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Summary record of the 3089th meeting

Topic:
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*Downloaded from the web site of the International Law Commission
(<http://legal.un.org/ilc/>)*

105. He agreed with most of what the Special Rapporteur referred to as “statements” in paragraph 94 of the report, but he had difficulties or was in partial or total disagreement with paragraph 94 (d), which stated that “[c]lassification of the conduct of an official as official conduct does not depend on the motives of the person or the substance of the conduct”, the “determining factor” apparently being whether the official was acting in a capacity as such; with subparagraph (f), where it was stated that immunity *ratione materiae* extended to the “illegal acts” of officials; with subparagraph (g), the formulation of which gave the impression that immunity *ratione materiae* covered all acts, whatever they might be, performed by a State official while in office; with subparagraph (n), in which the Special Rapporteur made the debatable assertion that “[t]he various rationales for exceptions to the immunity of State officials from foreign criminal jurisdiction are not sufficiently convincing”; and with subparagraph (o), where it was stated that “it cannot definitively be asserted that a trend toward the establishment of such a norm exists”. The latter conclusion could only be reached because the Special Rapporteur had only put forward arguments in its support. The Special Rapporteur had postulated a theory which he seemed to want to prove at all costs, including by minimizing any arguments that might have contradicted it. That created an uncomfortable feeling about the second report.

106. The Commission would do well to re-examine five questions in detail. First, the basis of the norm of immunity: was it a logical norm inherent in the principle of the sovereign equality of States, or was it a norm of customary international law? If it was a customary norm, it would need to be set off more clearly by defining its scope. From that point of view, the ICJ had not been entirely convincing when, in the *Arrest Warrant* case, it had declared—one could almost say “proclaimed”—the “complete immunity” of a Minister for Foreign Affairs. The Special Rapporteur could also have examined, more carefully than he had, the criticism levelled against the Court in that regard.

107. Secondly, consideration should be given to the relationship between State responsibility and the waiver of the immunity of State officials from foreign criminal jurisdiction: the idea was that State responsibility, in particular for the violation of an obligation owed to the international community as a whole, entailed the waiver of the immunity of its representatives, who ultimately were the perpetrators of the violation. In that case, the State shield disappeared, and the perpetrators of the crime were left to their fate, in other words their criminal responsibility. Of course, the two types of responsibility were different, but they shared the same factual basis: the initial illegal act which incurred the criminal responsibility of the individual or the international responsibility of the State was exactly the same.

108. Thirdly, the relationship between immunity *ratione materiae* and immunity *ratione personae* needed to be examined. The two types of immunity did not operate in parallel in all cases. In some instances, immunity *ratione materiae* and immunity *ratione personae* went hand in hand. The discontinuation of immunity *ratione personae* on account of official functions ceasing to exist

posed the question of whether immunity *ratione materiae* continued to apply to a State official.

109. That should lead the Commission to address the question of immunity *ratione temporis*: did the latter cover acts performed before a State official took office or was acting in that capacity? If so, did such coverage last solely for the beneficiaries of immunity *ratione personae*, or did it also extend to persons who enjoyed immunity *ratione materiae*? Did the benefit of immunity for acts performed before taking office cease to exist with the departure from office?

110. Fourthly, it would be necessary to consider whether the question of immunity arose even in the pretrial phase of the criminal process, as asserted by the Special Rapporteur in paragraph 7 of the report, or rather in the trial phase.

111. Fifthly, there was the question of the connection between universal jurisdiction and the immunity of a State official from foreign criminal jurisdiction. Given the legitimate reactions of most States to the first laws, notably Belgian and Spanish, relating to universal jurisdiction and the amendments to them, he suggested that the Commission examine the question of the connection between jurisdiction or competence for “the most serious crimes” and the circumstances of the particular case. There might be a link of territoriality (the alleged offences took place in the forum State) or a personal link (the alleged offences concerned nationals of the forum State). That would avoid criticism relating to the imbalance of power, the result of which was that officials of weak States could be prosecuted without regard to their immunity in jurisdictions of powerful nations on the basis of allegations of international crimes committed in any country, whereas in general, the opposite was not the case. The ideal, of course, would be a perfect universality of the International Criminal Court, but for that, all States without exception would have to be parties to the Rome Statute of the International Criminal Court. History always repeated itself, and often for the worse. The absolute immunity of State officials from foreign criminal jurisdiction would inevitably create such a risk.

The meeting rose at 1.15 p.m.

3089th MEETING

Tuesday, 17 May 2011, at 10 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Caffisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Ms. Jacobsson, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Filling of a casual vacancy in the Commission (article 11 of the statute) (concluded)* (A/CN.4/635 and Add.1–3)

[Agenda item 14]

1. The CHAIRPERSON announced that the Commission was required to fill the seat left vacant by the resignation of Mr. Bayo Ojo. The candidate's *curriculum vitae* was contained in document A/CN.4/635/Add.3, and a related communication was contained in document ILC/LXII/MISC.2.⁹⁶ The election would take place, as was customary, in a private meeting.

The meeting was suspended at 10.05 a.m. and resumed at 10.25 a.m.

2. The CHAIRPERSON announced that the Commission had elected Mr. Mohammed Bello Adoke to fill the seat vacated by Mr. Bayo Ojo. On behalf of the Commission, he would inform the newly elected member and invite him to join the Commission.

Effects of armed conflicts on treaties⁹⁷ (A/CN.4/638, sect. C, A/CN.4/644,⁹⁸ A/CN.4/645,⁹⁹ A/CN.4/L.777¹⁰⁰)

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE

3. Mr. MELESCANU (Chairperson of the Drafting Committee) introduced the titles and texts of the draft articles adopted by the Drafting Committee on the effects of armed conflicts on treaties, as contained in document A/CN.4/L.777, which read:

EFFECTS OF ARMED CONFLICTS ON TREATIES

PART ONE

SCOPE AND DEFINITIONS

Article 1. Scope

The present draft articles apply to the effects of armed conflict on the relations of States under a treaty.

Article 2. Definitions

For the purposes of the present draft articles:

(a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether

* Resumed from the 3084th meeting.

⁹⁶ Distribution limited to the members of the Commission.

