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Summary record of the 3313th meeting

Topic:
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had decided to use the formulation that appeared in the current version of the draft was that, even though, according to the opinion of the three judges cited by Mr. Kittichaisaree, the principle of passive personality jurisdiction was broadly accepted, that formulation appeared in the international instruments adopted since the publication of that opinion, including the International Convention for the Protection of All Persons from Enforced Disappearance – which suggested that States continued to have a preference for a provision that did not make the attribution of jurisdiction to the State of nationality of the victim obligatory.

71. The CHAIRPERSON thanked the Special Rapporteur for his explanations but said that he shared the views expressed by Mr. Kittichaisaree. As there were no comments on the other paragraphs of draft article 6, he took it that the members wished to adopt the draft article as a whole.

Draft article 6 was adopted.

Draft article 7. *Investigation*

Draft article 7 was adopted.

Draft article 8. *Preliminary measures when an alleged offender is present*

Draft article 8 was adopted.

Draft article 9. *Aut dedere aut judicare*

Draft article 9 was adopted.

72. Mr. KITTICHAISAREE said that it should be noted in the commentaries to draft articles 7, 8 and 9 that those articles should be read in parallel with the Commission's final report on the obligation to extradite or prosecute (*aut dedere aut judicare*), published in 2014.²⁸⁰

73. Mr. MURPHY (Special Rapporteur) said that this proposal would be taken into account in the commentary.

Draft article 10. *Fair treatment of the alleged offender*

Draft article 10 was adopted.

The report of the Drafting Committee on crimes against humanity, as a whole, as contained in document A/CN.4/L.873, was adopted.

74. Mr. PETER said that the issue of responsibility of legal persons, which the members had discussed during their consideration of the Special Rapporteur's second report, had not been addressed in the Drafting Committee's report.

75. The CHAIRPERSON said that the issue would be considered by the Drafting Committee during the second part of the session and that the Special Rapporteur would present his concept paper on the issue at that stage.

76. Mr. ŠTURMA (Chairperson of the Drafting Committee) said that, as he had indicated in his oral presentation,

the Drafting Committee had not had time to address the issue of the responsibility of legal persons, but would do so during the second part of the session since, according to the provisional programme of work drawn up by the secretariat, it should have a meeting allocated to preparing a draft article on the issue, which would then be submitted to the plenary for consideration.

The meeting rose at 11.20 a.m.

3313th MEETING

Friday, 10 June 2016, at 10 a.m.

Chairperson: Mr. Pedro COMISSÁRIO AFONSO

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

Subsequent agreements and subsequent practice in relation to the interpretation of treaties (*concluded*)* (A/CN.4/689, Part II, sect. D, A/CN.4/694, A/CN.4/L.874)

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. ŠTURMA (Chairperson of the Drafting Committee) introduced the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as provisionally adopted by the Drafting Committee on first reading and as contained in document A/CN.4/L.874. He said that the Committee had devoted four meetings, from 1 to 6 June 2016, to its consideration of the draft conclusions. It had examined two draft conclusions originally proposed by the Special Rapporteur in his fourth report (A/CN.4/694), together with a number of amendments to respond to suggestions made or concerns raised during the debate in plenary; it had also considered the structure of the entire set of draft conclusions, of which there were 13, in light of proposals made by the Special Rapporteur.

2. He commended the Special Rapporteur, whose constructive approach and flexibility had greatly facilitated the work of the Drafting Committee. Thanks were also due to the other members of the Committee and the Secretariat for their significant contributions.

3. The draft conclusions provisionally adopted by the Drafting Committee had been divided into four parts, on

²⁸⁰ *Yearbook ... 2014*, vol. II (Part Two), pp. 92 *et seq.*, para. 65.

* Resumed from the 3307th meeting.

the basis of the proposal made by the Special Rapporteur in his fourth report: Part One, entitled "Introduction", contained draft conclusion 1; Part Two, entitled "Basic rules and definitions", contained draft conclusions 2 to 5; Part Three, entitled "General aspects", contained draft conclusions 6 to 10; and Part Four, entitled "Specific aspects", contained draft conclusions 11 to 13. Moreover, the draft conclusions as a whole had been reorganized and subsequently renumbered. In addition to renumbering former draft conclusion 1a ("Introduction"), which had been adopted at the current session as draft conclusion 1, former draft conclusion 3 ("Interpretation of treaty terms as capable of evolving over time") had been moved to part three and now appeared as draft conclusion 8. The original numbering appeared in square brackets in document A/CN.4/L.874.

