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Summary record of the 3057th meeting

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addition, draft article 10 provided that treaties were separable and that different parts of treaties could survive—or not survive—for different reasons.

90. With regard to draft article 6, he said he had no objection to referring to the "rules of international law", rather than to the 1969 Vienna Convention in paragraph 1. Nor did he object to the deletion of the phrase "during an armed conflict" in paragraph 2.

91. Draft article 7 recalled that a treaty could contain express provisions on its continued operation, suspension or termination in situations of armed conflict. Such provisions took precedence over those of the draft articles, which were not part of *jus cogens* and were therefore of a residual character. It seemed logical to place draft article 7 immediately after draft article 3. The adverb "express" could certainly be deleted.

92. Draft article 8 concerning notification was an important provision, but one that was still incomplete. Thus it did not set any time limit for notification or objection. Account should also be taken of the fact that notification was not always necessary or possible. Paragraph 1 implied that States not engaged in a conflict but parties to a treaty did not have the right of notification, since extending that right to them was not desirable and the problems that might arise for States not engaged in a conflict could easily be resolved through the means provided for in articles 60 to 62 of the 1969 Vienna Convention. The new paragraph 5, concerning the continuation of obligations with regard to the peaceful settlement of disputes despite the incidence of an armed conflict, had had a mixed reception, but he remained in favour of retaining it, since provisions on dispute settlement contained in treaties between States remained applicable pursuant to subparagraph (*k*) of the list annexed to draft article 5. He thought that the general obligation of peaceful settlement of disputes through the means indicated in the Charter of the United Nations, provided for in the new paragraph 4, also continued to operate, but that was not a generally shared view. Paragraph 4 could be deleted if paragraph 5 was maintained.

93. Draft article 9 was not indispensable, in that its content, derived from article 43 of the 1969 Vienna Convention, appeared patently self-evident. It might be useful to keep it, however, in the interests of alignment with the Convention.

94. Draft articles 10 and 11 were derived from articles 44 and 45, respectively, of the Vienna Convention. Draft article 10, on separability of treaty provisions, was of considerable importance, since without it, the partial survival of a treaty in the event of a conflict would be impossible. Draft article 11 reflected a modicum of good faith that contracting States were expected to show each other, despite the occurrence of an armed conflict. Since it could be difficult for a State to determine, at the outset of an armed conflict, what the effect of that conflict might be on the treaties it had concluded, it would be useful to specify in the commentary that article 11 would apply insofar as the effects of the conflict could be gauged definitively. That meant that draft article 10 would not apply in situations where the length and duration of a conflict had altered the conflict's effects on the treaty, which could not have been foreseen by the State upon giving its express or tacit acquiescence in accordance with draft article 10.

95. Lastly, he had chosen to subsume into draft article 12 the clause contained in draft article 18, since the two provisions dealt with the resumption of treaty relations subsequent to an armed conflict. Draft article 18 addressed a case in which, on the basis of an agreement concluded after the conflict, States revived treaties that had been terminated or suspended owing to an armed conflict. In the case of terminated treaties, that amounted to novation of the treaty. Given that it was a purely voluntary process, draft article 18 was not indispensable. Draft article 12, for its part, was aimed only at treaties (or parts of treaties) that had been suspended as a consequence of an armed conflict and whose operation was resumed, not by virtue of a new agreement, but by the disappearance of the conditions that had prevailed at the time of suspension (hence the reference to draft article 4). The proposal to merge the two scenarios in draft article 12 had received wide approval, subject to certain changes pertaining to form.

96. In conclusion, he recommended that draft articles 1 to 12 be referred to the Drafting Committee.

97. The CHAIRPERSON said she took it that, in keeping with the Special Rapporteur's recommendation, the Commission wished to refer draft articles 1 to 12 to the Drafting Committee.

It was so decided.

The meeting rose at 1.05 p.m.

3057th MEETING

Friday, 4 June 2010, at 10.05 a.m.

Chairperson: Ms. Hanqin XUE

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

Protection of persons in the event of disasters (*continued*) (A/CN.4/620 and Add.1, sect. D, A/CN.4/629, A/CN.4/L.776)

[Agenda item 8]

Third report of the Special Rapporteur (*concluded*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the third report on protection of persons in the event of disasters (A/CN.4/629).

2. Mr. CANDIOTI said that in the report, specifically in draft articles 6 and 7, the Special Rapporteur addressed the fundamental principles to be observed in providing assistance to persons in the event of disaster, namely, humanity, neutrality and impartiality, as well as respect for and protection of human dignity. He agreed with the conclusions and texts proposed and expressed appreciation for the thorough analysis that had laid the groundwork for them. The Special Rapporteur had usefully taken stock of the practice of States and relief organizations and of international and regional standards and case law relating to assistance and relief. He himself was in favour of referring draft articles 6 and 7 to the Drafting Committee so that it could consider them in the light of the comments made.

3. Turning to draft article 8—a provision that the Special Rapporteur had correctly placed in the context of the principles of sovereign equality and non-intervention embodied in the Charter of the United Nations—he said that the rule enunciated in the phrase "Primary responsibility of the affected State" referred not to the kind of responsibility incurred by the violation of an international obligation, but rather to the authority invested chiefly in the affected State, in the event of a disaster, to ensure the protection of persons and to provide humanitarian assistance using all the means at its disposal. By virtue of that authority, the State had the right to direct, control, coordinate and supervise such assistance. He agreed entirely with that position. However, in view of what Judge Álvarez had said in his separate opinion on the *Corfu Channel* case, it might be advisable to add that the affected State had the obligation to provide an adequate response and protection. Such an obligation was also grounded in international human rights law.

4. In paragraphs 89 and 97, the Special Rapporteur cited as one of the sources of his inspiration for draft article 8 the resolution on humanitarian assistance adopted by the Institute of International Law in Bruges, Belgium, in 2003.[227] Without prejudice to the development of the content and scope of that duty in future draft articles, consideration might be given to adding to draft article 8 an explicit reference to the duty of protection referred to in the Bruges resolution.

5. With regard to draft article 8, paragraph 2, he supported the formulation of the rule that external assistance could be provided only with the consent of the affected State. However, he agreed with other members that consideration should be given to the fact that the nature of the disaster and the severity of the corresponding emergency could make it difficult, if not impossible, for the affected State to grant timely and formal consent, and that it might therefore be appropriate, in exceptional circumstances, to allow for the urgent deployment of external assistance, without prejudice to the option of halting such assistance if the State had sound reasons for doing so. He was in favour of referring draft article 8, accompanied by those suggestions, to the Drafting Committee.

6. Ms. JACOBSSON said that in his third report, the Special Rapporteur identified the three principles of humanity, neutrality and impartiality that underlay the protection of persons in the event of disasters, and claimed that the response to disasters, in particular humanitarian assistance, must comply with certain requirements in order to balance the interests of the affected State and the assisting actors. He had used the term "humanitarian response" because the scope extended beyond what was generally understood by "humanitarian assistance", which constituted only the minimum package of relief commodities. She fully supported that approach.

7. In draft article 6, the Special Rapporteur proposed that the response to disasters should take place in accordance with the three principles just mentioned. In her mind, that proposal gave rise to three questions: first, whether humanity, neutrality and impartiality were, in fact, principles of international law; secondly, whether they were all relevant to the work of the Commission; and thirdly, whether they should be placed in the text itself or in the preamble.

8. With regard to the first question, she did not believe that the Commission could conclude that the concepts of humanity, neutrality and impartiality were all principles of international law. Some members were probably not surprised to hear her take that view, since she had repeatedly raised the issue of the distinction between a principle and a rule. The three concepts were no doubt important principles in the context of the International Red Cross and Red Crescent Movement, but they were not necessarily principles of international law.

9. The Special Rapporteur had concluded, in line with what Jean Pictet had written in his commentary on the principles of the Red Cross,[228] that neutrality was a key operational tool. The crucial question was whether the principles of the International Red Cross and Red Crescent Movement could be transposed to the Commission's work. Neutrality had a special meaning for the Movement, given that its relief actions were so closely linked to wartime assistance. At the root of the concept was the traditional notion of neutrality in wartime, which explained why Switzerland was the home of the Movement. She aligned herself with those Commission members—in particular Mr. Vargas Carreño—who had expressed scepticism about including the principle of neutrality in draft article 8.

10. As to the second question, whether the three humanitarian principles were relevant to the Commission's work, she believed that, with the exception of the concept of neutrality, they were. However, as Mr. Vargas Carreño and others had said, it was of the utmost importance to include a reference to impartiality in the draft article.

11. As to the third question of whether the concepts belonged in the text of or in the preamble to the draft articles, she strongly supported the Special Rapporteur's suggestion that they deserved an article of their own. Given that the aim of the provision was to direct the manner in which humanitarian response should be undertaken, the placement of the provision in the text itself emphasized the fact that it was not merely a policy consideration but also a legal obligation.

[227] See footnote 187 above, p. 275.

[228] Pictet, *The Fundamental Principles of the Red Cross…, op. cit.* (see footnote 188 above).

12. With regard to draft article 7, she concurred with what others had said about human dignity being a source of human rights, rather than a right *per se*. It was important for the Commission to align the use of that concept with its use in expulsion of aliens.

13. As far as draft article 8 was concerned, one could look at it from either a constructive or a critical perspective. She had chosen the former, seeing it as an initial step in determining what was meant by the expression "primary responsibility of the affected State". However, the draft article could not stand alone, as it gave no indication of the obligations imposed on affected States and referred instead only to their rights. If the Commission was serious about upholding the belief that the right to sovereignty also implied a responsibility on the part of States, then it should spell out in legal terms exactly what that responsibility entailed. That would not be an abstract exercise. The Commission had already established that the individual, as a bearer of rights and as a person with essential needs, stood at the centre of its work and that its aim was to ensure the protection of persons. It must now give form to those views and transform legal principles into concrete legal proposals.