⁹⁷ At its sixtieth session in 2008, the Commission adopted on first reading a draft of 18 articles and an annex and the commentary thereto (*Yearbook ... 2008*, vol. II (Part Two), chap. V, p. 45, para. 65). At its sixty-first session in 2009, the Commission named Mr. Lucius Caflisch Special Rapporteur on the topic, following the resignation of Sir Ian Brownlie (*Yearbook ... 2009*, vol. II (Part Two), p. 150, para. 229). At its sixty-second session in 2010, the Commission commenced the second reading of the draft articles based on the Special Rapporteur's first report (*Yearbook ... 2010*, vol. II (Part One), document A/CN.4/627 and Add.1) and of the comments and information received from Governments (*ibid.*, document A/CN.4/622 and Add.1) and referred all the draft articles and the annex to the Drafting Committee (*ibid.*, vol. II (Part Two), chap. II, para. 16).

⁹⁸ Reproduced in *Yearbook ... 2011*, vol. II (Part One).

⁹⁹ *Idem.*

¹⁰⁰ Mimeographed; available from the Commission's website.

embodied in a single instrument or in two or more related instruments and whatever its particular designation, and includes treaties between States to which international organizations are also parties;

(b) "armed conflict" means a situation in which there is resort to armed force between States or protracted resort to armed force between governmental authorities and organized armed groups.

PART TWO

PRINCIPLES

CHAPTER I

OPERATION OF TREATIES IN THE
EVENT OF ARMED CONFLICTS

Article 3. General principle

The existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties:

- (a) as between States parties to the conflict;
- (b) as between a State party to the conflict and a State that is not.

Article 4. Provisions on the operation of treaties

Where a treaty itself contains provisions on its operation in situations of armed conflict, those provisions shall apply.

Article 5. Application of rules on treaty interpretation

The rules of international law on treaty interpretation shall be applied to establish whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict.

Article 6. Factors indicating whether a treaty is susceptible to termination, withdrawal or suspension

In order to ascertain whether a treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict, regard shall be had to all relevant factors, including:

(a) the nature of the treaty, in particular its subject matter, its object and purpose, its content and the number of parties to the treaty; and

(b) the characteristics of the armed conflict, such as its territorial extent, its scale and intensity, its duration and, in the case of non-international armed conflict, also the degree of outside involvement.

Article 7. Continued operation of treaties resulting from their subject matter

An indicative list of treaties the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict, is to be found in the annex to the present draft articles.

CHAPTER II

OTHER PROVISIONS RELEVANT TO
THE OPERATION OF TREATIES

Article 8. Conclusion of treaties during armed conflict

1. The existence of an armed conflict does not affect the capacity of a State party to that conflict to conclude treaties in accordance with international law.

2. States may conclude agreements involving termination or suspension of a treaty or part of a treaty that is operative between them during situations of armed conflict, or may agree to amend or modify the treaty.

Article 9. Notification of intention to terminate or withdraw from a treaty or to suspend its operation

1. A State intending to terminate or withdraw from a treaty to which it is a party, or to suspend the operation of that treaty as a consequence of an armed conflict, shall notify the other State party or States parties to the treaty, or its depositary, of such intention.

2. The notification takes effect upon receipt by the other State party or States parties, unless it provides for a subsequent date.

3. Nothing in the preceding paragraphs shall affect the right of a party to object within a reasonable time, in accordance with the terms of the treaty or other applicable rules of international law, to the termination of or withdrawal from the treaty, or suspension of its operation.

4. If an objection has been raised in accordance with paragraph 3, the States concerned shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations.

5. Nothing in the preceding paragraphs shall affect the rights or obligations of States with regard to the settlement of disputes insofar as they have remained applicable.

Article 10. Obligations imposed by international law independently of a treaty

The termination of or the withdrawal from a treaty, or the suspension of its operation, as a consequence of an armed conflict, shall not impair in any way the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of that treaty.

Article 11. Separability of treaty provisions

Termination, withdrawal from or suspension of the operation of a treaty as a consequence of an armed conflict shall, unless the treaty otherwise provides or the parties otherwise agree, take effect with respect to the whole treaty except where:

(a) the treaty contains clauses that are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

Article 12. Loss of the right to terminate or withdraw from a treaty or to suspend its operation

A State may no longer terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty remains in force or continues in operation; or

(b) it must by reason of its conduct be considered as having acquiesced in the continued operation of the treaty or in its maintenance in force.

Article 13. Revival or resumption of treaty relations subsequent to an armed conflict

1. Subsequent to an armed conflict, the States parties may regulate, on the basis of agreement, the revival of treaties terminated or suspended as a consequence of the armed conflict.

2. The resumption of the operation of a treaty suspended as a consequence of an armed conflict shall be determined in accordance with the factors referred to in draft article 6.

PART THREE

MISCELLANEOUS

Article 14. Effect of the exercise of the right to self-defence on a treaty

A State exercising its inherent right of individual or collective self-defence in accordance with the Charter of the United Nations is entitled to suspend in whole or in part the operation of a treaty to which it is a party insofar as that operation is incompatible with the exercise of that right.

Article 15. Prohibition of benefit to an aggressor State

A State committing aggression within the meaning of the Charter of the United Nations and resolution 3314 (XXIX) of the General Assembly of the United Nations shall not terminate or withdraw from a treaty or suspend its operation as a consequence of an armed conflict that results from the act of aggression if the effect would be to the benefit of that State.

Article 16. Decisions of the Security Council

The present draft articles are without prejudice to relevant decisions taken by the Security Council in accordance with the Charter of the United Nations.

Article 17. Rights and duties arising from the laws of neutrality

The present draft articles are without prejudice to the rights and duties of States arising from the laws of neutrality.

Article 18. Other cases of termination, withdrawal or suspension

The present draft articles are without prejudice to the termination, withdrawal or suspension of treaties as a consequence of, *inter alia*: (a) a material breach; (b) supervening impossibility of performance; or (c) a fundamental change of circumstances.

ANNEX

INDICATIVE LIST OF TREATIES REFERRED TO IN DRAFT ARTICLE 7

(a) Treaties on the law of armed conflict, including treaties on international humanitarian law;

(b) treaties declaring, creating or regulating a permanent regime or status or related permanent rights, including treaties establishing or modifying land and maritime boundaries;

(c) multilateral law-making treaties;

(d) treaties on international criminal justice;

(e) treaties of friendship, commerce and navigation and agreements concerning private rights;

(f) treaties for the international protection of human rights;

(g) treaties relating to the international protection of the environment;

(h) treaties relating to international watercourses and related installations and facilities;

(i) treaties relating to aquifers and related installations and facilities;

(j) treaties which are constituent instruments of international organizations;

(k) treaties relating to the international settlement of disputes by peaceful means, including resort to conciliation, mediation, arbitration and judicial settlement;

(l) treaties relating to diplomatic and consular relations.