4. Draft conclusion 1 had been proposed by the Special Rapporteur to explain the purpose and scope of the draft conclusions as a whole. The commentary would make it clear that the draft conclusions as a whole did not address all conceivable circumstances in which subsequent agreements and subsequent practice might be taken into account in the interpretation of treaties. For instance, one aspect not specifically dealt with was the relevance of subsequent agreements and subsequent practice in relation to treaties between States and international organizations or between international organizations. The Drafting Committee had considered it appropriate to use the word "role", rather than the word "significance" proposed in the Special Rapporteur's fourth report, since the word "role" more adequately conveyed the aim of the draft conclusions of clarifying the function of subsequent agreements and subsequent practice in the interpretation of treaties. The Drafting Committee had also made minor editorial changes.

5. The objective of draft conclusion 13, as indicated by the Special Rapporteur during the Commission's debate in plenary, was to recognize, for the purpose of the Commission's work on subsequent agreements and subsequent practice, that pronouncements of expert bodies, as a form of practice under a treaty or otherwise, might be relevant for its interpretation, either in connection with the practice of States parties, or as such. Paragraph 1 of the draft conclusion defined the term "expert treaty body" for the purpose of the present draft conclusions. Further to the suggestions made during the debate in plenary, the Special Rapporteur had proposed replacing the term "expert body" with the term "expert treaty body" and the term "individual capacity" with the term "personal capacity". The Drafting Committee had considered that the expression "expert treaty body" was appropriate, since it excluded bodies established by organs of international organizations, which were not the object of draft conclusion 13. Paragraph 1 stated that, for the purposes of the draft conclusions, an "expert treaty body" was a body that was "established under a treaty" and was "not an organ of an international organization". The exclusion of treaty bodies that were organs of international organizations from the scope of the draft conclusion had been made for formal reasons; therefore, a substantive conclusion should not be drawn to the effect that the pronouncements of expert treaty bodies that were organs of international organizations might, or might not, bear similar effects in the context of the interpretation of treaties. The purpose

of that part of the sentence was to make clear that draft conclusion 13 did not purport to make any determination of the effects of the pronouncements of such bodies. The commentary would provide examples of expert treaty bodies, including those cases that might appear *sui generis* "established under a treaty". Moreover, the Drafting Committee had found appropriate the proposal to refer to "personal" rather than "individual" capacity given its consistency with the terminology used in most treaties. On the suggestion of the Special Rapporteur, the Committee had also decided to delete the phrase "for the purpose of contributing to its proper application", since it was conceivable that such bodies might also be created for other purposes depending on the applicable rules of the treaty.

6. Paragraph 2 of draft conclusion 13 sought to import the idea contained in previous draft conclusion 12, paragraph 5, the purpose of the provision being to signal to the interpreter that, when assessing pronouncements of expert treaty bodies, in the context of the interpretation of a treaty, the necessary first step was to examine the treaty that established said body for indications regarding its role. Those important indications were to be found in "the applicable rules of the treaty". Those rules needed to be taken into consideration when assessing the relevance of a pronouncement of an expert treaty body. Pronouncements of such bodies were no more binding or authoritative than what the respective treaty establishing such bodies provided.

7. The purpose of paragraph 3 of draft conclusion 13 was to indicate the role that a pronouncement of an expert treaty body might perform with respect to a subsequent agreement or subsequent practice by the parties to a treaty. The first sentence of that paragraph reflected the proposal made in the fourth report under draft conclusion 12, paragraph 3. As indicated in the Special Rapporteur's fourth report, a pronouncement of an expert treaty body could not, as such, constitute subsequent practice under article 31, paragraph 3 (b), of the 1969 Vienna Convention, since that provision required that a subsequent practice in the application of the treaty should establish the agreement of the parties. That self-evident point would be reflected in the commentary. However, such pronouncements might have indirect effects in the application of article 31, paragraph 3, or article 32 of the same Convention. First, a pronouncement could refer to a subsequent agreement and subsequent practices by parties under article 31, paragraph 3, or other subsequent practice under article 32. Following some debate, the Drafting Committee had considered it appropriate to use the verb "refer" rather than the verb "reflect" to clarify that any subsequent agreement of the parties was not comprised in the pronouncement itself. Second, a pronouncement of an expert treaty body could play a catalyst role and give rise to a subsequent agreement or a subsequent practice by the parties.