14. The crucial questions were: how to handle a situation in which the affected State was unable or unwilling to live up to its responsibility; who had secondary responsibility; and what that responsibility specifically entailed. Draft article 8 did not address those questions.

15. A mere reference to the principles of sovereignty and non-intervention, at least if used in the classical sense, would not provide concrete solutions for the protection of persons. A situation of disaster was, for obvious reasons, an emergency situation requiring an immediate response. There was often, at least in the initial acute phase, a need to act out of necessity. For example, if a major dam located in an area that bordered on two States was damaged, it was unacceptable to do nothing more than watch, simply because no one was available to give consent. It was different when a disaster had been producing effects for some time and response actions had started to yield results: at that stage, the affected State should clearly be at the centre of operations. The Commission might wish to consider identifying various phases of disaster response and attempting to find solutions for each one.

16. Some members had raised the pertinent question of what specifically was meant by the term "affected State". Although it was usually clear which State that was, in the case of the occupation or international administration of a State or an area within a State, it might be somewhat complicated to identify the affected State: in the former case, because the *de facto* government or governing authority might not be recognized as legitimate, and in the latter, because the territory in question might not be recognized as a State, as in the case of Kosovo. In the first scenario, the assisting State or organization might discover that the government in exile had consented to receiving external assistance but, contrary to the laws of occupation, the occupying Power refused to provide it. In the second scenario, persons affected by a disaster might be deprived of assistance simply because no State officially existed or because the disaster had occurred in a State in transition—again, like Kosovo. The Commission must therefore discuss precisely what was meant by the term "the affected State".

17. Provided that those comments were taken into account, she was prepared to refer the draft articles to the Drafting Committee. However, a higher degree of flexibility than normal would be needed in discussing them, particularly draft article 8, since the Commission did not yet have a clear picture of all the draft articles that would eventually be formulated.

18. Mr. VASCIANNIE said that, generally speaking, he supported draft article 8 but thought that the two paragraphs it comprised should be made into two separate draft articles: they dealt with or applied to two related but distinct sets of issues. The word "primary" in paragraph 1 should be deleted, as it almost automatically implied the existence of secondary duties. That would prompt anyone who had read the advisory opinion of the ICJ on *Certain Expenses of the United Nations* to go searching through the draft articles for a reference to secondary responsibility. There was none that could reduce the significance of the reference to primary responsibility. If secondary responsibility existed, it could be mentioned elsewhere in the text and made explicitly subordinate to the affected State's jurisdiction and control. That would preclude the assumption that the distinction between primary and secondary responsibility allowed, in cases of disaster, for the intervention of other States or actors in the absence of the consent of the affected State. As an inherent part of its sovereignty, and in keeping with the rules of international law, the affected State was responsible for the protection of persons and the provision of humanitarian assistance in its territory. There was no need to cloud that straightforward statement of law with the primary/secondary dichotomy.

19. Draft article 8, paragraph 2, was a central provision: neither foreign States nor foreign NGOs should have *carte blanche* to enter the territory of an affected State in order to provide assistance without the consent of that State. That rule was based on elementary considerations of sovereignty and to violate it would constitute intervention contrary to the Charter of the United Nations and to several resolutions that had entered into the corpus of general law. Paragraph 2 should accordingly be formulated in stronger terms, in order to make it clear that the draft articles did not allow a right of intervention in cases of disaster and that consent must be given by the affected State.

20. In general, international law did not impose a duty on States to give aid to poor countries: they were free to decide when and when not to do so. Even in the face of a disaster such as the earthquake in Haiti, wealthy countries had no duty to provide aid. Nor was it possible for disaster-stricken countries to require that aid be provided in keeping with the principles of proportionality, humanity and neutrality, or simply because it was fair and equitable to do so: sovereignty ruled on the donor front. Aid was welcome in disaster situations, yet each donor country decided how it would express its largesse.

21. It had recently been argued that a country affected by a disaster must be obliged in some circumstances to accept aid and that the Commission should look past the

"old-fashioned" concept of sovereignty and abandon the insistence that affected States could decline to receive aid on grounds of State sovereignty. It had also been suggested that if the Commission did not accept intervention for the purposes of providing aid, it might be seen as merely reaffirming Article 2, paragraph 7 of the Charter of the United Nations. Implicit in that argument was the idea that it would be superfluous to invoke that provision and the important principles of non-intervention arising from the Charter of the United Nations. He did not accept that line of reasoning. The Commission's work on a set of draft articles concerning assistance in the event of disasters should not be diminished by the suggestion that if sovereignty was upheld, the draft articles were largely meaningless. The purpose of the work on the draft would be defeated if States were accorded the sovereign right to refuse aid in times of disaster: they should be required to accept intervention aimed at the provision of assistance.

22. Another point favouring some kind of humanitarian interventionism in the event of disaster was the notion that the guiding principle of the draft articles—the *maxima lex*, reflected in draft articles 1 and 2—was the protection of individuals in times of disaster. In truth, however, whenever the *maxima lex* intersected with the *jus cogens* rule of non-intervention, the latter prevailed under the existing law. Even though the guiding principle of the Commission's work was the protection of the individual, that did not mean that foreign States must have the right to intervene to protect people in times of disaster contrary to the will of the affected State. It was unlikely that States in the Sixth Committee or elsewhere realized that, by supporting the proposals contained in draft articles 1 and 2, they were accepting the right of other States to enter their territory for disaster relief purposes.

23. He did not believe, therefore, that the Commission should reformulate the rule laid down in draft article 8 in such a way as to suggest that the affected State could be penalized, as a matter of law, for unreasonably withholding consent for entry into its territory for the purpose of providing aid. Nor should draft article 8 be amended to suggest that the international community as a whole had the right to intervene in the territory of the affected State without its consent: that, too, was contrary to existing law, especially to Chapter VII of the Charter of the United Nations.

24. Apart from the right to sovereignty, there were many reasons why it was not advisable to allow intervention in times of disaster when thousands of persons might be suffering. There was no significant State practice or *opinio juris* in favour of that approach. While it was true that a few governments, at the peak of liberal interventionism, had suggested that the matter be considered, that had not been the majority sentiment, even at that time: the point was reinforced by the comprehensive memorandum by the Secretariat on protection of persons in the event of disasters.[229]

25. General Assembly resolution 46/182 on the strengthening of the coordination of humanitarian emergency assistance of the United Nations expressly required that humanitarian assistance be provided with the consent of the affected State; it thus constituted evidence of customary international law. Most States accepted that the responsibility to protect, to the extent that it justified intervention, did not extend to intervention in the event of disasters, as evidenced by the position taken in recent years in the Sixth Committee by countries such as China, India and Japan. The well-meaning idea of intervention could be abused, allowing powerful States to intervene in disaster areas for their own purposes. In some cases, stronger countries might wish to intervene in weaker ones for justifiable purposes such as self-defence or reasons covered in Chapter VII of the Charter of the United Nations. However, the international system had rules governing such intervention, and the historical experience of weaker countries suggested that States should be wary of mixed motives in such instances. States that appealed to the international community should not be vulnerable to intervention on the pretext of disaster relief.

26. The threshold for intervention would be problematic, and it would not be the same for poor countries as it was for rich ones, because a decision regarding such intervention would be based in part on perceptions of a State's capacity to solve the challenges facing it. Thus, double standards would probably apply. The affected State was in the best position to judge whether humanitarian assistance was needed. It should not be rushed into accepting assistance under the threat of sanctions or forced to make major decisions about protecting its territory at the very time it was contending with disaster-induced destruction.

27. There was a small likelihood that an affected State would willfully reject genuine assistance offered in the context of a disaster. Mention had been made of Myanmar as a model to be avoided. That and other tragic situations required diplomacy, not threats of intervention.

28. In conclusion, he thought that draft article 8 must not permit external assistance without consent. In a disaster situation, help should reach victims quickly but should not be imposed on an affected State as a matter of legal compulsion. Donor countries must be able to decide which incentives they wished to give in a situation of recalcitrance, and in all cases diplomacy should be used to help affected States to distinguish the ideological forest from the trees. The Special Rapporteur's proposal in draft article 8, paragraph 2, showed due respect for the complex realities of State sovereignty and interventionism, and the Commission should support it with those considerations in mind.

29. Mr. McRAE said that the third report demonstrated a breadth of research and a thoughtful and creative approach to the topic. He had no problem with the idea that the principles of humanity, neutrality, impartiality and human dignity should underlie any consideration of the response of States to disasters and the protection of persons as a result of those disasters. However, he could also understand the reservations of some members concerning the concept of neutrality. It was worthwhile querying whether the concepts just mentioned should be embodied in articles creating specific obligations rather than incorporated in the preamble. It was not entirely clear whether, in draft article 6, an obligation was being established, or whether

[229] See footnote 182 above.

a purely descriptive statement was being made of what should happen in the event of a disaster, without conveying any obligations.

30. The use of the term "shall" in draft article 7 suggested that a specific obligation was being imposed but gave rise to the question whether the corresponding responsibility related to a failure to respect human dignity or resulted from some violation of human rights—which suggested that human dignity had not been respected.

31. Other instruments had, of course, incorporated those concepts and given them obligatory form; if the draft articles did the same, the Commission would not be breaking new ground. The form in which the concepts should be couched, whether they should be combined in a single draft article or in a preambular provision, was a matter that could be dealt with in the Drafting Committee.

