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Summary record of the 3191st meeting

Topic:
Draft report of the International Law Commission on the work of its sixty-fifth session

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3191st MEETING

Monday, 5 August 2013, at 10.05 a.m.

Chairperson: Mr. Bernd H. NIEHAUS

Present: Mr. Caflisch, Mr. Candioti, Mr. El-Murtadi Suleiman Gouider, Ms. Escobar Hernández, Mr. Forteau, Mr. Gevorgian, Mr. Hassouna, Mr. Hmoud, Mr. Huang, Ms. Jacobsson, Mr. Kittichaisaree, Mr. Laraba, Mr. Murase, Mr. Murphy, Mr. Nolte, Mr. Park, Mr. Peter, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Šturma, Mr. Tladi, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Sir Michael Wood.

Draft report of the International Law Commission on the work of its sixty-fifth session (*continued*)

CHAPTER VI. *Protection of persons in the event of disasters (concluded)* (A/CN.4/L.821 and Add.1–2)

C. *Text of the draft articles on the protection of persons in the event of disasters provisionally adopted so far by the Commission (concluded)*

2. TEXT OF THE DRAFT ARTICLES AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-FIFTH SESSION (*concluded*)

1. The CHAIRPERSON invited the members of the Commission to consider, paragraph by paragraph, draft articles 5 *ter* and 16 and their related commentaries, as contained in document A/CN.4/L.821/Add.2.

Commentary to draft article 5 ter (Cooperation for disaster risk reduction)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

2. Mr. KITTICHAISAREE proposed that, in the last sentence, the adverb “specifically” should be inserted in place of “primarily”, which could exclude more secondary measures. Furthermore, it should be explained that the term “intended” in the text of the draft article should be interpreted in the light of the principle of good faith, because it could happen that cooperation had an ulterior motive to prevention.

3. Mr. VALENCIA-OSPINA (Special Rapporteur), while agreeing to the proposed amendment, said that the principle of good faith underpinned all the work of the Commission, and to emphasize its importance in the draft article might detract from it elsewhere.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Paragraph (3) was adopted.

The commentary to draft article 5 ter, as a whole, as amended, was adopted.

Commentary to draft article 16 (Duty to reduce the risk of disasters)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

4. Mr. MURPHY proposed that a footnote should be added to make a clearer reference to the Yokohama Strategy¹⁸¹ and the Hyogo Framework for Action.¹⁸²

Paragraph (2) was adopted with that addition and a minor editorial amendment proposed by Sir Michael Wood to the English text.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

5. Mr. NOLTE said he considered that the Commission was going too far by referring to an affirmative obligation to prevent the occurrence of human rights violations, since, in fact, it was an obligation of conduct and not of results. It should say that States had an affirmative obligation to take measures designed to prevent the occurrence of such violations. In the last sentence it would be more logical in the light of the preceding sentence to refer first of all to decisions relating to human rights and thereafter to international environmental law.

The two proposals by Mr. Nolte were adopted.

6. Mr. PARK recalled that throughout its work on the topic the Commission had endeavoured to maintain a balance between the principle of national sovereignty and the principles of human rights. However, it did not seem to be doing that by stating that it based itself on the former and drew on principles emanating from the latter.

7. Mr. VALENCIA-OSPINA (Special Rapporteur) said that the expression “emanating from” did not imply that human rights were less important, but simply meant that the Commission also drew on other principles, for example, from environmental law or refugee law. In any case, mention must be made of the sovereignty of States, at least in the commentary, since several members had stressed its importance.

8. Mr. MURPHY was of the opinion that the reference to the principle of non-intervention should be deleted; it was not relevant since the issue at stake was measures to be taken at the national level to prevent disasters. Furthermore, it might be considered that failure to meet the obligations laid down in draft article 16 would permit some form of intervention. At the end of the paragraph, it should be made clear that it was in the context of the European Convention on Human Rights that the European Court of Human Rights had affirmed the duty to take preventive measures.