4. The Drafting Committee had undertaken its task in two parts. It had held six meetings at the Commission's previous session, from 14 to 22 July 2010; most of the work had thus been done under the able guidance of his predecessor, Mr. Vázquez-Bermúdez. The Committee had then held two meetings at the current session, on 29 April and 3 May 2011. It had concluded its work on the 18 draft articles and had decided to report to the plenary Commission with the recommendation that the draft articles be adopted on second reading.

5. He paid tribute to the Special Rapporteur, whose constructive approach and patient guidance had greatly facilitated the Drafting Committee's task, and thanked the members of the Committee for their significant contributions and the secretariat for its valuable assistance.

6. The draft articles were structured into three parts. The first was entitled "Scope and definitions", the second "Principles" and the third "Miscellaneous". The draft articles were followed by an annex linked to draft article 7.

7. Draft article 1 established the scope. The Drafting Committee had considered three proposals for that provision. First, it had discussed the possibility of incorporating other provisions relating to the scope of the draft articles, such as draft article 2, subparagraph (b), defining armed conflict, and draft article 3, subparagraphs (a) and (b), indicating which States were to be covered by the draft articles. That would have rearranged the content of several draft articles but introduced no change whatsoever in substance. The Committee had decided to retain the existing structure, however, since it followed a well-established pattern for instruments codifying international law.

8. The Drafting Committee had then turned to an issue raised during the plenary debate, namely the fact that defining the scope of the draft articles as covering treaties between States seemed to exclude multilateral treaties which, although overwhelmingly acceded to by States, also had international organizations as parties.¹⁰¹ The example given was that of the United Nations Convention on the Law of the Sea. The Drafting Committee was of the view that draft article 1 should be reformulated to make it clear that such treaties were indeed covered by the draft articles. A solution had been found in the formula "relations of States under a treaty", which was based on similar wording in article 3, subparagraph (c), of the 1969 Vienna Convention. Accordingly, the draft articles applied to the treaty relations between States, regardless of whether other subjects of international law, such as international organizations, were also parties to the treaty. The point was further clarified through an addition to the definition of treaties in draft article 2.

9. The third issue related to the proposed inclusion of a reference to the application of the draft articles to non-international armed conflicts which, by their nature or extent, were likely to affect how treaties applied between States parties. The idea was to make it clear that not every conflict of a non-international character would affect treaty relations between States and that only those conflicts which, "by their nature or extent", were likely to affect a treaty or treaties were to be covered by the scope of the draft articles. The Drafting Committee, upon reflection, had decided not to include the proposed reference, as the point was already covered by the use of the adjective "protracted" in the definition of armed conflict in draft article 2, subparagraph (b), as well as by draft article 6. It was agreed that the commentary would make it clear that a typical non-international armed conflict should not call into question treaty relations.

10. As for the text itself, the Drafting Committee had changed the earlier phrase "deal with" to "apply to", which was more appropriate for a legal instrument. In addition, it had replaced the words "in respect of" with "on", so that the phrase now read "effects of armed conflict on the relations of States under a treaty". It had also been decided to delete the former concluding phrase, "where at least one of the States is a party to the armed conflict", because it was not the only scenario covered by the draft articles. Instead, an outline of the different hypotheses of armed conflict that fell within the scope of the draft articles was to be included in the commentary to draft article 1. Draft article 1 should be read in the light of draft article 3, which expressly envisaged such hypotheses.

11. The title of draft article 1 remained "Scope".

12. Draft article 2 provided some definitions of terms used in the draft articles.

13. Subparagraph (a) defined the word "treaty". With one exception, the definition remained that which had been adopted on first reading and which was based on the definition in the 1969 Vienna Convention. The Drafting Committee had also decided, as part of the package solution for covering treaties to which international organizations were also parties, to add the following phrase at the end of the definition of treaties: "and includes treaties between States to which international organizations are also parties". That addition did not mean that the draft articles dealt with international organizations, but rather that the participation of an international organization in a treaty did not *per se* exclude the draft articles from applying to the relations between States under that treaty.

14. Subparagraph (b) contained a definition of "armed conflict" that differed from the one adopted on first reading. In his first report, the Special Rapporteur had proposed replacing the first-reading definition with a modified version of the more contemporary one employed by the International Tribunal for the Former Yugoslavia in the *Tadić* decision.¹⁰² The majority of members had supported that proposal during the plenary debate.¹⁰³ The modification was to delete the final clause of the *Tadić* definition, which referred to resort to armed force between organized armed groups within a State. To leave that clause in would be inappropriate in the context of the draft articles.

15. The title of draft article 2 had been changed to "Definitions" so as to align it with the title of Part One.

16. Draft articles 3 to 7, contained in chapter I of Part Two, were central to the operation of the entire set of draft articles. Draft article 3 established the basic orientation of the draft articles: armed conflict did not, in and of itself, terminate or suspend the operation of treaties. Whether there was continuity therefore depended on the circumstances of each case. Draft articles 4 to 7 sought to guide the determination of whether a treaty survived an armed conflict, and they were arranged in order of priority. The first step was to look at the treaty itself. Under draft

¹⁰¹ *Yearbook ... 2010*, vol. II (Part Two), pp. 168–169, para. 203; see also *ibid.*, p. 168, paras. 199–200.

¹⁰² *Ibid.*, vol. II (Part One), document A/CN.4/627 and Add.1, paras. 21 and 30.

¹⁰³ *Ibid.*, vol. II (Part Two), pp. 169–170, paras. 209 and 213.

article 4, if the treaty contained a provision expressly regulating its continuity in the context of an armed conflict, that provision would govern. In the absence of an express provision, resort would next be had, under draft article 5, to the established international rules on treaty interpretation so as to ascertain the fate of the treaty in the event of an armed conflict. If no conclusive answer were found following the application of those two draft articles, the enquiry would then shift to considerations extraneous to the treaty, and draft article 6 provided a number of contextual factors that might be relevant. Finally, the reader was further assisted by draft article 7, which referred to an indicative list of treaties, contained in the annex, the subject matter of which indicated that they continued in operation, in whole or in part, during armed conflict.

