would not have accepted if the reserving State had formulated its reservation at a later date. He wondered whether the interests of early legal security should really prevail in such circumstances. After all, the treaty had not yet entered into force and, once it had done so, the organs of the newly established international organization might immediately take a decision on whether to accept reservations. If the Commission were to take the view that the interests of early legal security should indeed prevail, consideration could perhaps be given to requiring all signatories to the treaty to accept the reservation concerned.

17. Having listened to the points made by Ms. Escameia and Mr. McRae regarding the final and irreversible nature of acceptances of reservations, he tended to con-

cur with the Special Rapporteur. He could imagine circumstances in which the full implications of a reservation might become clear only some time after it had been accepted; however, if such a case were to arise, it would be more appropriate for the accept-

ing State to react by explaining and interpreting its acceptance.

18. In conclusion, he was in favour of referring all the draft guidelines contained in the twelfth report to the Drafting Committee.

2933rd Meeting, 10 July 2007

Available at:

http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr2933.pdf&lang=EFS

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Summary record of the 2933rd meeting

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2933rd Meeting

Tuesday, 10 July 2007, at 10 a.m.

Responsibility of international organizations (*continued*)**(p. 132)**

91. Mr. Nolte said it was impossible, at the current stage, to expect the Special Rapporteur to propose more highly differentiated rules given the relative lack of discernible practice. In general, he endorsed the draft articles although, like Mr. McRae, he was uncertain whether future practice would bear out all the abstract rules which had been formulated.

92. He wished to draw the Commission's attention to what he considered to be a lacuna. In 2005, the Commission had provisionally adopted a draft article 16 (now 15), entitled "Decisions, recommendations and authorizations addressed to member States and international organizations", which had been based on the Special Rapporteur's third report dealing with the responsibility of an international organization in connection with the act of a State or another international organization. According to that draft article, an international organization incurred responsibility not only if it adopted a decision which bound member States to commit an internationally wrongful act, but also if it issued recommendations and authorizations to do so. That provision raised the obvious question of whether an international organization should bear the same amount of responsibility for wrongful acts committed on the strength of a recommendation or authorization as for those resting on a binding decision. The Special Rapporteur had broached that question in paragraph 43 of his third

report, where he had concluded that "since the degree of responsibility concerns the content of responsibility, but not its existence, the question should be examined at a later stage of the present study".

93. The time had come to deal with that important issue, as the Commission was currently debating the content of responsibility. He would have expected the Special Rapporteur to address the matter in the context of draft article 42 concerning contribution to the injury. That draft article should play a much more important role than its counterpart in the draft articles on responsibility of States, namely, draft article 39, because the responsibility of an international organization was often accompanied by the additional or contributory responsibility of another State or international organization, precisely because of the division of labour which international organizations made possible. The draft articles on responsibility of international organizations should therefore include some general guidance as to the distribution of responsibility, at least with respect to acts stemming from such different categories of sources of authority as binding decisions and mere recommendations.

94. Such guidance should bear in mind the fact that States were not generally held responsible for instigating an internationally wrongful act committed by another State. Unless there were pertinent reasons to the contrary, the situation should not be fundamentally different for international organizations. It was doubtful whether there was always justification for holding international organizations responsible for making their recommendations in the first place. If, however, the Commission thought that it could

identify such a rule, it should make it clear that the responsibility was relatively limited in comparison to that of the States which had actually committed an internationally wrongful act on the basis of that recommendation. His opinion in that respect had been confirmed by the statement of the President of the International Court of Justice regarding the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, in which she had emphasized that the strict standard of responsibility as formulated in *Military and Paramilitary Activities in and against Nicaragua* meant responsibility for actual acts and not responsibility for some form of general influence or control. There was no reason to impose stricter standards of responsibility on international organizations than on States.

95. Mr. Nolte did not endorse Ms. Escameia's argument that non-State actors

should be covered by the draft articles and he also disagreed with Mr. Pellet's submission that member States had a duty to provide an international organization with the means to fulfil its obligations arising from its international responsibility. In that connection he, too, had a positivist streak and was of the opinion that the Special Rapporteur had convincingly demonstrated that such a duty had not been accepted in international practice to date, and, indeed, had been openly contradicted thereby. On the other hand, it might be advisable to give some consideration to Mr. McRae's suggestion that exceptions might be allowed for certain kinds of organization.

96. He recommended that the draft articles should be referred to the Drafting Committee, subject to the reservations he had just expressed.

2927th Meeting, 30 May 2007

Available at:

http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr2927.pdf&lang=EF5

A/CN.4/SR.2927

Summary record of the 2927th meeting

Extract from the Yearbook of the International Law Commission: 2007, vol. I

2927th Meeting

Wednesday, 30 May 2007, at 10.05 a.m.