32. Greater difficulties arose with draft article 8. As others had pointed out, it was difficult to assess it fully without knowing the specific obligations that would follow, as they might change the nature of the provision.

33. Draft article 8 did make, perhaps indirectly, a very strong assertion of the sovereignty of the State. The State had the right to keep external assistance out, and it had the right, although that was expressed in terms of primary responsibility, to control the operation of relief within its territory. He wondered whether it was appropriate for the draft articles to be so heavily weighted towards a reassertion of sovereignty, however. The Special Rapporteur seemed to have been greatly influenced by the debate on his preliminary report,[230] when many members of the Commission had expressed the strong view that there should be no right of unilateral intervention in the event of a disaster.[231] The core of the topic was the protection of persons, but if the Commission continued to emphasize the rights of the affected State and to include specific provisions on non-intervention, the focus might change to the protection of States in the event of disasters.

34. If the Commission was to take seriously the protection of persons in the event of disasters, it had to think in terms of placing obligations on States to provide that protection. Unfortunately, the non-intervention debate had had a dissuasive effect on the development of a range of obligations on States, including on the affected State.

35. It was difficult to be creative when the starting point was a "no-go" area that dominated the debate and imposed limitations. A better approach might be to identify the needs of persons affected by disasters and consider what obligations should be placed on States to fulfil those needs. The Commission would then be able to assess what was realistic, what might be acceptable to States and what was too great an infringement of their sovereignty: it would end with sovereignty, not start with it. That might mean placing some limitations on the ability of affected States, which undoubtedly existed, to refuse external assistance. Perhaps some formulation might be found to that effect.

36. The expectations created by the Commission in taking on the present topic needed much more than a renewed emphasis on sovereignty and non-intervention. Draft articles that simply stated that, in the event of a disaster, Article 2, paragraph 7, of the Charter of the United Nations applied, would not be regarded as a contemporary response.

37. Draft article 8 could be held in abeyance until the next set of draft articles had been formulated or referred to the Drafting Committee for preliminary discussion, on the understanding that subsequent draft articles might change the way it would ultimately be phrased. In any case, the Special Rapporteur should refrain from giving the impression that the draft articles focused on protecting the interests of States. He should, instead, aim to develop obligations upon States that genuinely responded to the needs of persons affected by disasters.

38. Mr. VALENCIA-OSPINA (Special Rapporteur), summing up the discussion on his third report, thanked all the participants for their constructive comments, which would be the best possible guidance for the Drafting Committee in its work to finalize the draft articles on protection of persons in the event of disasters. The main conclusion to be drawn from a discussion in which nearly all the members of the Commission had participated was that all had been in favour of referring draft articles 6 and 7 to the Drafting Committee, while only two had been reluctant to recommend the referral of draft article 8. Their concerns related to its content, which they thought proclaimed the principle that a State affected by a disaster bore the primary responsibility for the protection of persons. In fact, however, nothing could be further from the truth. As he had stated in his introduction to the third report, he intended, in his fourth report, to propose provisions that specified the scope and limits of a State's exercise of its primary responsibility in the event of a disaster.

39. As had been pointed out during the discussion of his second report,[232] the progressive development and codification of any topic in international law was a time-consuming task,[233] each step along the way being at once the culmination, and yet at the same time a new beginning, in what was always a work in progress. From that standpoint, the uncertainty of the two members, not shared by the rest of the Commission, was not necessarily equivalent to total rejection of draft article 8, and he accordingly felt he could request the Commission to refer all three draft articles to the Drafting Committee, in the light of the discussion in plenary and with particular regard to the specific suggestions made on how to improve the texts. Such had been the procedure adopted on the much more controversial draft articles 1 to 3, which the Drafting Committee, doubtless inspired by the biblical tale of multiplication of the loaves and the fishes, had transformed into five separate texts that had been adopted by consensus.

40. Although the Commission's discussion on draft articles 6 to 8 had been less expansive, so to speak, it had nonetheless been rich in insights. For example, it had been pointed out that since definitions of terms such as

[230] *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/598.

[231] *Ibid.*, vol. II (Part Two), p. 143, paras. 241–250.

[232] See footnote 178 above.

[233] See *Yearbook ... 2009*, vol. I, 3018th meeting, *passim*, and 3019th meeting, paras. 1–19, especially para. 17.

"humanity", "neutrality", "impartiality" and "proportionality" had already been incorporated in specific branches of the law—the first three in international humanitarian law and the latter, in respect of the non-use of force, in the Charter of the United Nations—it was pointless to transpose them to the field of protection of persons in the event of disasters. It had also been pointed out, and he agreed, that a principle that by definition was envisaged in general and abstract terms could hardly be applied to areas of the law other than those with which it originated and was usually associated. The problem was perhaps attributable to the strictures of legal usage: witness the many and widely varying meanings given to the term "responsibility" in the different branches of the law.

41. It had also been suggested that definitions of terms be incorporated, not in the body of the text, but in the preamble. Specific definitions of any terms relating to principles that were universally accepted under international law were surely superfluous, however. It must be enough to say that a given act must conform to certain principles of international law. Moreover, the Commission was preparing draft articles, not a draft preamble.

42. In draft article 6, on the other hand, the definitions called for by some members of the Commission should be provided, not in separate draft articles on each principle, but in the relevant commentary. Differing views had been expressed on whether the reference in draft article 6 to the principle of neutrality should be retained. He thought it should be, for the reasons outlined in his report. However, it had been proposed that the word "impartiality" be replaced with "non-discrimination", because impartiality was a principle incorporated in international humanitarian law, and thus applicable in the event of armed conflict. The principle of non-discrimination was likewise rooted in international humanitarian law, however, specifically in the very first (Geneva) Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, of 1864. The fact that international humanitarian law had given rise to a certain principle did not preclude its further elaboration in the context of international law on human rights, and specifically on the protection of persons in the event of disasters. Accordingly, he had no objection to including a reference to the principle of non-discrimination in draft article 6. A reference to the principle of proportionality had been opposed for the same reasons as those advanced against any mention of the principle of neutrality. In his third report, he had explained that proportionality was a component of the larger principle of impartiality: that was why it had not been singled out as a separate principle in draft article 6.

43. Turning to draft article 7, he said that since the Commission had decided to include a reference to human dignity in the draft articles on expulsion of aliens, it must also do so in the text on protection of persons. It had been suggested that draft article 7 include a reference to the obligation to respect the fundamental human rights set out in certain human rights instruments. He had no objection to that suggestion.

44. Draft article 8, it should be recalled, had been prepared in response to a request made by the Commission at its previous session for a text on the primary responsibility of an affected State.[234] It would be followed by other draft articles that would specify the scope of and constraints upon the exercise by a State of its responsibility. Many members had stressed the importance of having such provisions, which he would propose in his fourth report, and two had made their agreement to refer the draft article to the Drafting Committee conditional upon the submission of the provisions. In addition, one of the two members had proposed the deletion of draft article 8, paragraph 2, concerning the consent of the affected State. That text, however, was in line with existing international rules and practice, in that it suggested that the principles of sovereignty and non-intervention applied in the event of disasters. Some members thought that the two principles should be explicitly mentioned, perhaps even in separate articles, but he did not see that as necessary or useful. However, if the Commission wished to cite them in either draft article 7 or draft article 8, he would accommodate himself to its wishes.

45. He would give due attention to the suggestions made about the future work on the topic, including on the responsibility of the international community in the event of disasters, initiatives for the acceptance by the affected State of external assistance, the channelling of such assistance through the United Nations and other competent bodies and the obligations of the affected State.

46. In conclusion, he requested that draft articles 6 to 8 be referred to the Drafting Committee.

47. Sir Michael WOOD said that he remained of the view that draft article 8 should not be sent to the Drafting Committee now: that might be understood, wrongly, as indicating support for the text in its current form, something that simply was not justified by the overall thrust of the debate. Draft article 8 must be discussed together with the more detailed proposals that the Special Rapporteur promised to provide in his fourth report, defining the scope and the limits of the principles set out therein.

48. Mr. PETRIČ said that he had formerly favoured the referral of draft article 8 to the Drafting Committee on the grounds that a State must not simply refuse assistance while doing nothing to provide humanitarian assistance to its population: that would be tantamount to genocide. However, the tenor of the debate seemed to have shifted from protection of persons in the event of disaster to protection of State sovereignty and exercise of the principle of non-intervention. No one had advocated such a change of course. He now agreed that unless the Special Rapporteur explained clearly what he intended to include in the provisions he would propose in his fourth report, the draft articles should not yet be referred to the Drafting Committee.

49. Mr. VALENCIA-OSPINA (Special Rapporteur) said he had already explained his intentions, which, if the time was allowed him, would evolve on the basis of the debate. He hoped to be spared the task of outlining his fourth report, which was to be submitted only at the Commission's next session. He remained of the view that draft article 8 should be referred to the Drafting Committee: the Chairperson of the Committee had spoken in favour of that course of action, which would allow it to discuss the

[234] *Ibid.*, 3029th meeting, para. 23.

issues raised in plenary and would advance the Commission's work. As a firm believer in the democratic process of voting, if a consensus could not be reached, he would request a vote on the question.

50. Mr. HASSOUNA said that the debate had offered a chance for all to air their views, but the time had come to take a procedural decision. The divergence of views paralleled that of the previous year, when a number of draft articles had nevertheless been referred to the Drafting Committee and appropriate solutions had been found there. Accordingly, he appealed to those who had doubts about draft article 8 because of its lack of clarity to withdraw their opposition to its referral to the Drafting Committee, on the understanding that all positions would be fully debated in that forum.