17. Draft article 3 recognized the principle that the existence of an armed conflict did not *ipso facto* terminate or suspend the operation of treaties. The Drafting Committee had held a preliminary discussion as to whether draft article 3 would be best presented in an affirmative formulation, establishing a principle of continuity so as to emphasize the importance of the stability of treaty relations. The Committee had had before it an alternative proposal along those lines. Following an extensive discussion, the Committee had decided to retain the approach adopted on first reading. The purpose of draft article 3 was to make it clear that the existence of an armed conflict did not, in and of itself, affect treaties: whether a particular conflict affected a treaty would be determined in accordance with the draft articles that followed draft article 3.

18. The Drafting Committee had been of the view that instead of adopting a presumption in favour of continuity and then attempting to list treaties or categories of treaties which presumably did not continue, it was preferable to make a simple statement of principle first, so as to dispel any assumption of discontinuity, and then proceed to describe situations where treaties were assumed to continue. It had been felt that the net effect of the latter approach was to strengthen the stability of treaty relations, and that a change in the orientation of draft article 3 would require a significant redraft of the articles that followed, something that the Committee had not been inclined to undertake at such a late stage in the work and without clear instructions from the plenary Commission.

19. In the *chapeau* of draft article 3, the Drafting Committee had replaced the reference to the “outbreak” of an armed conflict with the word “existence”, so as to make it clear that the scope of the draft articles was not limited to armed conflicts that affected treaties at the time of their outbreak: an effect on a treaty could occur later in time. Furthermore, the reference to “outbreak” suggested armed conflicts of an international character, since it was unusual to speak of the “outbreak” of non-international armed conflicts; hence, the word “existence” accorded more closely with the scope of the draft articles.

20. The Drafting Committee had also had an extensive discussion on the Latin term “*ipso facto*”. While the practice was not to use Latin terms when there was a non-Latin equivalent enjoying general agreement, the Committee had not been able to agree on a suitable non-Latin replacement. Accordingly, it had decided to keep the words “*ipso facto*”.

21. The drafting of subparagraphs (a) and (b) had been simplified, no substantive change being intended thereby. The reference to States “parties to the treaty”, as proposed by the Special Rapporteur, had been deleted because it was implied from draft article 1.

22. Finally, the Drafting Committee had looked at a series of proposals for the title of draft article 3. In the end, it had decided that the best solution was for the title to give an indication of the nature of the provision in relation to the entire set of draft articles. The Committee had considered the formulations “basic principle” or “general principle”, and had settled on the latter.

23. Draft article 4 covered a situation when a treaty contained provisions on its continued operation, or non-operation, in situations of armed conflict. Such provisions would, of course, be applicable; accordingly, the Drafting Committee had focused on the placement of the draft article within the whole text and on whether its formulation might be improved.

24. On first reading, the provision had appeared as draft article 7. The Drafting Committee had accepted the Special Rapporteur’s proposal to relocate it immediately after draft article 3, the logic being that the statement of general principle in draft article 3 was followed by several articles providing guidance on how to ascertain the effect of an armed conflict on the treaty. The first such article, draft article 4, indicated that if the answer lay in a provision within the treaty itself, that provision should be followed.

25. The Drafting Committee had proceeded on the basis of the reformulation proposed in the Special Rapporteur’s report, but had decided not to include any reference to “express” provisions, an adjective that was considered redundant. It had also discussed a proposal to refer to “specific” provisions but had decided against it, since specificity was a contextual concept that could give rise to conflicting interpretations in practice. The title of draft article 4 had been shortened, with the deletion of “express”, so that it now read “Provisions on the operation of treaties”.

26. Draft article 5 was a new provision, focusing on the next stage of inquiry when the treaty did not include an express provision on the effect of an armed conflict: resort would then be had to the rules on treaty interpretation. While the provision restated the obvious to a certain extent, it was nonetheless useful to include it so as to clarify the relationship between articles 3, 4, 6 and 7. In particular, its inclusion had arisen out of the discussion concerning whether draft article 6 should refer to the criterion of intention and cite articles 31 and 32 of the 1969 Vienna Convention. That had been a matter of some debate during the consideration of the draft articles on first reading, and the matter had re-emerged now, following a proposal by the Special Rapporteur to resurrect the reference to the criterion of intention.

27. The Drafting Committee was cognizant of the fact that there was no agreement in the plenary Commission on reintroducing the criterion of intention in draft article 6 and that in his closing statement, the Special Rapporteur had distanced himself from his earlier proposal to do

exactly that. There were also divergent views in the Committee, as there had been in plenary, on whether the criterion of intention was reflected in articles 31 and 32 of the 1969 Vienna Convention. In the final analysis, the sense of the Committee was that the interpretation of the treaty through the application of articles 31 and 32 of the Vienna Convention was an inquiry distinct from the consideration of factors external to the treaty that might give an indication of the treaty's susceptibility to termination, withdrawal or suspension in the event of an armed conflict.

28. The question remained as to whether there ought to be a reference to the criterion of intention, in addition to a reference to the rules of interpretation in articles 31 and 32. Upon reflection, the Committee had decided against such a reference, since the framers of treaties rarely provided an indication of their intentions should the parties to the treaties ever become engaged in an armed conflict. Furthermore, giving a prominent place to intention might diverge from the position adopted at the United Nations Conference on the Law of Treaties, namely to provide other criteria so as to limit the possibility that those who applied treaties might rely solely on assertions of intention. Making reference to intention would amount to reintroducing a subjective approach, focusing on the "intention of the parties", when the 1969 Vienna Convention had adopted an objective approach, focusing on the "meaning of the text".

29. Nonetheless, in order to accommodate both views, it had been decided not to refer to the criterion of intention but to make a more general reference to the "rules of international law on treaty interpretation". It was understood that those rules were reflected in the 1969 Vienna Convention and also existed as a matter of customary international law for States that were not parties to that Convention. The Drafting Committee had considered different ways of expressing the concept and had settled on a formulation that did not envisage treaty interpretation as providing the definitive answer, but rather left the door open for the application of draft articles 6 and 7 in situations when interpreting the meaning of the treaty did not yield a conclusive result.