¹⁸¹ Yokohama Strategy for a Safer World: Guidelines for Natural Disaster Prevention, Preparedness and Mitigation, containing the Principles, the Strategy and the Plan of Action, Report of the World Conference on Natural Disaster Reduction (A/CONF.172/9 [and Add.1]), chap. I, resolution 1, annex I.

¹⁸² Report of the World Conference on Disaster Reduction, held in Kobe, Hyogo, Japan, 18–22 January 2005 (A/CONF.206/6 and Corr.1), chap. I, resolution 2.

9. Mr. NOLTE, supported by Ms. JACOBSSON, said that one should not give the impression that the European Court of Human Rights had been the only court to affirm that duty with regard to human rights; many others had done so. The specificity of the cases cited in the paragraph¹⁸³ was that the Court had applied the rule to natural disasters.

10. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he was surprised by Mr. Murphy's interpretation, but agreed that draft article 16 did not concern inter-State relations, which were covered by the articles on cooperation. However, certain measures to be taken at the national level could require cooperation with other States, for example, the establishment of an early warning system. It was also conceivable that modern technology carried a risk of interference. However, since the principle of non-intervention emanated from the principle of national sovereignty, perhaps a reference to it was not essential.

11. Mr. TLADI said that, while he was an advocate of the principle of non-intervention, he shared Mr. Murphy's opinion regarding its lack of relevance to the case in point. In the draft articles under consideration, the notion of sovereignty did not have the same meaning as in other areas of the Commission's work, where, in addition to the State's freedom to do whatever it wished, it implied a duty to protect. The text did not reflect that but, rather, seemed to create a dichotomy between national sovereignty and the protection of human rights.

12. Mr. WISNUMURTI said he considered it important to keep the reference to non-intervention, particularly since it had happened that a State had refused foreign assistance based on that principle, as mentioned by Mr. Kittichaisaree. As for the question of balance between respect for national sovereignty and respect for human rights, it emerged clearly from the draft articles as a whole.

13. Mr. KITTICHAISAREE said he also considered that mention must be made of non-intervention, since in the Sixth Committee many States had expressed concern about the risk of rules being imposed on States affected by disasters. He proposed that the second sentence should be reworded to the effect that the Commission based itself on the fundamental principle of State sovereignty including non-intervention in the domestic affairs of another State, and thereafter to make reference to international human rights law as in the original text.

Following a discussion in which Mr. Valencia-Ospina, Sir Michael Wood, Mr. Petrič, Mr. Saboia, Ms. Jacobsson and Mr. Murphy took part, Mr. Kittichaisaree's proposal was adopted.

On that understanding, paragraph (4), as amended, was adopted.

Paragraph (5)

14. Mr. NOLTE said that in the light of the preceding paragraph it seemed contradictory to state that the "primary foundation" of draft article 16 was the practice of

States. Instead he proposed the phrase "a most important legal foundation".

That proposal was adopted.

15. Mr. MURPHY proposed that the word "commitment" should be used instead of "obligation" in the first sentence, since State practice mostly consisted of political declarations which did not entail any legal obligation. He also proposed that the third sentence should be deleted and that, instead, the multilateral, regional and bilateral agreements concluded concerning the prevention of disasters, listed in paragraph 33 of the sixth report (A/CN.4/662), should be added at the end of the second sentence. That would show that draft article 16 was based not only on the general principles set forth in paragraph 4, but also on a large number of binding and non-binding instruments. In the last sentence the term "obligation" should also be replaced with the term "commitment" and a full list of examples of preventive measures incorporated in national policies and legal frameworks, particularly in connection with the Hyogo Framework for Action and the International Strategy for Disaster Reduction, should be added.

16. Mr. VALENCIA-OSPINA (Special Rapporteur) endorsed those proposals, in particular the choice of the term "commitment" which covered all initiatives, as well as legal instruments, political declarations, platforms and action plans. He also suggested that the term "agreements" in the second sentence should be replaced.

On that understanding, paragraph (5), as amended, was adopted.

Paragraph (6)

17. Sir Michael WOOD proposed that the words "is subject to" should be replaced with "is to be read together with".

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

18. Sir Michael WOOD proposed the deletion of the third sentence.

Paragraph (8), as amended, was adopted.