51. Mr. GAJA said the reticence expressed by some members of the Commission had to do not so much with draft article 8 itself as with the need to know what the provisions expanding on it would look like. The Commission could therefore send draft articles 6 to 8 to the Drafting Committee on the understanding that it would finalize draft article 8 only after the subsequent draft articles, to be submitted at the next session, had been referred to it.

52. Mr. WISNUMURTI endorsed those remarks. The Drafting Committee had already discussed draft article 8, paragraph 2, on the understanding that at the Commission's next session, the Special Rapporteur would propose additional provisions on the primary responsibility of the affected State. The course of action adopted the previous year for draft articles 1 to 3 could be used now for draft articles 6 to 8.

53. The CHAIRPERSON said that even if a few members had doubts about the advisability of referring draft article 8 to the Drafting Committee, those concerns could be addressed within the Committee itself. No speaker had opposed the inclusion of a reference to State sovereignty: the Special Rapporteur had all the time required to draft an appropriate text, on the basis of a discussion in the Drafting Committee, in advance of the Commission's next session. She suggested that the Commission refer draft articles 6 to 8 to the Drafting Committee, on the understanding that all the comments made in plenary would be taken into account and that the texts of the various language versions would be properly aligned.

Draft articles 6 to 8 were referred to the Drafting Committee.

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

[Agenda item 3]

Report of the Drafting Committee (*continued*)[**]

54. Mr. McRAE (Chairperson of the Drafting Committee) introduced the titles and texts of draft guidelines 4.1 to 4.4.3, adopted by the Drafting Committee at 13 meetings held from 11 to 27 May 2010, as contained in document A/CN.4/L.760/Add.1, which read:

"4. *Legal effects of reservations and interpretative declarations*

"4.1 *Establishment of a reservation with regard to another State or organization*

"A reservation formulated by a State or an international organization is established with regard to a contracting State or contracting organization if it is permissible and was formulated in accordance with the required form and procedures, and if that contracting State or contracting organization has accepted it.

"4.1.1 *Establishment of a reservation expressly authorized by a treaty*

"1. A reservation expressly authorized by a treaty does not require any subsequent acceptance by the other contracting States and contracting organizations, unless the treaty so provides.

"2. A reservation expressly authorized by a treaty is established with regard to the other contracting States and contracting organizations if it was formulated in accordance with the required form and procedures.

"4.1.2 *Establishment of a reservation to a treaty which has to be applied in its entirety*

"A reservation to a treaty in respect of which it appears from the limited number of negotiating States and organizations and the object and purpose of the treaty, that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty is established with regard to the other contracting States and contracting organizations if it is permissible and was formulated in accordance with the required form and procedures, and if all the contracting States and contracting organizations have accepted it.

"4.1.3 *Establishment of a reservation to a constituent instrument of an international organization*

"A reservation to a treaty which is a constituent instrument of an international organization is established with regard to the other contracting States and contracting organizations if it is permissible and was formulated in accordance with the required form and procedures, and if it has been accepted in conformity with guidelines 2.8.7 to 2.8.10.

"4.2 *Effects of an established reservation*

"4.2.1 *Status of the author of an established reservation*

"As soon as a reservation is established in accordance with guidelines 4.1 to 4.1.3, its author becomes a contracting State or contracting organization to the treaty.

[*] Resumed from the 3054th meeting.

[**] Resumed from the 3051st meeting.

"4.2.2 *Effect of the establishment of a reservation on the entry into force of a treaty*

"1. When a treaty has not yet entered into force, the author of a reservation shall be included in the number of contracting States and contracting organizations required for the treaty to enter into force once the reservation is established.

"2. The author of the reservation may however be included at an earlier date in the number of contracting States and contracting organizations required for the treaty to enter into force, if no contracting State or contracting organization is opposed in a particular case.

"4.2.3 *Effect of the establishment of a reservation on the status of the author as a party to the treaty*

"The establishment of a reservation constitutes its author a party to the treaty in relation to contracting States and contracting organizations in respect of which the reservation is established if or when the treaty is in force.

"4.2.4 *Effect of an established reservation on treaty relations*

"1. A reservation established with regard to another party excludes or modifies for the reserving State or international organization in its relations with that other party the legal effect of the provisions of the treaty to which the reservation relates or of the treaty as a whole with respect to certain specific aspects, to the extent of the reservation.

"2. To the extent that an established reservation excludes the legal effect of certain provisions of a treaty, the author of that reservation has neither rights nor obligations under those provisions in its relations with the other parties with regard to which the reservation is established. Those other parties shall likewise have neither rights nor obligations under those provisions in their relations with the author of the reservation.

"3. To the extent that an established reservation modifies the legal effect of certain provisions of a treaty, the author of that reservation has rights and obligations under those provisions, as modified by the reservation, in its relations with the other parties with regard to which the reservation is established. Those other parties shall have rights and obligations under those provisions, as modified by the reservation, in their relations with the author of the reservation.

"4.2.5 *Non-reciprocal application of obligations to which a reservation relates*

"Insofar as the obligations under the provisions to which the reservation relates are not subject to reciprocal application in view of the nature of the obligation or the object and purpose of the treaty, the content of the obligations of the parties other than the author of the reservation remains unaffected. The content of the obligations of those parties likewise remains unaffected when reciprocal application is not possible because of the content of the reservation.

"4.3 *Effect of an objection to a valid reservation*

"Unless the reservation has been established with regard to an objecting State or organization, the formulation of an objection to a valid reservation precludes the reservation from having its intended effects as against that State or international organization.

"4.3.1 *Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation*

"An objection by a contracting State or by a contracting organization to a valid reservation does not preclude the entry into force of the treaty as between the objecting State or organization and the reserving State or organization, except in the case mentioned in guideline 4.3.4.

"4.3.2 *Entry into force of the treaty between the author of a reservation and the author of an objection*

"The treaty enters into force between the author of a valid reservation and the objecting contracting State or contracting organization as soon as the author of the reservation has become a contracting State or a contracting organization in accordance with guideline 4.2.1 and the treaty has entered into force.

"4.3.3 *Non-entry into force of the treaty for the author of a reservation when unanimous acceptance is required*

"If unanimous acceptance is required for the establishment of the reservation, any objection by a contracting State or by a contracting organization to a valid reservation precludes the entry into force of the treaty for the reserving State or organization.

"4.3.4 *Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect*

"An objection by a contracting State or by a contracting organization to a valid reservation precludes the entry into force of the treaty as between the objecting State or organization and the reserving State or organization, if the objecting State or organization has definitely expressed an intention to that effect in accordance with guideline 2.6.8.

"4.3.5 *Effects of an objection on treaty relations*

"1. When a State or an international organization objecting to a valid reservation has not opposed the entry into force of the treaty between itself and the reserving State or organization, the provisions to which the reservation relates do not apply as between the author of the reservation and the objecting State or organization, to the extent of the reservation.

"2. To the extent that a valid reservation purports to exclude the legal effect of certain provisions of the treaty, when a contracting State or a contracting

organization has raised an objection to it but has not opposed the entry into force of the treaty between itself and the author of the reservation, the objecting State or organization and the author of the reservation are not bound, in their treaty relations, by the provisions to which the reservation relates.

"3. To the extent that a valid reservation purports to modify the legal effect of certain provisions of the treaty, when a contracting State or a contracting organization has raised an objection to it but has not opposed the entry into force of the treaty between itself and the author of the reservation, the objecting State or organization and the author of the reservation are not bound, in their treaty relations, by the provisions of the treaty as intended to be modified by the reservation.

"4. All the provisions of the treaty other than those to which the reservation relates shall remain applicable as between the reserving State or organization and the objecting State or organization.

"4.3.6 *Effect of an objection on provisions other than those to which the reservation relates*

"1. A provision of the treaty to which the reservation does not relate, but which has a sufficient link with the provisions to which the reservation does relate, is not applicable in the treaty relations between the author of the reservation and the author of an objection formulated in accordance with guideline 3.4.2.

"2. The reserving State or organization may, within a period of twelve months following the notification of such an objection, oppose the entry into force of the treaty between itself and the objecting State or organization. In the absence of such opposition, the treaty shall apply between the author of the reservation and the author of the objection to the extent provided by the reservation and the objection.

"4.3.7 *Right of the author of a valid reservation not to be compelled to comply with the treaty without the benefit of its reservation*

"The author of a reservation which is permissible and which has been formulated in accordance with the required form and procedures cannot be compelled to comply with the provisions of the treaty without the benefit of its reservation.

"4.4 *Effects of a reservation on rights and obligations outside of the treaty*

"4.4.1 *Absence of effect on rights and obligations under another treaty*

"A reservation, acceptance of it or objection to it neither modifies nor excludes the respective rights and obligations of their authors under another treaty to which they are parties.

"4.4.2 *Absence of effect on rights and obligations under customary international law*

"A reservation to a treaty provision which reflects a rule of customary international law does not of itself affect the rights and obligations under that rule, which shall continue to apply as such between the reserving State or organization and other States or international organizations which are bound by that rule.

"4.4.3 *Absence of effect on a peremptory norm of general international law (*jus cogens*)*

"A reservation to a treaty provision which reflects a peremptory norm of general international law (*jus cogens*) does not affect the binding nature of that norm, which shall continue to apply as such between the reserving State or organization and other States or international organizations.

55. The draft guidelines pertained to the fourth part of the Guide to Practice, addressing the legal effects of reservations and interpretative declarations. He paid a tribute to the Special Rapporteur for his useful and patient guidance and thanked the other members of the Drafting Committee for their continuous and effective participation and the Secretariat for its valuable assistance.