30. The title of draft article 5 was "Application of rules on treaty interpretation", which suggested that the provision was concerned, not with the question of treaty interpretation generally, but rather with specific situations where the existing rules on treaty interpretation were to be applied with a view to obtaining a result.

31. Draft article 6 provided several factors to be taken into account—the enumeration was not exhaustive—in determining whether a treaty was susceptible to termination or suspension of operation. Such an exercise would be undertaken after resort to draft articles 4 and 5 proved inconclusive. The Drafting Committee's extensive discussion on draft article 6 had resulted in a number of changes. One of the conceptual shifts involved had just been described: the question of the intention of the parties had been delinked with that of the rules on the interpretation of treaties, which had become the subject of draft article 5. That decision had helped to clear the way to agreement on a reformulated draft article 6.

32. In the text adopted on first reading, the word "indicia" had been used at the suggestion of the then-Special Rapporteur. However, that term had not been favoured by many, including members of the Commission and States that had commented on the draft articles. The Drafting Committee was no exception, which was why it had decided to employ the word "factors".

33. The *chapeau* had in large measure been retained as in the first-reading text, except that at the end, the words "resort shall be had to" had been replaced by "regard shall be had to all relevant factors, including", expressly to confirm that the lists of factors in subparagraphs (a) and (b) were non-exhaustive and were to provide help in determining the effect of the armed conflict on treaties. That was confirmed by the use of the term "relevant factors", which established a relative test in that some of the factors might be more relevant than others, depending on the treaty or conflict, as well as by the word "including", introduced to make the point even clearer.

34. The version considered on first reading had comprised two sets of factors: the first, contained in subparagraph (a), related to the rules on treaty interpretation in the 1969 Vienna Convention, while the second, in subparagraph (b), related to both the conflict and the treaty in question, without the two categories being necessarily interrelated. With the removal of the question of treaty interpretation, the Drafting Committee had been able to redistribute the second set of factors between new subparagraphs (a) and (b), the former listing factors relating to the treaty and the latter, factors pertaining to the armed conflict.

35. Subparagraph (a) placed emphasis on the "nature" of the treaty, in particular the treaty's subject matter, its object and purpose, its content and the number of parties thereto. Subparagraph (b) focused on the characteristics of the armed conflict, with the factors suggested being its territorial extent—for example, whether it was on land or at sea, something that could be relevant in ascertaining its impact on air transportation agreements—and its scale, intensity and duration. In addition, given that the scope of the draft articles included conflicts of a non-international character, the degree of outside involvement was mentioned as one of the factors to be taken into account. That new element was intended as a control factor to favour the stability of treaties. The rationale was that non-international armed conflicts could potentially affect the relationship between parties to a treaty: the greater the involvement of third States in a non-international armed conflict, the greater the possibility that treaties would be affected, and vice versa.

36. The title of draft article 6 was "Factors indicating whether a treaty is susceptible to termination, withdrawal or suspension".

37. Draft article 7 dealt with the continued operation of treaties resulting from their subject matter and it took a new approach, one that had emerged from a revised proposal by the Special Rapporteur. That proposal had comprised two paragraphs, the first based on the text adopted on first reading, and the second establishing a link to an annex containing a list of treaties the subject matter of which indicated that they continued in operation, in whole or in part, during armed conflict.

38. The Drafting Committee had generally been of the view that the provision adopted on first reading did not add much and should be reformulated to elaborate on the “subject matter” listed in draft article 6, subparagraph (a), as one of the factors to be taken into account in ascertaining susceptibility to termination, withdrawal or suspension of operation in the event of an armed conflict. The linkage between draft articles 6 and 7 helped to explain the basis on which the Commission had developed the list and preserved the Special Rapporteur’s idea of including in the draft articles an explicit cross reference to the annex in draft article 7.

39. The commentary would clarify that the effect of the provision was to establish that the outbreak of an armed conflict involved an implication in favour of the continuation of the treaties identified in the annex.

40. The title of draft article 7 had been aligned with the new formulation and now read: “Continued operation of treaties resulting from their subject matter”.

41. Turning to the annex, which related to draft article 7, he said the Drafting Committee had decided to retain it in the draft articles and to locate it at the end, as had been the case on first reading, contrary to the wishes of the Special Rapporteur, who would have preferred its insertion after draft article 7. The Committee had used the recommendations of the Special Rapporteur, both for refining the wording and for the content of the annex. The Special Rapporteur had done further research into the existing case law and had provided a summary of his findings in a short paper. He himself recommended that the Secretariat should be asked to reproduce the Special Rapporteur’s findings as an official document of the Commission, in order to preserve it for the record (A/CN.4/645).

42. For the contents of the list, the Drafting Committee had decided to retain, in large part, the version adopted on first reading. It had decided against transferring some of the categories of treaties into the draft article as a second paragraph, so as to set them apart as a select set of treaties which, by their very nature and importance, would survive an armed conflict. That would invariably have implied a hierarchy of treaties, something that the Drafting Committee felt was not the purpose of draft article 7 and the annex.

43. In terms of additions, the Drafting Committee had accepted the Special Rapporteur’s proposal to include a new item (d), “treaties on international criminal justice”, as well as a new category (j), “treaties which are constituent instruments of international organizations”. The Drafting Committee had decided to delete the entry “treaties relating to commercial arbitration”. The Special Rapporteur’s additional research had confirmed that the inclusion of such treaties was not always supported by relevant practice. Some practice did exist, but it was considered inconclusive. The Drafting Committee had also been of the opinion that there was insufficient agreement in the Commission for including commercial arbitration treaties by way of progressive development. However, the commentary would explain that the treaties mentioned in paragraph (e), “treaties of friendship, commerce and navigation and agreements concerning private rights”, covered investment protection

treaties to the extent that they dealt with private rights. The Drafting Committee had also decided not to include an entry for “*jus cogens* treaties”, as had been proposed in plenary. It took the view that while it was conceivable that treaties might contain provisions enjoying preemptory status under international law, it was not common to refer to such treaties as a category. Finally, the Drafting Committee had decided to retain an entry for “multilateral law-making treaties” and had relocated it higher in the list, in paragraph (c), for presentation purposes.