Paragraph (9)

19. Mr. FORTEAU (Rapporteur) proposed, for the sake of readability, that the second sentence, which concerned a very specific point, should be placed in a footnote.

20. Mr. VALENCIA-OSPINA (Special Rapporteur) said that he had no objection to that proposal.

Paragraph (9), as amended, was adopted.

¹⁸³ Öneriyıldız v. Turkey and Budayeva and Others v. Russia.

Paragraph (10)

21. Mr. NOLTE proposed the deletion of the word “therefore” in the last sentence.

Paragraph (10), as amended, was adopted.

Paragraph (11)

22. Mr. NOLTE proposed, for the sake of clarity, that the words “of law” should be added after the word “manifestations” in the English text.

Paragraph (11) was adopted with that amendment to the English text.

Paragraph (12)

23. Sir Michael WOOD proposed that the words “types of rules” in the first sentence should be replaced with the word “arrangements”.

Paragraph (12), as amended, was adopted.

Paragraph (13)

24. Ms. ESCOBAR HERNÁNDEZ said that the last sentence was not necessary and proposed its deletion.

Paragraph (13), as amended, was adopted.

Paragraph (14)

Paragraph (14) was adopted.

Paragraph (15)

25. Sir Michael WOOD proposed, for the sake of readability, that the last indent of subparagraph (b) should appear as a footnote, since it was a comment by the Commission and not a quotation.

26. Mr. VALENCIA-OSPINA endorsed the proposal provided that the text of the indent was shortened.

On that understanding, paragraph (15), as amended, was adopted.

Paragraph (16)

27. Sir Michael WOOD proposed that the verb “limit” in the third sentence should be replaced with “refer expressly”.

Paragraph (16), as amended, was adopted.

Paragraphs (17) to (20)

Paragraphs (17) to (20) were adopted.

Paragraph (21)

28. Mr. MURPHY proposed that, in the English text, the term “kick-starting” should be replaced with “initiating”.

Paragraph (21) was adopted with that amendment to the English text.

Paragraph (22)

Paragraph (22) was adopted.

The commentary to draft article 16, as a whole, as amended, was adopted.

Chapter VI of the report of the Commission, as a whole, as amended, was adopted.

CHAPTER IV. Subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/L.819 and Add.1–3)

29. The CHAIRPERSON invited the members of the Commission to consider, paragraph by paragraph, document A/CN.4/L.819.

A. Introduction

Paragraphs 1 to 3

Paragraphs 1 to 3 were adopted.

Paragraph 4

30. Mr. NOLTE proposed the addition of the word “also” before the word “decided”.

Paragraph 4, as amended, was adopted.

B. Consideration of the topic at the present session

Paragraph 5

Paragraph 5 was adopted.

Paragraph 6

31. Mr. FORTEAU (Rapporteur) drew the attention of the Secretariat to an error in the way the chapters were numbered.

Paragraph 6 was adopted, subject to the renumbering of the chapters.

Paragraph 7

32. Mr. FORTEAU (Rapporteur) said that contrary to what was indicated in the paragraph, the Commission had referred to the Drafting Committee draft conclusions 1 to 5 and not “1 to 4”.

Paragraph 7 was adopted with that correction.

Paragraph 8

33. Mr. FORTEAU (Rapporteur) said that the Commission had not adopted four draft conclusions but five.

Paragraph 8 was adopted with that correction.

Paragraph 9

Paragraph 9 was adopted.

Sections A and B contained in document A/CN.4/L.819, as a whole, as amended, were adopted.

C. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Commission at its sixty-fifth session

2. TEXT OF THE DRAFT CONCLUSIONS AND COMMENTARIES THERETO PROVISIONALLY ADOPTED BY THE COMMISSION AT ITS SIXTY-FIFTH SESSION

34. The CHAIRPERSON invited the members of the Commission to continue its consideration, paragraph by paragraph, of chapter IV, as contained in document A/CN.4/L.819/Add.1.