56. The Drafting Committee had begun its work on draft guidelines 4.1 to 4.1.3 by considering whether reference should be made to the "establishment" of a reservation. During the debate in plenary, several members of the Commission had expressed support for the use of such terminology, recalling that the word "established" appeared in the *chapeau* of article 21, paragraph 1, of the 1969 and 1986 Vienna Conventions. Other members, however, had expressed the view that it was neither necessary nor appropriate to introduce a concept which seemed to refer to a category of reservations that was not clearly defined by the Vienna Conventions. Concerns had also been expressed regarding the precise meaning and implications of the concept. After careful consideration, the Drafting Committee had decided to retain the term "establishment" as a short and convenient way to refer to a reservation which met the substantive and formal requirements for its validity, pursuant to articles 19 and 23 of the 1969 and 1986 Vienna Conventions, and which had been accepted in conformity with article 20 of those Conventions. The commentary would provide the necessary clarifications, while also indicating that the reference to an "established" reservation did not purport to introduce a new concept or a new category of reservations but was intended to add clarity to the *chapeau* of article 21, paragraph 1, of the Vienna Conventions.

57. Draft guideline 4.1 was entitled "Establishment of a reservation with regard to another State or organization". It enunciated, in general terms, the three requirements for the establishment of a reservation, namely its permissibility, its formulation in accordance with the required form and procedures and the acceptance of the reservation by a contracting State or a contracting organization. In the wording retained by the Drafting Committee, some changes had been introduced to the text proposed by the Special Rapporteur. First, the phrase "with regard to another State or organization" had been added to the title in order to draw attention to the fact that draft guideline 4.1 referred to the normal situation, in which the establishment of a reservation occurred *vis-à-vis* a

particular contracting State or contracting organization, as opposed to the special cases, addressed in draft guidelines 4.1.1, 4.1.2 and 4.1.3, where the establishment of a reservation occurred *vis-à-vis* all the other contracting States and contracting organizations. That essential difference would be explained in the commentary.

58. Turning to the text of draft guideline 4.1, he said that, for the sake of clarity and completeness, the words "formulated by a State or an international organization" had been inserted after the term "reservation". The Drafting Committee had opted for streamlined wording in the enunciation of the first two conditions for the establishment of a reservation: the expression "if it meets the requirements for permissibility" had been replaced by "if it is permissible" and the expression "in accordance with the form and procedures specified for that purpose" by "in accordance with the required form and procedures". The commentary would explain that the reference to the "required … procedures" was intended to cover the procedural conditions set forth in the Vienna Conventions, in the Guide to Practice and, as the case might be, in the treaty itself.

59. The Drafting Committee had also decided to replace the words "contracting party" by "contracting State or contracting organization" in order to ensure consistency with the terminology of the Vienna Conventions. The expression "contracting party" proposed by the Special Rapporteur was meant to be a simplified way of referring simultaneously to a contracting State or a contracting organization. However, several members of the Drafting Committee had been of the view that such a concise formulation was a source of potential confusion, in that it appeared to conflate the separate definitions in article 2 of the 1969 and 1986 Vienna Conventions, namely that of "contracting State" and "contracting organization" and that of a "party" to a treaty. Article 21, paragraph 1, of the Vienna Conventions referred to a "party", but that text addressed the legal effects of a reservation and thus presupposed that the treaty had already entered into force, whereas draft guideline 4.1 aimed to specify the conditions under which a reservation was established and would be capable of producing legal effects between its author and a contracting State or organization if and when the treaty came into force.

60. Lastly, it was understood that, in due course, the term "contracting party" would need to be replaced by "contracting State or contracting organization" in the text of a number of other guidelines that had already been adopted by the Commission.

61. Draft guideline 4.1.1 was entitled "Establishment of a reservation expressly authorized by a treaty". While the version proposed by the Special Rapporteur had comprised three paragraphs, the text adopted by the Drafting Committee consisted of only two.

62. The Drafting Committee had decided to reverse the order of paragraphs 1 and 2 so as to indicate from the outset the specificity that characterized the establishment of a reservation expressly authorized by a treaty, namely the fact that such a reservation did not require any subsequent acceptance by the other contracting States and contracting organizations unless the treaty so provided. The commentary would explain that the expression "contracting States and contracting organizations" covered three possible scenarios, namely when there were only contracting States; when there were only contracting organizations; and when there were both. Paragraph 2 enunciated, in terms identical to those of draft guideline 4.1, the only condition for the establishment of a reservation expressly authorized by a treaty, namely that the reservation should be formulated in accordance with the required form and procedures.

63. An extensive discussion had taken place on paragraph 3 of the text proposed by the Special Rapporteur, which attempted to define the expression "reservation expressly authorized by a treaty". During the plenary debate and also in the Drafting Committee, the view had been expressed that the fact that a reservation was expressly authorized by a treaty did not necessarily mean, in all cases, that all contracting States and contracting organizations had accepted the reservation and were therefore precluded from raising an objection to it. It had also been observed that the definition provided in paragraph 3 might be too wide or imprecise, in that it did not clearly exclude those cases in which a treaty authorized specific reservations without defining their content. It had been felt that it would be difficult to capture in the guideline itself all the nuances relating to the definition of a reservation expressly authorized by a treaty. Therefore, the Drafting Committee had decided to delete paragraph 3, on the understanding that the necessary clarifications regarding that definition, including the positions adopted by the relevant international bodies, would be provided in the commentary. The commentary would also refer to guidelines 3.1.2 and 3.1.4 dealing, respectively, with the definition and the permissibility of specified reservations. It had been further suggested that the commentary indicate that objections should be allowed in respect of authorized reservations, the content of which was not defined by the treaty.

64. Draft guideline 4.1.2, entitled "Establishment of a reservation to a treaty which has to be applied in its entirety", concerned the case of a reservation to a treaty, the application of which in its entirety between all the parties was an essential condition of the consent of each one to be bound by the treaty. It indicated that, in such a case, the acceptance of the reservation by all contracting States and contracting organizations was a necessary condition for the establishment of the reservation.

65. During the plenary debate, some members had expressed the view that the text should be redrafted so as to make it clear that the criterion of limited participation was not the main factor to be considered in determining whether the application of the treaty in its entirety was an essential condition of the consent of all the parties to be bound, and whether, as a result, a reservation to the treaty required unanimous consent. Some members had suggested that an explicit reference to the object and purpose of the treaty be included in the draft guideline and that the text follow more closely the wording of article 20, paragraph 2, of the Vienna Conventions.

66. In response to those concerns, the Special Rapporteur had presented a revised text. On the basis of that

proposal, the Drafting Committee had been able to agree on a single paragraph, largely based on article 20, paragraph 2, of the Vienna Conventions. It had been generally felt that in spite of its complexity, the formulation had the advantage of reproducing as faithfully as possible the language of the Vienna Conventions. The point had also been made that the two criteria referred to in the draft guideline, namely limited participation and the object and purpose of the treaty, were indicative and should not be regarded as cumulative. The wording of the draft guideline had been aligned with the text of draft guideline 4.1 with reference to the other conditions for the establishment of a reservation, namely its permissibility and its formulation in accordance with the required form and procedures.

67. Draft guideline 4.1.3 was entitled "Establishment of a reservation to a constituent instrument of an international organization". As it had been well received in plenary, the Drafting Committee had introduced only minor changes to the text.

68. Reference was now made, in the opening sentence, to "a treaty which is the constituent instrument of an international organization", so as to follow more closely the wording of the Vienna Conventions. For the same reasons as in draft guideline 4.1, the expression "contracting parties" had been replaced by "contracting States and contracting organizations". Following a suggestion made during the plenary debate, the final sentence, relating to the acceptance of the reservation as a requirement for its establishment, had been slightly modified in order to reflect the fact that, in the special case envisaged in draft guideline 2.8.10 of a reservation to a constituent instrument of an international organization that had not yet entered into force, the acceptance of the reservation by a future competent organ of the organization was not required. Instead, the reservation would be considered to have been accepted as a result of a lack of objections on the part of the signatory States and signatory international organizations by the end of a period of 12 months after they had been notified of the reservation. The Drafting Committee had accordingly opted for the broader formulation "and if it [the reservation] has been accepted in conformity with guidelines 2.8.7 to 2.8.10". The terminology used in the enunciation of the other two conditions for the establishment of the reservation, namely its permissibility and its formulation in accordance with the required form and procedures, had been aligned with the wording of the previous draft guidelines.

69. Lastly, it had been suggested that some explanations be given in the commentary concerning the rationale of the rule according to which a reservation to a constituent instrument of an international organization required acceptance only by the competent organ of the organization, and not by the members of the organization.

70. Section 4.2 of the Guide to Practice dealt with the effects of an established reservation. In addition to draft guideline 4.2.1, which was directly related to draft guidelines 4.1 to 4.1.3, the four other draft guidelines in that section dealt with the effects of the establishment of a reservation on the entry into force of a treaty, the status of the author as a party to the treaty and treaty relations, as well as with the specific issue raised by obligations that were not subject to reciprocal application.

71. The text of draft guideline 4.2.1 had been only slightly amended by the Drafting Committee. An express reference to guidelines 4.1 to 4.1.3 had been inserted in the opening phrase, so as to better reflect the logical sequence between the establishment of a reservation and the effects of an established reservation. In the same phrase, it had appeared more appropriate that the initial reference should be to "a" reservation rather than to "the" reservation. Lastly, the Drafting Committee had decided to replace the words "is considered" with the term "becomes", as it was undisputed that the status of the author of a reservation as a contracting State or a contracting organization was directly and immediately related to the establishment of that reservation.