44. Aside from the inclusion of the word “international” before the phrases “protection of human rights” and “protection of the environment”, in paragraphs (f) and (g), respectively; the deletion of the word “analogous”, considered obscure, before the phrase “agreements concerning private rights” in paragraph (e); and the merging of the references to diplomatic and consular treaties into a single entry, namely paragraph (l), the only significant redrafting had been in paragraph (k): the phrase “settlement of disputes between States by peaceful means” had been replaced by “international settlement of disputes by peaceful means”. The deletion of the words “between States” broadened the scope of the provision so as to include disputes involving other subjects of international law, particularly international organizations. Since such changes implied the settlement of disputes outside the jurisdiction of the ICJ, the Drafting Committee had replaced the reference to the Court at the end of the paragraph with the more generic phrase “judicial settlement”, which was the terminology used in Article 33 of the Charter of the United Nations. The Drafting Committee was of the view that treaty-based mechanisms for the protection of human rights were covered by paragraph (f).

45. Finally, the Drafting Committee had decided to delete all references to “categories” of treaties, a term not typically used in legal texts, for example the 1969 Vienna Convention. The change had been made in both the title and text of draft article 7. A proposal to refer to the “provisions” of treaties had not been accepted.

46. The commentary would make it clear that the list of treaties was indicative in nature, was not presented in any particular order and did not reflect a “hierarchy” of instruments. Furthermore, no *a contrario* interpretation ought to be drawn from the fact that certain types of treaties had not been included in the list, since their survival in the event of an armed conflict would continue to depend on the application of draft articles 4 to 6.

47. The title of the annex was “Indicative list of treaties referred to in draft article 7”.

48. Turning to chapter II of Part Two, he said that draft article 8 concerned the conclusion of treaties during armed conflict. The Drafting Committee had opted to retain the draft article without major changes to the text adopted on first reading but had recognized that the provision was largely expository in nature and its inclusion was not strictly necessary.

49. Paragraph 1 confirmed that armed conflicts did not affect the capacity of States parties to an armed conflict to conclude treaties. The earlier reference to the “outbreak”

of an armed conflict had been replaced by “existence” so as to accord with the changes made in draft article 3. Furthermore, in line with the general policy of not including references to specific treaties, the reference to the 1969 Vienna Convention had been replaced by the more generic “international law”.

50. Paragraph 2 referred to the specific possibility that States might agree *inter se* during an armed conflict on the termination or suspension of a treaty operative between them. The Drafting Committee had retained the formulation adopted on first reading and had added a reference to the possibility of agreement concerning the amendment or modification of the treaty. In so doing, the Drafting Committee had had in mind the position of third States parties to the treaty but not parties to the armed conflict. Such States could conceivably not be in a position to justify termination or suspension of operation, thus leaving them only the possibility to seek modification or amendment.

51. Another issue discussed was the reference to “lawful” agreements in the text adopted on first reading, a phrase considered infelicitous since it suggested *a contrario* the possibility of concluding “unlawful” agreements. Alternatives considered included simply deleting the word or replacing it with “valid”. The Drafting Committee had settled on the former, as the latter could introduce unnecessary confusion.

52. The Drafting Committee had also considered the possibility of locating draft article 8 earlier in the text, after draft article 4, but had decided against doing so in order not to disrupt the sequence of articles 3, 4, 5, 6 and 7.

53. The title of draft article 8 remained “Conclusion of treaties during armed conflict”.

54. Draft article 9 concerned the requirement of notification of termination of or withdrawal from a treaty, or the suspension of its operation, in the event of an armed conflict. The text adopted on second reading included two additional paragraphs based on recommendations by the Special Rapporteur.

55. Paragraph 1 retained the version adopted on first reading, with some drafting changes. The Drafting Committee had sought to align it more closely with article 65 of the 1969 Vienna Convention by deleting the reference to the State “engaged in armed conflict” and with the addition, after the words “operation of that treaty”, of the clarifying phrase “as a consequence of an armed conflict”.

56. The Drafting Committee had decided to retain the text of paragraph 2 that had been adopted on first reading.

57. The key issue concerning paragraph 3 had been the time period for objection. Various suggestions had been made, but the Drafting Committee had opted for the inclusion, after the phrase “to object”, of the words “within a reasonable time”—a time frame that would be determined through the operation of the procedures envisaged in paragraph 4.

58. The Special Rapporteur had proposed the inclusion of the additional phrase “unless the treaty provides

otherwise”. The Drafting Committee had decided against it, however, since it could imply that the treaty was setting an unreasonable time period.

59. Paragraph 4 was new and was based on the version proposed by the Special Rapporteur in paragraph 96 of his first report, with some slight adjustment, including the insertion of a cross reference to paragraph 3. According to paragraph 4, if an objection was raised under paragraph 3, the States concerned would be required to seek the peaceful settlement of their dispute through the means listed in Article 33 of the Charter of the United Nations.

60. The Special Rapporteur’s proposal for a new paragraph 5 had proved uncontroversial in the Drafting Committee. The paragraph contained a saving clause to preserve the rights or obligations of States with regard to the settlement of disputes, to the extent that they remained applicable in the event of an armed conflict. The Committee had considered the provision useful in order to counterbalance any interpretation of paragraph 4 as implying that States involved in an armed conflict operated from a clean slate when it came to the peaceful settlement of disputes. The adoption of the provision also accorded with the inclusion in paragraph (k) of the annex of treaties relating to the international settlement of disputes by peaceful means. The wording of the provision was based on a proposal made by the Special Rapporteur in his report, with the deletion of a reference to “the incidence of the armed conflict” that had been considered unnecessary.

61. The title of draft article 9 remained “Notification of intention to terminate or withdraw from a treaty or to suspend its operation”. The Drafting Committee had sought to harmonize the draft articles by employing variations of that formulation in draft article 9, paragraph 3; in the title and *chapeau* of draft article 12; and in the text of draft article 15.

62. The Drafting Committee had decided to retain draft article 10 as adopted on first reading. The provision sought to preserve obligations imposed by international law independently of a treaty, regardless of whether the treaty had been affected by a conflict through the application of the draft articles.

63. The title of draft article 10 remained “Obligations imposed by international law independently of a treaty”.

64. Draft article 11 dealt with the separability of treaty provisions. The Commission had introduced the provision towards the end of the first reading, drawing inspiration from article 44 of the 1969 Vienna Convention. The Drafting Committee had decided to retain draft article 11, since it played a key role in the whole text in moderating the impact of the provisions in chapter I by acknowledging the possibility of differentiated effects on a treaty. Other than a slight amendment to refer to the “operation of a treaty”, as opposed to “operation of the treaty”, the Committee had decided not to change the first-reading formulation. The word “unjust” in subparagraph (c) had been queried in the comments received from Governments. The commentary would clarify that this was language used in article 44 of the 1969 Vienna Convention. The Committee had felt it advisable not to introduce any changes in subparagraph (c).