**Effects of armed conflicts on treaties
(continued)****(p. 86)**

104. Mr. Nolte said he agreed with the proposal that the draft articles should be referred to a working group for further consideration.

105. The Commission should try to steer a middle course between the competing goals of clarity and simplicity on the one hand, and comprehensiveness on the other. His sense was that the differences between the approach of the Special Rapporteur and that of Mr. Pellet and others originated, at least in part, in the different emphasis they placed on those two respective goals. Thus, whether to include treaties involving international organizations and non-international armed conflicts and whether to address substantive questions on the use of force and State responsibility should also depend on striking a balance, for each particular issue, between the competing goals of clarity and comprehensiveness.

106. With regard to draft article 3, the choice between the words “necessarily” and “*ipso facto*” (or “automatically”) was an important one. “Necessarily” implied that armed conflicts might, under certain circumstances, have the effect of automatically and directly terminating or suspending a treaty, whereas “*ipso facto*” or “automatically” would mean that armed conflicts as such would never

have such an effect and that, in order to suspend or terminate a treaty, the procedure under draft article 8 would have to be followed.

107. He shared the doubts of those who thought that draft article 4 placed too much emphasis on the intention of the parties. The formulation in article 31 of the 1969 Vienna Convention, in all its aspects, should provide the point of departure, rather than earlier formulations dating back to the 1920s. Otherwise, there would be a tension between the subjective general principle in draft article 4 and the much more objective approach in draft article 7.

108. He wondered whether draft article 6 *bis* should not reaffirm the *lex specialis* rule, namely the law applicable in armed conflict, in more general terms, rather than restricting it to standard-setting treaties.

109. There was a marked contrast between the strong language used in draft article 7 and the explanation in the report that draft article 7, paragraph (2), contained an indicative list of weak rebuttable presumptions. If it was retained, draft article 7 should be reformulated to reflect its stated purpose more clearly. As to the options available regarding draft article 7, he would favour combining the Special Rapporteur’s approach with a list of relevant factors or criteria, bearing in mind that those factors or criteria should not create undue uncertainty and thereby undermine the usefulness of the articles.

2916th Meeting, 9 May 2007

Available at:

http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr2916.pdf&lang=EF5

A/CN.4/SR.2916

Summary record of the 2916th meeting

Extract from the Yearbook of the International Law Commission: 2007, vol. I

2916th Meeting

9 May 2007, at 10.07 a.m.

Reservations to treaties (*continued*)**(p. 15)**

29. Mr. Nolte said he agreed with the general thrust of the eleventh report, but had doubts about the phrase “for any reason whatsoever” in draft guidelines 2.6.3 and 2.6.4, which seemed to open the door to arbitrariness. Although he understood why the Special Rapporteur had chosen it and agreed with him that the principle of free consent underlay the whole reservations regime, he nevertheless wondered whether there were substantive limits to the formulation of reservations. Perhaps it would be possible to find a formulation that echoed draft guideline 3.1.9 (Reservations to provisions setting forth a rule of *jus cogens*), which excluded objections that would have the effect of creating treaty relations that violated peremptory norms of general international law. While not easy to imagine, such a situation was nevertheless possible. Suppose, for example, that a reservation to a treaty excluded a certain part of the territory of a State from the scope of the treaty. It was unclear whether that reservation was incompatible with the object and purpose of the treaty and whether the reserving State was bound by the entire treaty, regardless of the reservation. Another State formulated an objection to the reservation, whereby it did not accept the territorial limitation, but only where the exclusion of a certain racial group was concerned. At first glance, the effect of such an objection would be to produce a treaty relation which violated a peremptory norm of international law, namely the prohibition of racial discrimina-

tion. Such a possibility, albeit theoretical, should not be excluded.

30. The first sentence of paragraph 65 of the report was misleading and could be misquoted for illegitimate purposes. Sometimes States failed to properly identify their own interests, and those interests could change; thus, it was perfectly possible for a State to be bound by treaty obligations that were not in its interests. What the Special Rapporteur probably intended to say was that a State could never be forced to enter into a treaty relation which it did not consider to be in its interests.

31. With regard to the freedom to make objections, he thought, like other members of the Commission, that it would be preferable to speak of a “right” rather than a “freedom”. The nuance could largely be explained by differences in the respective legal systems.

32. As to draft guideline 2.6.5, he agreed with Mr. Saboia, who drew a distinction between two types of objections: objections in the strict sense, which only contracting parties could make, and conditional objections, which could be formulated by States that were entitled to become parties to the treaty. Like Ms. Xue, he was of the view that States parties to a treaty and non-States parties could not be treated in the same way. He therefore suggested that the Drafting Committee come up with a formulation to distinguish between those two types of objections, depending on the status of the State concerned.