72. Draft guideline 4.2.2 was entitled "Effect of the establishment of a reservation on the entry into force of a treaty". Paragraph 1 corresponded to draft guideline 4.2.2, with the replacement of the word "or" with "and" between "contracting States" and "contracting organizations".

73. Following an extensive exchange of views, the Drafting Committee had opted for the inclusion of a second paragraph in draft guideline 4.2.2. During the debate in plenary, a variety of opinions had been expressed on whether it was appropriate to reflect the practice followed by some depositaries of multilateral treaties. The Secretary-General of the United Nations, for instance, included among the instruments required for the entry into force of a treaty those that were accompanied by a reservation, without waiting for prior acceptance of that reservation,[235] contrary to the rules embodied in the Vienna Conventions.

74. In summarizing the debate, the Special Rapporteur had introduced two alternatives to draft guideline 4.2.2, to be considered by the Drafting Committee if it deemed appropriate. However, the Drafting Committee had decided to focus on the initial text and to consider various options for acknowledging the existence of the practice of depositaries without jeopardizing the legal architecture of the Vienna Conventions. A first possibility would have been to add at the end of the text that was now paragraph 1 a phrase such as "unless the parties otherwise agree". The Drafting Committee had been of the view that such a phrase, which could actually apply to the Guide as a whole, would not adequately reflect the existence of the practice.

75. Another option would have been to reaffirm the application of the rule derived from the Vienna Conventions unless "the well-established practice followed by the depositary differs and no contracting State or organization is opposed". The reference to the well-established practice, already used in another draft guideline, would indicate that the Commission did not intend to encourage diverging practices adopted on an *ad hoc* basis. Nonetheless, the Drafting Committee had considered that, while the existence of the relevant practice should not be ignored, its acknowledgement should not undermine the legal regime of the Vienna Conventions.

[235] See footnote 84 above.

76. Eventually, the Drafting Committee had opted for the addition of a second paragraph to draft guideline 4.2.2, the purpose of which was to describe the existing practice of some depositaries as an alternative to the application of the rule. The words "may however be included" reflected the optional character of the diverging practice, while the phrase "at an earlier date" had been included to specify the main feature of the practice. The phrase "if no contracting State or contracting organization is opposed in a particular case" was intended to emphasize that a treaty might not enter into force by anticipation—in other words, by counting the author of the reservation among the contracting States without waiting for the acceptance of that reservation—if one contracting State or contracting organization favoured the application of the rule embodied in the Vienna Conventions. The commentary to draft guideline 4.2.2 would further clarify the relationship between the rule and the practice and indicate that, while the integrity of the former was to be preserved, the Commission did not intend to condemn the latter. In a similar vein, the commentary would emphasize the fact that the divergence between the rule and the decisions made by some depositaries had not given rise to practical difficulties; if any were to arise, they could easily be resolved by express acceptance of the reservation by a single other contracting State.

77. The text of draft guideline 4.2.3 had not been substantially modified by the Drafting Committee, which had simply changed the words "contracting States or international organizations" to "contracting States and contracting organizations" in order to ensure some consistency between the terminology used in the Guide to Practice and that in the 1986 Vienna Convention. The phrase "if or when the treaty is in force" had been questioned but ultimately retained, as it reproduced the language of article 20, paragraph 4 (*a*), of the Vienna Conventions. The only significant change made to draft guideline 4.2.3 concerned its title, which now read "Effect of the establishment of a reservation on the status of the author as a party to the treaty". The Drafting Committee had deemed it appropriate to describe the specific status of the author of an established reservation as a party to a treaty, once that treaty was in force.

78. Draft guideline 4.2.4 was significantly different from the initial text. Most of the modifications resulted from the decision taken by the Drafting Committee to merge in a single text the substance of draft guidelines 4.2.4, 4.2.5 and 4.2.6. The Drafting Committee had made a few changes in direct response to the plenary debate. The first related to the title of the draft guideline, which now read "Effect of an established reservation on treaty relations". While it was more specific than the previous "Content of treaty relations", it remained broad enough to encompass the dual effect that a reservation might have on treaty relations pursuant to article 2, paragraph 1 (*d*), of the Vienna Conventions. It was precisely to align the text of the guideline with that provision of the Conventions that the first paragraph of draft guideline 4.2.4 now stated that an established reservation might exclude, and not only modify, the legal effect of the provisions of the treaty. The word "effect" had been put in the singular for the sake of consistency with article 2, paragraph 1 (*d*) of the Vienna Conventions.

79. The first paragraph of draft guideline 4.2.4 contained another modification compared with the earlier text. The Drafting Committee had deemed it necessary to reproduce the phrase "or of the treaty as a whole with respect to certain specific aspects", found in draft guideline 1.1.1 on the object of reservations. It was important that a draft guideline specifically devoted to the effect of a reservation on treaty relations contain an explicit reference to the systemic effect that a reservation might have, not only on certain provisions, but on the treaty in its entirety, viewed from a particular perspective. On the other hand, the Drafting Committee had refrained from incorporating in the text an express reference to the combination of excluding and modifying effects a reservation might have. The concluding phrase, "to the extent of the reservation", as well as the opening phrase of paragraphs 2 and 3, "To the extent that", accompanied with a proper explanation in the commentary to the draft guideline, had been deemed sufficient in that regard.

80. Draft guideline 4.2.4 now incorporated the substance of the text proposed originally and that of draft guidelines 4.2.5 and 4.2.6. The latter two provisions, devoted to the exclusion and to the modification of the legal effect of a treaty provision, respectively, were intended to specify the general provision embodied in the preceding guideline. The Drafting Committee had considered that a single guideline, covering both the excluding and the modifying effects of a reservation on treaty relations, would avoid unnecessary repetitions, and better correspond to the condensed legal regime adopted in article 21, paragraph 1, of the Vienna Conventions.

81. Having considered various options, the Drafting Committee had eventually adopted a draft guideline consisting of three paragraphs. The first was of a general character and addressed both the excluding and modifying effects of a reservation; its inclusion made it unnecessary to retain the first paragraphs of draft guidelines 4.2.5 and 4.2.6, which merely described the nature of excluding and modifying effects, respectively.

82. As explicitly pointed out in the opening phrase, paragraphs 2 and 3 dealt with the excluding or modifying effect of a reservation on treaty relations. They both comprised two sentences with a parallel structure, the first dealing with the rights and obligations, or the absence thereof, of the author of the reservation, the second, with those of the other parties to the treaty with regard to which the reservation was established. That structure echoed the second and third paragraphs of draft guidelines 4.2.5 and 4.2.6, but was broader in that it did not cover only the obligations of the author of the reservation and the rights of the other parties with regard to which the reservation was established, it actually dealt with the rights and obligations of both the author and the other parties, to the extent that those rights and obligations were affected by the reservation.

83. Referring to an issue that had given rise to some debate in the Drafting Committee, he noted that the opening phrase of paragraphs 2 and 3 focused on the effect of the reservation, while the remaining part of the first sentence referred to the rights and obligations of the author the reservation. That dichotomy was intended to avoid a

certain ambivalence noticed by some members of the Drafting Committee in the definition of a reservation in article 2, paragraph 1 (*d*), of the Vienna Conventions. According to the English version of that provision, a reservation was a unilateral statement made by a State or an international organization whereby "it" purported to exclude or modify the legal effect of certain provisions of a treaty. While the French version left no doubt that "it" referred to the author of the reservation, the wording in English might be understood as referring to the reservation itself.

84. Draft guideline 4.2.4, paragraph 2, dealt with reservations that had an excluding effect on treaty relations. The Drafting Committee had striven to adopt fairly straightforward wording that clearly stated that the author of such a reservation neither had to comply with obligations under the provisions to which the reservation related nor had any rights under those provisions. The word "likewise" in the second sentence emphasized the symmetrical effect of such a reservation for the other parties with regard to which the reservation was established.

85. Paragraph 3 dealt with reservations that had a modifying effect on treaty relations. Its drafting echoed that of the preceding paragraph. The phrase "as modified by the reservation" had been included as an implicit reference to the different kinds of modifying effects that a reservation might have. The commentary would further explain that some reservations might only modify the rights and obligations of their author, while others might also have a modifying effect on the rights and obligations of the other parties with regard to which the reservation was established.

86. Draft guideline 4.2.5 was the last in section 4.2 of the Guide to Practice and corresponded to draft guideline 4.2.7 originally proposed by the Special Rapporteur. Several modifications had been introduced by the Drafting Committee to reflect the views expressed during the plenary debate and to ensure the proper linkage between draft guideline 4.2.5 and those that preceded it. The first of the modifications concerned the title, which now read "Non-reciprocal application of obligations to which a reservation relates". It focused more on the particular case in which an established reservation did not have the ordinary effect on treaty relations described in draft guideline 4.2.4 because of the specific nature of the obligations at stake.

87. The earlier version of the draft guideline had consisted of a *chapeau* restating the principle of reciprocity of the effects of an established reservation, followed by three cases in which reciprocal application was not possible. Given the logical sequence between draft guidelines 4.2.4 and 4.2.5, the Drafting Committee had not deemed it necessary to replicate in the latter the principle of reciprocal application that was already set out in the former.

88. It had thus been left with the three options listed in the original draft guideline 4.2.7 for situations when the reservation did not affect the performance of the obligations of the other parties to the treaty. After the discussion in plenary, the Drafting Committee had decided not to retain the second option when the obligation to which the reservation related was not owed individually to the author of the reservation, because that hypothesis could be subsumed under non-reciprocal application due to the nature of the obligation or the object and purpose of the treaty.