65. The title of draft article 11 remained “Separability of treaty provisions”.

66. Draft article 12 was also based on the 1969 Vienna Convention and dealt with the loss of the right to terminate or withdraw from a treaty or to suspend its operation. The text was substantially the same as that adopted on first reading, with the following changes.

67. At the end of the *chapeau*, the Drafting Committee had decided to include the phrase “after becoming aware of the facts” so as to align the provision more closely with its counterpart in the 1969 Vienna Convention, namely article 45. For the same reasons, the words “shall have” and “must” had been introduced in subparagraphs (a) and (b).

68. The Drafting Committee understood the qualifying phrase in the *chapeau*, “after becoming aware of the facts”, as relating not only to the existence of an armed conflict, but also to the practical consequences thereof in terms of the possible effect of the armed conflict on a treaty. That point would be further illustrated in the commentary. The Committee had considered making a reference to “relevant facts”, but had decided against it.

69. The title of draft article 12 remained “Loss of the right to terminate or withdraw from a treaty or to suspend its operation”.

70. Draft article 13 dealt with the revival or resumption of treaty relations subsequent to an armed conflict. The text was a combination of draft article 18 as adopted on first reading, the substance of which was now reproduced in paragraph 1, and the first-reading text of draft article 13, which was now to be found in paragraph 2.

71. The Drafting Committee had considered and accepted paragraph 1 on the basis of a proposal made by the Special Rapporteur in his first report (para. 114). It dealt with situations analogous to “novations”, a term from the law of contracts: the revival, subsequent to an armed conflict, of treaties that had been terminated or whose operation had been suspended. It was anticipated that States parties would enter into agreements for that purpose.

72. Paragraph 2 was based on the version adopted on first reading, the only change being the replacement of the word “indicia” with “factors”, by way of aligning the text with draft article 6. The paragraph confirmed that the resumption of the operation of a treaty was to be determined in accordance with the factors listed in draft article 6.

73. The title of draft article 13 was “Revival or resumption of treaty relations subsequent to an armed conflict”.

74. Draft article 14 dealt with the effect of the exercise of the right to individual or collective self-defence on a treaty. The text was substantially the one adopted on first reading, but the Drafting Committee had decided to refine it through the inclusion of the adjective “inherent” before “right”, thereby aligning it with Article 51 of the

Charter of the United Nations. A suggestion that the reference to the Charter of the United Nations should be replaced by a more general formula (“in accordance with international law”) had not been adopted on the grounds that it was the Charter of the United Nations that provided the contemporary legal framework for the exercise of the right of self-defence. The Drafting Committee had further decided to include, after the words “operation of a treaty”, the phrase “to which it is a party insofar as that operation is”, so as to inject an element of relativity, the idea being that a treaty might only be partly incompatible with the exercise of the right.

75. In his report, the Special Rapporteur had proposed the inclusion of an opening phrase to make the provision subject to draft article 7, but he had subsequently distanced himself from his proposal, and the Drafting Committee had decided not to take it up.

76. The title of draft article 14 was “Effect of the exercise of the right to self-defence on a treaty”. The title no longer included the earlier reference to “individual or collective”, which had been deleted by way of streamlining the text, although the Committee considered the concept to be implied in the words “right to self-defence”.

77. Draft article 15 dealt with the prohibition of benefit to an aggressor State from the application of the draft articles. The prohibition had generally been endorsed, and the only matter faced by the Drafting Committee had been whether to keep the text as adopted on first reading, namely with a limited reference to aggression as defined in General Assembly resolution 3314 (XXIX) of 14 December 1974, or to adopt a broader formulation referring to resort to force in violation of Article 2, paragraph 4, of the Charter of the United Nations.

78. Divergent views had been expressed during the plenary debate, but according to the Drafting Committee’s sense of those views, the majority of members had been in favour of retaining the narrower version, or at least, there was insufficient support to deviate from the position taken at first reading. Accordingly, the first-reading formulation of draft article 15 had been adopted, with precision added by the insertion of the phrase “that results from the act of aggression” after “armed conflict”.

79. The title of draft article 15 remained “Prohibition of benefit to an aggressor State”.

80. Draft article 16 sought to preserve the effects of decisions taken by the Security Council under the Charter of the United Nations. In the first-reading text, it had immediately preceded what was now draft article 15, but it had been placed after draft article 15 so as to better group it with the other saving clauses at the end of the draft articles.

81. Several changes had been made to the text adopted on first reading. First, the Drafting Committee had replaced the words “legal effects of” by “relevant”, because not all decisions of the Security Council had legal effects: what was at issue was those decisions that were relevant to the application of the draft articles. The

Drafting Committee had further refined the wording by turning “decisions of the Security Council” into “decisions taken by the Security Council”. Finally, the first-reading text had referred exclusively to decisions taken in accordance with “provisions of Chapter VII” of the Charter of the United Nations: that restriction had been deleted out of recognition that the Security Council acted under other provisions of the Charter of the United Nations, including Article 94 on the enforcement of judgments of the ICJ. It was assumed that decisions concerning an armed conflict taken by the Security Council under Chapter VII would be relevant to the application of the draft articles, but there might be other decisions by the Security Council, taken under other provisions of the Charter of the United Nations, that might also be relevant.

82. The title of draft article 16 remained “Decisions of the Security Council”.

83. The Drafting Committee had adopted draft article 17, which preserved the application of the laws of neutrality, in the form adopted on first reading, without change.

84. The title of draft article 17 remained “Rights and duties arising from the laws of neutrality”.

85. Draft article 18 was the last of the saving clauses. It sought to preserve a number of the grounds for termination, withdrawal from or suspension of treaties provided for in the 1969 Vienna Convention. The formulation adopted on first reading had been restructured into a single paragraph and retained, with one change. On first reading, the Commission had included the agreement of the parties as one of the alternative grounds for termination, withdrawal or suspension, but the Drafting Committee had deleted it in the light of the inclusion of new provisions in draft article 4 on the operation of treaties.