Introduction

Paragraph (1)

35. Mr. MURPHY proposed, in order to avoid any confusion, that the footnote at the end of the paragraph should be amended to read: "See below draft conclusion 1, paragraph 1, and the associated commentary."

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Commentary to draft conclusion 1 (General rule and means of treaty interpretation)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

36. Mr. TLADI proposed that the verb "is" should be replaced with "sets forth".

37. Mr. FORTEAU (Rapporteur) proposed the addition of the words "or leads to a result which is manifestly absurd or unreasonable" ["*ou conduit à un résultat qui est manifestement absurde ou déraisonnable*"], at the end of the last sentence, to reproduce the text of article 32, which provided for not one hypothesis but two hypotheses.

38. Ms. ESCOBAR HERNÁNDEZ proposed the deletion of the words in brackets—"in the sense of article 32"—which did not only add nothing, but might even cause confusion.

Paragraph (3), as amended, was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

39. Mr. FORTEAU (Rapporteur) said that, in the last footnote to the paragraph, the case law of the International Tribunal for the Law of the Sea should be cited before that of the European Court of Human Rights in order to go from universal to regional law, as in the sentence to which the footnote referred. In the last sentence, it seemed to be going too far to say "and no indications to the contrary", since, for example, the *LaGrand* case might be interpreted as being an indication to the contrary; he therefore proposed the deletion of that phrase.

40. Ms. ESCOBAR HERNÁNDEZ said that, in the Spanish version, the tenses used should be changed and the use of several terms in the references to the case law of the International Court of Justice should be checked. She would send a note along those lines to the Secretariat.

41. Sir Michael WOOD said that, in the penultimate sentence, the word "asserted" should be replaced with "stated", which was a more neutral term.

42. Mr. NOLTE, in response to Mr. Tladi's concern, proposed that in the first sentence the word "also" should be replaced with the phrase "in particular".

43. Mr. CAFLISCH and Mr. CANDIOTI said that the verbs "constitute", in the English text, and "*constituir*", in the Spanish text, were not appropriate and should be replaced with "reflect", "*expresar*" or other equivalent terms, because codification did not constitute rules of customary international law but merely reflected them.

Paragraph (6) was adopted subject to those amendments to the English and Spanish texts.

Paragraph (7)

Paragraph (7) was adopted.

Paragraph (8)

44. Sir Michael WOOD proposed that, in the second sentence, the word "reasoning" should be replaced with the word "process" and that the last sentence, which seemed obscure, should be deleted.

45. Mr. NOLTE (Special Rapporteur) proposed that the end of the second sentence should be replaced with "is to be integrated into the process of interpretation according to article 31". The last sentence stressed that subsequent agreements and subsequent practice played as important a role as other means of interpretation, an idea that was taken up again later in the text and which he would like to retain.

46. Sir Michael WOOD suggested that the Special Rapporteur should redraft the last sentence so as to clarify its meaning.

47. Mr. TLADI said that it might be a good idea to reflect the idea of a single integrated approach in the last sentence. At the end of the second sentence, it would be preferable to retain the words "paragraph 1" instead of replacing them with "article 31".

48. Ms. ESCOBAR HERNÁNDEZ said she also considered that the last sentence was unclear and would like the Special Rapporteur to redraft it. She proposed that the phrase "as the main focus of the topic" should be deleted. If the Special Rapporteur preferred to keep it, for the sake of clarity, the word "current" should be added before "topic", because in Spanish the term "*tema*" was not always the same as "topic" and could give rise to confusion.

49. Mr. FORTEAU (Rapporteur) proposed that the last sentence should be deleted and that the penultimate sentence should be reworded as follows: "Accordingly, the *chapeau* of article 31, paragraph 3, is maintained in order

to emphasize that the means of interpretation mentioned in paragraph 3 (a) and (b) of article 31 must be fully integrated as elements of the general rule of interpretation in article 31.” [*“En conséquence, le texte introductif de l'article 31, paragraphe 3, est conservé de façon à souligner que les moyens d'interprétation mentionnés à l'article 31, paragraphe 3 a et b, doivent être intégrés comme éléments à part entière de la règle générale d'interprétation de l'article 31”*].