89. The first sentence of draft guideline 4.2.5 dealt with non-reciprocal application. The opening phrase, "Insofar as", was intended to convey the idea that, even when the nature of the obligation required its continuing application, notwithstanding the existence of a reservation, there might still be some degree of reciprocity in the relations between the author of that reservation and the other parties to the treaty. Perhaps, for instance, the author of the reservation did not invoke the obligation concerned or claim its performance from the other parties, even though those parties still had to comply with the obligation. In other words, draft guideline 4.2.5 did not create any exception to the normal effect of a reservation between the parties to a treaty in that particular respect. The point would be further clarified in another draft guideline and through a reference to article 21, paragraph 2, of the Vienna Conventions.

90. In the first sentence of draft guideline 4.2.5, the Drafting Committee had retained the wording proposed by the Special Rapporteur on the nature of the obligation or the object and purpose of the treaty. That was standard terminology in texts on human rights or the environment for referring to obligations that were not subject to reciprocal application. The reference in the final part of the first sentence and in the second sentence to the "content" of the obligation must be read in conjunction with draft guideline 4.2.4 and as relating to the effect that the reservation would normally have on the application of the obligation if the principle of reciprocity applied. The phrase "remains unaffected" was intended to describe in broad terms the absence of effect of a reservation for the other parties to the treaty in the case of the non-reciprocal application of the obligation.

91. The second sentence of draft guideline 4.2.5 dealt with a different case of non-reciprocal application in which the reciprocal application was precluded, not by the nature of the obligation, but by the specific content of the reservation, which concerned only the author of that reservation. Such might be the case, for instance, with a reservation by which a party to the treaty modified the territorial application of an obligation. The hypothesis envisaged there clearly had a different rationale than the one covered in the first sentence; however, as the use of the word "likewise" was intended to convey, the result was identical in that the content of the obligations of the other parties to the treaty remained unaffected by the modification entailed by the reservation.

92. Draft guidelines 4.3 to 4.3.7 dealt with the effect of an objection to a valid reservation. Draft guideline 4.3 indicated that unless a reservation had been established with regard to the objecting State or organization, the formulation of an objection to a valid reservation precluded the reservation from having its intended effects as against that State or international organization. The draft guideline had been well received during the plenary debate and the text adopted by the Drafting Committee was largely based on the one originally proposed, with the following minor changes.

93. First, in order to make the draft guideline easier to read and to better reflect the sequence of events envisaged, the Drafting Committee had reversed the order of the two sentences. The text now began with the proviso "Unless the reservation has been established with regard to an objecting State or organization". Another change was the replacement of the words "renders the reservation inapplicable" by the words "precludes the reservation from having its intended effects". After some discussion, it had been felt that the latter formulation was more in line with article 21, paragraph 3, of the Vienna Conventions. The Drafting Committee had also replaced the expression "objecting State or international organization" by "objecting State or organization" in order to ensure consistency with article 21, paragraph 3, of the Vienna Conventions.

94. A suggestion had been made in the Drafting Committee to accompany the proviso contained in the opening sentence by a cross reference to draft guideline 2.8.12, which stated the final nature of the acceptance of a reservation. However, in view of the introductory nature of draft guideline 4.3, it had been deemed preferable not to make the text unnecessarily cumbersome. The relation between that draft guideline and draft guideline 2.8.12 would be explained in the commentary.

95. Draft guideline 4.3.1 was entitled "Effect of an objection on the entry into force of the treaty as between the author of the objection and the author of a reservation". It stated that, except in the case mentioned in guideline 4.3.4, an objection to a valid reservation did not preclude the entry into force of the treaty as between the reserving State or organization and the objecting State or organization.

96. Since the guideline had been well received in plenary, the Drafting Committee had introduced only minor modifications to its text. As in draft guideline 4.3, the adjective "international" had been omitted in the phrase "objecting State or organization" for the sake of consistency with article 21, paragraph 3, of the Vienna Conventions. The definite article "the" had been replaced by the indefinite article "a[n]" before the words "objection" and "reservation" in the title.

97. Draft guideline 4.3.2 was entitled "Entry into force of the treaty between the author of a reservation and the author of an objection". It, too, had received broad support during the plenary debate, and the Drafting Committee had introduced only minor changes to the text. In order to ensure consistency with draft guideline 4.3.1, reference was now made, in the first line of draft guideline 4.3.2, to "a valid" reservation. Furthermore, with a view to facilitating the reading of the provision, the Drafting Committee had decided to reverse the order in which the two conditions for the entry into force of the treaty between the author of the reservation and the author of the objection were enumerated. Finally, as in previous guidelines and for the same reasons, the words "contracting party" had been replaced by "a contracting State or a contracting organization".

98. Draft guideline 4.3.3 was entitled "Non-entry into force of the treaty for the author of a reservation when unanimous acceptance is required". It stated that in situations in which unanimous acceptance was required for the establishment of a valid reservation, any objection to the reservation by a contracting State or by a contracting organization precluded the entry into force of the treaty for the reserving State or organization.

99. Since it, too, had been well received during the debate in plenary, the Drafting Committee had retained the original text, simply replacing the definite article "the" before the word "reservation" with the indefinite article "a" in the title.

100. Draft guideline 4.3.4 was entitled "Non-entry into force of the treaty as between the author of a reservation and the author of an objection with maximum effect". It reiterated the content of article 20, paragraph 4 (*b*), of the Vienna Conventions and had not generated any controversy during the plenary debate, although some members believed that it duplicated guideline 4.3.1 to some extent. It had also been suggested that a positive formulation would be more appropriate, and the Drafting Committee had decided to follow that suggestion. The current text accordingly provided that an objection to a reservation *precluded* the entry into force of the treaty as between the objecting State or organization and the reserving State or organization, *if* the objecting State or organization "has definitely expressed an intention to that effect in accordance with guideline 2.6.8". That active formulation concerning the expression of intention by the objecting State or organization had been deemed more concise and more straightforward than the one in article 20, paragraph 4 (*b*), of the Vienna Conventions. The cross reference to guideline 2.6.8, which had appeared in brackets in the text proposed by the Special Rapporteur, had been retained, although the view had also been expressed that an appropriate explanation in the commentary could have sufficed.

101. The word "international" had been omitted in the phrase "contracting organization" in order to align the text with the wording of the 1986 Vienna Convention, and the definite article "the" had been replaced by the indefinite article "a" before "reservation" in the title.

102. Draft guideline 4.3.5, entitled "Effects of an objection on treaty relations", was the result of the merging of draft guidelines 4.3.5, 4.3.6 and 4.3.7, decided on by the Drafting Committee for the sake of consistency with the approach taken for the new draft guideline 4.2.4, which incorporated the text of the previous guidelines 4.2.4, 4.2.5 and 4.2.6. Draft guideline 4.3.5 now consisted of four paragraphs.

103. Paragraph 1, which corresponded to the text of draft guideline 4.3.5, was introductory in nature. It reiterated the content of article 21, paragraph 3, of the Vienna Conventions by enunciating, in general terms, the effect of an objection on the treaty relations between the author of a valid reservation and an objecting State or organization. The Drafting Committee had retained the text originally proposed, with the deletion of the words "or parts of provisions" in response to a suggestion made during the debate in plenary. The commentary would clarify that the word "provisions" should be given a broad meaning so as to also cover those situations in which a reservation related only to certain parts of a provision of the treaty.

104. Paragraphs 2 and 3 of draft guideline 4.3.5 were to be understood as specifications of the general rule enunciated in paragraph 1. They concerned reservations that purported to exclude or modify the legal effect of certain provisions of the treaty and were based on paragraph 1 of the original draft guidelines 4.3.6 and 4.3.7. However, they had been redrafted by the Drafting Committee so as to echo the structure of draft guideline 4.2.4, paragraphs 2 and 3. There again, the opening phrase, "To the extent that", took into account the fact that a reservation might produce a combination of excluding and modifying effects. The phrases "purports to exclude" and "purports to modify", taken from the definition of a reservation in article 2, paragraph 1 (*d*), of the Vienna Conventions, had been retained, as opposed to the words "excludes" or "modifies" that appeared in draft guideline 4.2.4, in order to reflect the fact that the reservations envisaged in draft guideline 4.3.5 were not established, since they had given rise to an objection. The commentary would emphasize that point while also indicating that, in that context, the word "purport" would cover not only the consequences arising from the declared intentions of the author of the reservation but also the objective or even indirect effects that the reservation might have produced if it had been established. In both paragraphs 2 and 3, the Drafting Committee had found it more appropriate to refer to "certain", rather than "one or more", provisions of the treaty, and had omitted the word "international" in the phrase "objecting State or organization", in order to align the wording of the draft guideline with the text of article 21, paragraph 3, of the Vienna Conventions.

105. The Drafting Committee had also decided to simplify the closing phrases of both paragraphs 2 and 3. In paragraph 2, which dealt with reservations purporting to exclude the legal effects of certain provisions of the treaty, the final sentence, "to the extent that they [these provisions] would not be applicable as between them if the reservation were established", had been deleted: that clarification had seemed superfluous, particularly in the light of the insertion of the phrase "to the extent that" at the beginning of the paragraph. The Drafting Committee had also decided to shorten the final phrase of paragraph 3, which had originally read "by the provisions to which the reservation relates to the extent they would be modified as between them if the reservation were established". It now read "by the provisions of the treaty as intended to be modified by the reservation".