86. The title of draft article 18 remained “Other cases of termination, withdrawal or suspension”.

87. Having concluded his presentation of the first report of the Drafting Committee, he expressed the hope that the Commission would be in a position to adopt the draft articles on the effects of armed conflicts on treaties on second reading.

88. The CHAIRPERSON drew attention to the recommendation by the Chairperson of the Drafting Committee that the supplementary research into existing case law undertaken by the Special Rapporteur in connection with the annex to the draft articles should be reproduced as an official document of the Commission. If he heard no objection, he would take it that the Commission endorsed that recommendation.

It was so decided.

89. The CHAIRPERSON invited the Commission to adopt the draft articles on the effects of armed conflicts on treaties, as contained in document A/CN.4/L.777, on second reading.

PART ONE. SCOPE AND DEFINITIONS

Draft articles 1 and 2

Draft articles 1 and 2 were adopted.

PART TWO. PRINCIPLES

CHAPTER I. OPERATION OF TREATIES IN THE EVENT OF ARMED CONFLICTS

Draft articles 3 to 7

Draft articles 3 to 7 were adopted.

CHAPTER II. OTHER PROVISIONS RELEVANT TO THE OPERATION OF TREATIES

Draft articles 8 and 9

Draft articles 8 and 9 were adopted.

Draft article 10

90. Mr. PELLET said that the translation into French of the phrase “shall not impair in any way the duty of any State” by the words “*ne dégagent en aucune manière un État de son devoir*” was infelicitous. That text should be replaced by the phrase “*n’affectent en aucune manière le devoir d’un État*”.

91. Mr. CAFLISCH (Special Rapporteur) endorsed that proposal.

Draft article 10 was adopted, subject to that editorial amendment to the French text.

Draft articles 11 to 13

Draft articles 11 to 13 were adopted.

PART THREE. MISCELLANEOUS

Draft article 14

Draft article 14 was adopted.

Draft article 15

92. Mr. SABOIA said that the Chairperson of the Drafting Committee had reported that, for the wording of draft article 15, the Drafting Committee had favoured a narrow reference to aggression as defined in General Assembly resolution 3314 (XXIX). In his own view, draft article 15 was quite broad in scope, referring as it did to both General Assembly resolution 3314 (XXIX) and to the provisions of the Charter of the United Nations on the prohibition of the use of force.

93. Mr. NOLTE said that he had always understood the term “aggression” to be somewhat narrower than the prohibition of the use of force in Article 2, paragraph 4, of the Charter of the United Nations.

94. Mr. MELESCANU (Chairperson of the Drafting Committee), speaking as a member of the Commission, said that his interpretation of the text adopted for draft article 15 was that it incorporated all the definitions of aggression contained both in the Charter of the United Nations and in General Assembly resolution 3314 (XXIX).

95. Sir Michael WOOD said that he took the view that nothing in draft article 15 or in the Commission's discussion thereof in any way affected the international law on the use of force and on aggression.

Draft article 15 was adopted.

Draft articles 16 to 18

Draft articles 16 to 18 were adopted.

ANNEX

The annex was adopted.

96. The CHAIRPERSON said he took it that the Commission wished to adopt on second reading the titles and texts of the draft articles on the effects of armed conflicts on treaties as a whole, subject to an editorial amendment to the French text of draft article 10.

It was so decided.

Organization of the work of the session (continued)*

[Agenda item 1]

97. Ms. JACOBSSON (Chairperson of the Planning Group) announced that the Planning Group would be composed of Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Kamto, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti and Sir Michael Wood, and Mr. Perera (*ex officio*).

The meeting rose at 11.45 a.m.

3090th MEETING

Friday, 20 May 2011, at 10.05 a.m.

Chairperson: Mr. Maurice KAMTO

Present: Mr. Cafilisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escobar Hernández, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. McRae, Mr. Melescanu, Mr. Murase, Mr. Niehaus, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vargas Carreño, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Reservations to treaties (continued)* (A/CN.4/638, sect. A, A/CN.4/639 and Add.1, A/CN.4/647 and Add.1, A/CN.4/L.779, A/CN.4/L.793, A/CN.4/L.795)

[Agenda item 2]

REPORT OF THE WORKING GROUP ON RESERVATIONS TO TREATIES

1. The CHAIRPERSON invited the Chairperson of the Working Group on reservations to treaties to report on the work of the Working Group.

2. Mr. VÁZQUEZ-BERMÚDEZ (Chairperson of the Working Group on reservations to treaties) said that at its 3080th meeting, held on 26 April 2011, the Commission had decided to establish a Working Group on reservations to treaties in order to finalize the Guide to Practice on Reservations to Treaties at the current session (as envisaged in paragraph 45 of the report of the Commission on the work of its sixty-second session¹⁰⁴).

3. The Working Group had held 14 meetings, from 26 to 29 April, and on 4, 5, 6, 10, 11, 12, 17 and 18 May 2011, during which it had been able to finalize the whole set of guidelines constituting the Guide to Practice, the text of which was reproduced in document A/CN.4/L.779.

4. He paid tribute to the Special Rapporteur on reservations to treaties, Mr. Alain Pellet, whose mastery of the subject and guidance had greatly facilitated the efforts of the Working Group. He also thanked the members of the Working Group for their active participation and the secretariat for its assistance.

5. In accordance with its mandate, the Working Group had revisited the draft Guide to Practice as provisionally adopted by the Commission at the previous session with a view to finalizing the text by taking into account, where appropriate, the observations made by Governments. The Working Group had also made a number of linguistic and technical changes to the text. Furthermore, in order to facilitate the use of the Guide to Practice, it had been agreed that the structure of some sections should be slightly altered, and that had led to the renumbering of several draft guidelines and sections. In performing its tasks, the Working Group had relied, *inter alia*, on a document prepared by the Special Rapporteur containing his proposals for possible modifications to the text of the draft guidelines in the light of the written comments received from Governments (A/CN.4/639 and Add.1) and of the observations made by Governments during the debate in the Sixth Committee ever since the Commission had begun its consideration of the topic at its forty-seventh session, in 1995.

6. He would present only the main changes made by the Working Group to the text of the draft guidelines as provisionally adopted by the Commission and to the structure of certain sections of the Guide to Practice. However, he would not describe those changes that were of a purely technical or linguistic nature.

* Resumed from the 3085th meeting.

* Resumed from the 3080th meeting.

¹⁰⁴ *Yearbook ... 2010*, vol. II (Part Two), p. 19.