50. Mr. NOLTE (Special Rapporteur) said that the sentence proposed by Mr. Forteau seemed to be fine, but that he would like to have a look at the English and Spanish versions before taking a decision. He therefore proposed that the paragraph should be held in abeyance.

Paragraph (8) was held in abeyance.

Paragraph (9)

51. Mr. FORTEAU (Rapporteur) proposed the deletion of the adverb “more” in the last sentence, since it gave the impression that in some respects article 31 was also based on discretionary application.

Paragraph (9), as amended, was adopted.

Paragraphs (10) to (13)

Paragraphs (10) to (13) were adopted.

Paragraph (14)

52. Sir Michael WOOD proposed that in the fourth sentence the term “factors”, which did not appear anywhere else, should be replaced with the word “elements”, and that in the last sentence the words “in an interactive process” should be deleted and the term “rule” should be replaced with the word “treaty”.

53. Mr. NOLTE (Special Rapporteur) pointed out that the term “factors”, covered the elements mentioned in article 32 as well as those mentioned in article 31 and referred to the function of those elements. The words “in an interactive process” conveyed the idea that it was a single integrated operation, which was a generally accepted idea. As for the object and purpose of a treaty, he considered that they included the object and purpose of the different rules of a treaty, and proposed that the phrase in question should read “the object and purpose of a treaty, and in particular a treaty rule”.

54. Sir Michael WOOD said that he was not convinced by the Special Rapporteur’s explanation concerning the term “factors”, and even less so concerning the object and purpose of a rule as opposed to the object and purpose of a treaty. The terms “object and purpose” had a very specific meaning in the 1969 Vienna Convention and that they of course applied to the treaty. However, the phrase could be made simpler by merely referring to “the purpose of a rule”.

55. Mr. FORTEAU (Rapporteur) endorsed the three points made by Sir Michael. He seemed to recall that in the separate opinion of Judge Torres Bernárdez in the *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)* case, the adjective

“combined” had been used to describe the process of interpretation. The expression “interactive process” could therefore be replaced with “combined operation” [*“démarche combinatoire”*], an expression found in the Commission’s work on the law of treaties.

56. Mr. NOLTE (Special Rapporteur) proposed that the wording of the 1969 Vienna Convention “the object and purpose of the treaty” should be followed, but that the words “including the purpose of a particular rule” should be added. While he could accept the expression “combined operation”, he regretted that the reference to the way in which the interpretation was done did not dare to stray a millimetre from the formula used in the 1960s.

57. Mr. CANDIOTI proposed that the word “interactive” should be replaced with “integrative”, “integrating” or another term with the same meaning.

58. Sir Michael WOOD said that he had nothing against new words if they made sense and might go along with Mr. Candiotti’s proposal, although it seemed to him that in the case in question the appropriate term in English would be “integral process”, which gave the idea of a single process. However, he considered that by adding the words “including of a particular rule”, the Commission would be introducing a novel element that should be given consideration before it was accepted.

59. Mr. TLADI endorsed Sir Michael’s comments and said that it might also be possible to use the term “integrated”.

60. Mr. NOLTE (Special Rapporteur) said he was surprised that it could be thought that there was only one “object and purpose” of the treaty and that it was exclusively in that light that the various treaty rules in question were interpreted. Different rules could have different objects and purposes that must ultimately be reconciled if the treaty was to be interpreted in an integrated fashion.

61. Mr. FORTEAU (Rapporteur) said that two issues were being confused: the Vienna Convention, which was simply the object and purpose of the treaty, and the means of interpretation, in particular the effectiveness of the provision. Since it was not the purpose of the exercise to codify all means of interpretation, the Commission should confine itself to what was stipulated in article 31, and he strongly supported those members who wished to retain the expression “the object and purpose of the treaty”.

62. The CHAIRPERSON suggested that the consideration of paragraph (14) should be deferred to give members time to reflect on the various proposals made.

Paragraph (14) was deferred.

Paragraph (15)

Paragraph (15) was adopted with a minor editorial amendment to the French text.

The meeting rose at 1 p.m.