106. Finally, paragraph 4 of draft guideline 4.3.5 corresponded to the second paragraph of draft guidelines 4.3.6 and 4.3.7 originally proposed by the Special Rapporteur. However, the Drafting Committee had simplified the paragraph, which now stated, in a clearer and more direct way, that all the provisions of the treaty other than those to which the reservation related were to remain applicable as between the reserving State or organization and the objecting State or organization. There again, for the sake of consistency with the text of article 21, paragraph 3, of the Vienna Conventions, the word "international" had been omitted in the phrases "reserving State or organization" and "objecting State or organization".

107. Draft guideline 4.3.6, entitled "Effect of an objection on provisions other than those to which the reservation relates", was based on the earlier draft guideline 4.3.8. It dealt with "objections with intermediate effect", in other words, those purporting to exclude the application of provisions of a treaty other than those to which the reservation related. The conditions for the permissibility of an objection "with intermediate effect" were set out in draft guideline 3.4.2, provisionally adopted by the Commission at its 3051st meeting (para. 111). Draft guideline 4.3.6 consisted of two paragraphs.

108. Paragraph 1 enunciated the non-applicability, in the treaty relations between the author of the reservation and the author of an objection formulated in accordance with draft guideline 3.4.2, of a provision to which the reservation did not relate but which had a sufficient link with the provisions to which the reservation did relate. The Drafting Committee had decided to reformulate the original text of paragraph 1 by including an explicit reference to guideline 3.4.2 in order to emphasize that the purported effect of an objection with intermediate effect, namely the exclusion of a treaty provision to which the reservation did not relate, could come into play only if such an objection fulfilled all the conditions set forth in draft guideline 3.4.2. In order to ensure consistency with draft guideline 3.4.2, the words "does not refer directly" had been replaced by "does not relate" and the word "refers" by "does relate".

109. Following an intense debate, the Drafting Committee had eventually retained the expression "sufficient link", instead of the phrase "sufficiently close link" proposed by the Special Rapporteur, in order to harmonize the terminology with that of guideline 3.4.2. The commentary would indicate, however, that some members had regarded the expression "sufficient link" as being too weak and had proposed that it be replaced by stronger wording, such as "inextricable link". It had been suggested that the commentary also indicate that objections with intermediate effect entailed the risk of undermining the balance of treaty relations and should therefore remain exceptional. On the other hand, the point had been made that some of those concerns might be alleviated in the light of the safeguards provided for in paragraph 2.

110. Paragraph 2 was largely based on the text of an additional paragraph submitted by the Special Rapporteur in response to a suggestion made during the plenary debate and supported by several members of the Commission. The paragraph had been intended to preserve the principle of consensus and the balance in treaty relations that an objection "with intermediate effect" was likely to undermine. It was intended to recognize that the reserving State or organization could prevent such an objection from producing its intended effect by opposing the entry into force of the treaty between itself and the objecting State or organization.

111. The Drafting Committee had retained the substance of the additional paragraph. However, it had been felt that the formulation could be simplified and that the emphasis should be put on the freedom of the author of the reservation to oppose the entry into force of the treaty *vis-à-vis* the objecting State or organization. In that spirit, the text had been split into two sentences, the first of which indicated that the reserving State or organization could, within a period of 12 months following the

notification of an objection, oppose the entry into force of the treaty between itself and the objecting State or organization. The second sentence specified that, in the absence of such opposition, the treaty was to apply between the author of the reservation and the author of the objection, to the extent provided by the reservation and the objection. The commentary would clarify that the formula "to the extent provided by the reservation and the objection" meant that the treaty would apply between the author of the reservation and the author of the objection, except for the provisions whose application was excluded by the reservation and the additional provisions whose application was excluded by the objection.

112. Once again, for the sake of consistency with article 21, paragraph 3, of the Vienna Conventions, the word "international" had been omitted in the phrases "reserving State or organization" and "objecting State or organization".

113. Draft guideline 4.3.7, which corresponded to draft guideline 4.3.9 originally proposed by the Special Rapporteur, was entitled "Right of the author of a valid reservation not to be compelled to comply with the treaty without the benefit of its reservation". The Commission had referred the text to the Drafting Committee on the understanding that the Committee had not been mandated to address the legal consequences that would arise if an objection purporting to deprive the reserving State or organization of the benefit of the reservation was incapable of producing the intended legal effects. It was understood that the debate regarding such consequences would be exposed in the commentary.

114. The Drafting Committee had introduced only minor changes to the text proposed by the Special Rapporteur, which had been well received in plenary. Thus, in both the title and the text of the draft guideline, the Committee had decided to use the words "compelled to comply with" instead of "bound by" and "bound to comply with". The word "all", referring to the provisions of the treaty, and the words "in no case", had been considered superfluous and had been deleted. The wording of the draft guideline had been brought into line with that of previous guidelines with regard to the enunciation of the substantive and formal requirements for the validity of a reservation.

115. Section 4.4 of the Guide to Practice concerned the effects of a reservation on rights and obligations outside of the treaty.

116. Draft guideline 4.4.1 was entitled "Absence of effect on rights and obligations under another treaty". Since it had been well received in plenary, the Drafting Committee had retained the text originally proposed, while replacing, in the title, the words "the application of provisions of another treaty" with "rights and obligations under another treaty" in order to harmonize the title with its text.

117. The Drafting Committee had considered a suggestion originally made in plenary that the qualifier "as such" should be included in the text of the draft guideline. The reasoning had been that, under certain circumstances, a reservation, an acceptance of a reservation or an objection to a reservation might produce certain interpretative effects on the provisions of another treaty. However, after careful consideration, the Drafting Committee had come to the conclusion that the insertion of those words was neither necessary nor appropriate. It had been felt, in particular, that the draft guideline was limited to the non-modification or non-exclusion of rights and obligations under another treaty; it did not address the question of whether a reservation, acceptance or objection might, in certain cases, produce certain indirect effects on the interpretation or application of provisions of another treaty. A reference to such a possibility could be included in the commentary.

118. Draft guideline 4.4.2 was entitled "Absence of effect on rights and obligations under customary international law". Again, the text adopted by the Drafting Committee was largely based on that originally proposed by the Special Rapporteur, although some changes had been introduced.

119. The main change had been the addition of the words "of itself", so that the first sentence now provided that a reservation to a treaty provision which reflected a rule of customary international law "does not *of itself* affect" the rights and obligations under that rule. That modification had been introduced in response to a suggestion made in plenary for the insertion of the words "as such" in the first sentence of the draft guideline, in order to take into account the fact that a reservation to a treaty provision reflecting a rule of customary international law, while not affecting *per se* the binding nature of that rule, might be regarded, in certain circumstances, as a manifestation of an *opinio juris* which could also be an element of a process that could eventually lead to the modification or the extinction of the rule. In spite of some hesitations regarding the merit of that suggestion, the Drafting Committee had eventually decided to follow it by adopting a formulation that would leave open the possibility that a reservation might produce certain effects on the process leading to the formation and modification of a rule of customary international law. The Committee had found that the expression "does not *of itself* affect" could serve that purpose. An appropriate explanation would be included in the commentary.

120. The Drafting Committee had felt it was more appropriate to refer to rights and obligations under a rule of customary international law, rather than to "the binding nature" of that rule. The text of the draft guideline had been modified accordingly. The Committee had also harmonized the title of the guideline with its text by replacing the words "the application of customary norms" with the phrase "rights and obligations under customary international law". The word "norm" had been replaced by "rule" in the text of the draft guideline, and in order to ensure consistency with the text of other draft guidelines, the phrase "reserving State or international organization" had been replaced by "reserving State or organization".

121. Draft guideline 4.4.3 was entitled "Absence of effect on a peremptory norm of general international law (*jus cogens*)". Once again, the text proposed by the Special Rapporteur had received broad support in plenary and the formulation retained by the Drafting Committee closely resembled it.

122. However, during the plenary debate, several members had suggested that the words "which are bound by that norm" at the end of the draft guideline be deleted, as they seemed to imply that some States or international organizations might not be bound by a *jus cogens* norm. The Drafting Committee had followed that suggestion and had deleted those words. The commentary would, however, indicate that the provision should not be read as excluding the possibility that regional rules of *jus cogens* might also exist.

123. The Drafting Committee had also simplified the first part of the draft guideline by replacing the words "the norm in question" with "that norm". In order to ensure consistency with the other draft guidelines, the phrase "the reserving State or international organization" had been replaced by "the reserving State or organization".

124. Having thus concluded his introduction of the report of the Drafting Committee, he expressed the hope that the plenary would adopt the draft guidelines contained in it.

125. The CHAIRPERSON said she took it that the Commission wished to adopt the titles and texts of draft guidelines 4 to 4.4.3 contained in document A/CN.4/L.760/Add.1. In response to a comment by Mr. Candioti, she said that the various language versions would be properly aligned.

126. Mr. VALENCIA-OSPINA noted that only 16 members were present and that a quorum of 18 was needed to take a decision. He suggested that a decision be postponed until the first meeting of the second part of the session.

127. After a procedural discussion in which Mr. CANDIOTI, Mr. HASSOUNA, Mr. PETRIČ, Mr. VALENCIA-OSPINA and Mr. VASCIANNIE participated, the CHAIRPERSON said she took it that the Commission wished to inform the Special Rapporteur that the Commission would adopt the report at the beginning of the second part of the current session, when it had a quorum and that he could begin preparing the commentaries to the draft guidelines.

It was so decided.

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

[Agenda item 1]

128. The CHAIRPERSON drew attention to the programme of work for the first two weeks of the second half of the session. If she heard no objection, she would take it that the Commission wished to adopt the proposed programme of work.

It was so decided.

129. After the customary exchange of courtesies, the CHAIRPERSON declared the first part of the sixty-second session closed.

The meeting rose at 1.20 p.m.

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[*] Resumed from the 3055th meeting.