8. The second sentence of paragraph 3 of the current draft conclusion 13 had been proposed in the Special Rapporteur's fourth report under previous draft conclusion 12, paragraph 4. It indicated to the interpreter that caution should be exercised when interpreting silence by a party in respect of a pronouncement of an expert treaty body, which was a circumstance with respect to which

the silence of a party did not typically indicate acceptance. The formulation proposed in the fourth report had been simplified to highlight that a subsequent practice that established the agreement of the parties under article 31, paragraph 3 (b), of the 1969 Vienna Convention was not to be presumed in such instances.

9. Whereas paragraph 3 of draft conclusion 13 dealt with the possible “indirect” effect of a pronouncement, paragraph 4 sought to address the situation covered in the Special Rapporteur’s fourth report of the possible “independent” effect of the pronouncement of an expert treaty body. Paragraph 4 provided that draft conclusion 13 was without prejudice to the contribution that the pronouncement of an expert treaty body might otherwise make to the interpretation of a treaty. The use of the word “otherwise” sought to draw a link between paragraph 3, which acknowledged the possible “indirect” effect of the pronouncement of an expert treaty body, and paragraph 4, which left unprejudiced the possible “independent” effect of such a pronouncement.

10. The title of draft conclusion 12, “Pronouncement of expert treaty bodies”, was based on the Special Rapporteur’s proposal in his fourth report. The word “expert” had been added to reflect the current orientation of the draft conclusion.

11. In conclusion, he expressed the hope that the Commission would be in a position to adopt the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as contained in document A/CN.4/L.874.

Draft conclusions 1 to 12 were adopted.

Draft conclusion 13

12. Mr. PARK said that, as a member of the Drafting Committee, he had not opposed the adoption of draft conclusion 13. However, during the Committee’s deliberations, he had been strongly in favour of including in draft conclusion 13 a sentence to the effect that the pronouncements of a treaty body could not, as such, constitute subsequent practice under article 31, paragraph 3 (b), of the 1969 Vienna Convention, since that was a well-established principle. Although the role of the draft conclusions on the topic was to demonstrate the status of the law on the basis of State practice, draft conclusion 13 did not expressly point out the aforementioned well-established principle, but merely set out, in paragraphs 3 and 4, the potential effects of the pronouncements of expert treaty bodies in the context of the interpretation of treaties. While he continued to believe that the proposed sentence would have been better placed in the draft conclusion itself, he had agreed, in order not to block the emerging consensus in the Drafting Committee, that it should instead be included in the commentary to the draft conclusion.

13. The CHAIRPERSON said that he took it that the Commission wished to adopt draft conclusion 13.

It was so decided.

14. The CHAIRPERSON said that he took it that the Commission wished to adopt the report of the Drafting Committee on subsequent agreements and subsequent practice in relation to the interpretation of treaties, as a whole, as contained in document A/CN.4/L.874.

It was so decided.

15. The CHAIRPERSON said that it was his understanding that the Special Rapporteur would prepare the commentaries to the draft conclusions, for inclusion in the Commission’s report on its sixty-eighth session.

Organization of the work of the session (continued)*

[Agenda item 1]

16. The CHAIRPERSON drew attention to the proposed programme of work for the second part of the Commission’s sixty-eighth session, to be held from 4 July to 12 August 2016.

17. Mr. LLEWELLYN (Secretary to the Commission) said that the four first weeks of the second part of the session would be devoted to consideration of Special Rapporteurs’ reports on four topics: *jus cogens*; protection of the environment in relation to armed conflicts; immunity of State officials from foreign criminal jurisdiction; and provisional application of treaties. In the light of the large quantity of text and commentaries expected to be contained in the Commission’s report on its sixty-eighth session, the Bureau had allowed two weeks, from 2 to 12 August 2016, for the discussion and ultimate adoption of the report.

18. The CHAIRPERSON said that he took it that the Commission wished to adopt the programme of work for the second part of its sixty-eighth session.

It was so decided.

19. After the usual exchange of courtesies, the CHAIRPERSON declared the first part of the sixty-eighth session closed.

The meeting rose at 10.40 a.m.

* Resumed from the 3311th meeting.